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April 30, 2020

Austin Evers
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Re: DOJ-2018-006172
18-cv-2846 (D.D.C.)
TAZ:JMS

Dear Austin Evers:

This is an interim response to your Freedom of Information Act (FOIA) request, dated and received in this Office on June 20, 2018, in which you requested email records containing specified search terms and search combinations, dating from March 6, 2017. This response is made on behalf of the Offices of the Attorney General (OAG) and Legal Policy (OLP).

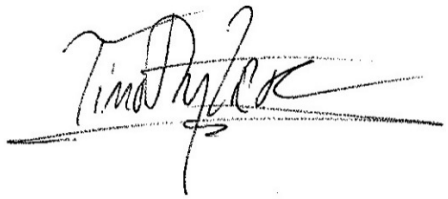
Please be advised that a search has been conducted on behalf of OAG and OLP. At this time, pursuant to the narrowing agreement set forth in the October 1, 2019 Joint Status Report, see ECF No. 27, this Office has processed an additional 913 pages of potentially responsive material, and the material that has been initially found to be responsive has been sent out on consultation. We will respond to you after the consultation process is complete.

Additionally, we advised by letter dated March 31, 2020, that we processed potentially responsive material, that the material that was initially found to be responsive was sent out on consultation, and that we would respond to you after the consultation process was complete. For your information, the consultation process to which we referred in the March 31, 2020 response is now complete. As a result, I have determined that 147 pages are appropriate for release without excision, and copies are enclosed. Additionally, 125 pages containing records responsive to your request are being withheld in full pursuant to Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5). Exemption 5 pertains to certain inter- and intra- agency communications protected by the deliberative process and attorney work-product privileges.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c) (2018). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

If you have any questions regarding this response, please contact Michelle Jackson of the United States Attorney's Office for the District of Columbia, at (202) 252-7230.

Sincerely,



Timothy Ziese
Senior Supervisory Attorney

Enclosures

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

STATE OF HAWAI'I and ISMAIL ELSHIKH, Plaintiffs, vs. DONALD J. TRUMP, *et al*., Defendants.	CV. NO. 17-00050 DKW-KSC **ORDER GRANTING MOTION FOR TEMPORARY RESTRAINING ORDER**

INTRODUCTION

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

revokes Executive Order No. 13,769 upon taking effect.[1] Exec. Order §§ 13, 14. Like its predecessor, the Executive Order restricts the entry of foreign nationals from specified countries and suspends entrants from the United States refugee program for specified periods of time.

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

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

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

[3]Plaintiffs filed a Second Amended Complaint for Declaratory and Injunctive Relief ("SAC") on March 8, 2017 simultaneous with their Motion for TRO. SAC, ECF. No. 64.

BACKGROUND

I. The President's Executive Orders

A. Executive Order No. 13,769

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

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

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

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

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

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

B. <u>The New Executive Order</u>

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

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

§ 1101 *et seq*.: Iran, Libya, Somalia, Sudan, Syria, and Yemen.[6] 8 U.S.C. § 1187(a)(12); Exec. Order § 2(c). The suspension of entry applies to nationals of these six countries who (1) are outside the United States on the new Executive Order's effective date of March 16, 2017; (2) do not have a valid visa on that date, and (3) did not have a valid visa as of 5:00 p.m. Eastern Standard Time on January 27, 2017 (the date of the prior Executive Order, No. 13,769). Exec. Order § 3(a).

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

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

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

> (i) the foreign national has previously been admitted to the United States for a continuous period of work, study, or other longterm activity, is outside the United States on the effective date of the Order, seeks to reenter the United States to resume that activity, and denial of reentry during the suspension period would impair that activity;
>
> (ii) the foreign national has previously established significant contacts with the United States but is outside the United States on the effective date of the Order for work, study, or other lawful activity;
>
> (iii) the foreign national seeks to enter the United States for significant business or professional obligations and the denial of entry during the suspension period would impair those obligations;
>
> (iv) the foreign national seeks to enter the United States to visit a close family member (e.g., a spouse, child, or parent) who is a United States citizen, lawful permanent resident, or alien lawfully admitted on a valid nonimmigrant visa, and the denial of entry during the suspension period would cause undue hardship;
>
> (v) the foreign national is an infant, a young child or adoptee, an individual needing urgent medical care, or someone whose entry is otherwise justified by the special circumstances of the case;
>
> (vi) the foreign national has been employed by, or on behalf of, the United States Government (or is an eligible dependent of

> such an employee) and the employee can document that he or she has provided faithful and valuable service to the United States Government;
>
> (vii) the foreign national is traveling for purposes related to an international organization designated under the International Organizations Immunities Act (IOAI), 22 U.S.C. § 288 et seq., traveling for purposes of conducting meetings or business with the United States Government, or traveling to conduct business on behalf of an international organization not designated under IOIA;
>
> (viii) the foreign national is a landed Canadian immigrant who applies for admission at a land border port of entry or a preclearance location located in Canada; or
>
> (ix) the foreign national is traveling as a United States Government sponsored exchange visitor.

Exec. Order § 3(c).

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

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

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

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

Exec. Order § 1(h).

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

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

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

II. Plaintiffs' Motion For TRO

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

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

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

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

> 48. In an interview on January 25, 2017, Mr. Trump discussed his plans to implement "extreme vetting" of people seeking entry into the United States. He remarked: "[N]o, it's not the Muslim ban. But it's countries that have tremendous terror. . . . [I]t's countries that people are going to come in and cause us tremendous problems."
>
> 49. Two days later, on January 27, 2017, President Trump signed an Executive Order entitled, "Protecting the Nation From Foreign Terrorist Entry into the United States."

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

51. When signing the first Executive Order [No. 13,769], President Trump read the title, looked up, and said: "We all know what that means." President Trump said he was "establishing a new vetting measure to keep radical Islamic terrorists out of the United States of America," and that: "We don't want them here."

. . . .

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

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

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

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

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

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

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

SAC ¶ 74(a) (citing *Miller: New order will be responsive to the judicial ruling; Rep. Ron DeSantis: Congress has gotten off to a slow start*, *The First 100 Days* (Fox News television broadcast Feb. 21, 2017), transcript *available at* https://goo.gl/wcHvHH (rush transcript)). Plaintiffs argue that, in light of these and similar statements "where the President himself has repeatedly and publicly

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

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

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

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

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

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

DISCUSSION

I. Plaintiffs Have Demonstrated Standing At This Preliminary Phase

A. Article III Standing

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

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

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

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

B. <u>The State Has Standing</u>

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

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[7]The State's *parens patriae* theory focuses on the Executive Order

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

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

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

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

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

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

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

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

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

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

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

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

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

and a decline in tourism has a direct effect on the State's revenue. *See* SAC ¶ 18. Because there is preliminary evidence that losses of current and future revenue are traceable to the Executive Order, this injury to the State's proprietary interest also appears sufficient to confer standing. *Cf. Texas v. United States*, 809 F.3d 134, 155 56 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (holding that the "financial loss[es]" that Texas would bear, due to having to grant drivers licenses, constituted a concrete and immediate injury for standing purposes).

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

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

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

C. Dr. Elshikh Has Standing

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

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

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

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

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

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

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

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

Like his children, Dr. Elshikh is "deeply saddened by the message that [both Executive Orders] convey that a broad travel-ban is 'needed' to prevent people from certain Muslim countries from entering the United States." Elshikh Decl. ¶ 1 ("Because of my allegiance to America, and my deep belief in the American ideals of democracy and equality, I am deeply saddened by the passage of the Executive Order barring nationals from now-six Muslim majority countries from entering the United States."); *id.* ¶ 3 (["My children] are deeply affected by the knowledge that the United States their own country would discriminate against individuals who are of the same ethnicity as them, including members of their own family, and who

hold the same religious beliefs. They do not fully understand why this is happening, but they feel hurt, confused, and sad.").

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

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

II. Ripeness

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

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

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

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

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

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

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

III. Legal Standard: Preliminary Injunctive Relief

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

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

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

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

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

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

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

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

A. Establishment Clause

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). To determine whether the Executive Order runs afoul of that command, the Court is guided by the three-part test for Establishment Clause claims set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). According to *Lemon*, government action (1) must have a primary secular purpose, (2) may not have the principal effect of advancing or inhibiting religion, and (3) may not foster excessive entanglement with religion. *Id.* "Failure to satisfy any one of the three prongs of the *Lemon* test is sufficient to invalidate the challenged law or practice." *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1076 77 (9th Cir. 2010). Because the Executive Order at issue here cannot survive the secular purpose prong, the Court does not reach the balance of the criteria. *See id*. (noting that it is unnecessary to reach the second or third *Lemon* criteria if the challenged law or practice fails the first test).

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[11]The Court expresses no views on Plaintiffs' due-process or INA-based statutory claims.

B. The Executive Order's Primary Purpose

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

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

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

Clause analysis to a purely mathematical exercise. *See Aziz*, 2017 WL 580855, at *9 (rejecting the argument that "the Court cannot infer an anti-Muslim animus because [Executive Order No. 13,769] does not affect all, or even most, Muslims," because "the Supreme Court has never reduced its Establishment Clause jurisprudence to a mathematical exercise. It is a discriminatory purpose that matters, no matter how inefficient the execution" (citation omitted)). Equally flawed is the notion that the Executive Order cannot be found to have targeted Islam because it applies to *all individuals* in the six referenced countries. It is undisputed, using the primary source upon which the Government itself relies, that these six countries have overwhelmingly Muslim populations that range from 90.7% to 99.8%.[12] It would therefore be no paradigmatic leap to conclude that targeting these countries likewise targets Islam. Certainly, it would be inappropriate to conclude, as the Government does, that it does not.

The Government compounds these shortcomings by suggesting that the Executive Order's neutral text is what this Court must rely on to evaluate purpose. Govt. Mem. in Opp'n at 42 43 ("[C]ourts may not 'look behind the exercise of [Executive] discretion' taken 'on the basis of a facially legitimate and bona fide

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[12]*See* Pew-Templeton Global Religious Futures Project, Muslim Population by Country (2010), *available at* http://www.globalreligiousfutures.org/religions/muslims.

reason.'"). Only a few weeks ago, the Ninth Circuit commanded otherwise: "It is well established that evidence of purpose beyond the face of the challenged law may be considered in evaluating Establishment and Equal Protection Clause claims." *Washington*, 847 F.3d at 1167 68 (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) ("Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality."); *Larson*, 456 U.S. at 254 55 (holding that a facially neutral statute violated the Establishment Clause in light of legislative history demonstrating an intent to apply regulations only to minority religions); and *Village of Arlington Heights v. Metro. Hous. Dev. Corp*., 429 U.S. 252, 266 68 (1977) (explaining that circumstantial evidence of intent, including the historical background of the decision and statements by decisionmakers, may be considered in evaluating whether a governmental action was motivated by a discriminatory purpose)). The Supreme Court has been even more emphatic: courts may not "turn a blind eye to the context in which [a] policy arose." *McCreary Cty. v. Am. Civil Liberties Union of Ky*., 545 U.S. 844, 866 (2005) (citation and quotation signals omitted).[13] "[H]istorical context and 'the specific sequence of events leading up

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[13]In *McCreary*, the Supreme Court examined whether the posting of successive Ten Commandments displays at two county courthouses violated the Establishment Clause. 545 U.S. at 850 82.

to'" the adoption of a challenged policy are relevant considerations. *Id*. at 862; *see also Aziz*, 2017 WL 580855, at *7.

A review of the historical background here makes plain why the Government wishes to focus on the Executive Order's text, rather than its context. The record before this Court is unique. It includes significant and unrebutted evidence of religious animus driving the promulgation of the Executive Order and its related predecessor. For example

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

SAC ¶ 41 (citing *Anderson Cooper 360 Degrees: Exclusive Interview With Donald Trump* (CNN television broadcast Mar. 9, 2016, 8:00 PM ET), transcript *available at* https://goo.gl/y7s2kQ)). In that same interview, Mr. Trump stated: "But there's a tremendous hatred. And we have to be very vigilant. We have to be very careful. And we can't allow people coming into this country who have this hatred of the United States. . . [a]nd of people that are not Muslim."

Plaintiffs allege that "[l]ater, as the presumptive Republican nominee, Mr. Trump began using facially neutral language, at times, to describe the Muslim ban." SAC ¶ 42. For example, they point to a July 24, 2016 interview:

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

SAC ¶ 44; Ex. 7 (*Meet the Press* (NBC television broadcast July 24, 2016), transcript *available at* https://goo.gl/jHc6aU). And during an October 9, 2016 televised presidential debate, Mr. Trump was asked:

> "Your running mate said this week that the Muslim ban is no longer your position. Is that correct? And if it is, was it a mistake to have a religious test?" Mr. Trump replied: "The Muslim ban is something that in some form has morphed into a[n] extreme vetting from certain areas of the world." When asked to clarify whether "the Muslim ban still stands," Mr. Trump said, "It's called extreme vetting."

SAC ¶ 45 (citing The American Presidency Project, *Presidential Debates: Presidential Debate at Washington University in St. Louis, Missouri* (Oct. 9, 2016), *available at* https://goo.gl/iIzf0A)).

The Government appropriately cautions that, in determining purpose, courts should not look into the "veiled psyche" and "secret motives" of government decisionmakers and may not undertake a "judicial psychoanalysis of a drafter's heart of hearts." Govt. Opp'n at 40 (citing *McCreary*, 545 U.S. at 862). The Government need not fear. The remarkable facts at issue here require no such

impermissible inquiry. For instance, there is nothing "*veiled*" about this press release: "Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States.[]" SAC ¶ 38, Ex. 6 (Press Release, Donald J. Trump for President, *Donald J. Trump Statement on Preventing Muslim Immigration* (Dec. 7, 2015), *available at* https://goo.gl/D3OdJJ)). Nor is there anything "*secret*" about the Executive's motive specific to the issuance of the Executive Order:

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

SAC ¶ 59, Ex. 8. On February 21, 2017, commenting on the then-upcoming revision to the Executive Order, the President's Senior Adviser, Stephen Miller, stated, "Fundamentally, [despite "technical" revisions meant to address the Ninth Circuit's concerns in *Washington*,] you're still going to have the same basic policy outcome [as the first]." SAC ¶ 74.

These plainly-worded statements,[14] made in the months leading up to and contemporaneous with the signing of the Executive Order, and, in many cases, made

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[14]There are many more. *See, e.g.*, Br. of The Roderick and Solange MacArthur Justice Center as Amicus Curiae in Supp. of Pls.' Mot. for TRO, ECF No. 204, at 19-20 ("It's not unconstitutional keeping people out, frankly, and until we get a hold of what's going on. And then if you look at Franklin Roosevelt, a respected president, highly respected. Take a look at Presidential proclamations back a long time ago, 2525, 2526, and 2527 what he was doing with Germans, Italians, and Japanese because he had to do it. Because look we are at war with radical Islam.")

by the Executive himself, betray the Executive Order's stated secular purpose. Any reasonable, objective observer would conclude, as does the Court for purposes of the instant Motion for TRO, that the stated secular purpose of the Executive Order is, at the very least, "secondary to a religious objective" of temporarily suspending the entry of Muslims. *See McCreary*, 545 U.S. at 864.[15]

To emphasize these points, Plaintiffs assert that the stated national security reasons for the Executive Order are pretextual. Two examples of such pretext include the security rationales set forth in Section 1(h):

> "[I]n January 2013, two Iraqi nationals admitted to the United States as refugees in 2009 were sentenced to 40 years and to life in prison, respectively, for multiple terrorism-related offenses." [Exec. Order] § 1(h). "And in October 2014, a native of Somalia who had been brought to the United States as a child refugee and later became a naturalized United States citizen was

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(quoting Michael Barbaro and Alan Rappeport, *In Testy Exchange, Donald Trump Interrupts and 'Morning Joe' Cuts to Commercial,* New York Times (Dec. 8, 2015), *available at* https://www.nytimes.com/politics/first-draft/2015/12/08/in-testy-exchange-donaldtrump-interrupts-and-morning-joe-cuts-to-commercial/)); Br. of Muslim Advocates et al. as Amici Curiae in Supp. of Pls.' Mot. for TRO, ECF No. 198, at 10-11 ("On June 13, 2016, after the attack on a nightclub in Orlando, Florida, Mr. Trump said in a speech: 'I called for a ban after San Bernardino, and was met with great scorn and anger, but now many are saying I was right to do so.' Mr. Trump then specified that the Muslim ban would be 'temporary,' 'and apply to certain 'areas of the world when [sic] there is a proven history of terrorism against the United States, Europe or our allies, until we understand how to end these threats.'") (quoting Transcript: Donald Trump's national security speech, *available at* http://www.politico.com/story/2016/06/transcript-donald-trump-national-security-speech-22427).

[15]This Court is not the first to examine these issues. In *Aziz v. Trump,* United States District Court Judge Leonie Brinkema determined that plaintiffs were likely to succeed on the merits of their Establishment Clause claim as it related to Executive Order No. 13,769. Accordingly, Judge Brinkema granted the Commonwealth of Virginia's motion for preliminary injunction. *Aziz v. Trump*, ___ F. Supp. 3d ___, 2017 WL 580855, at *7 *10 (E.D. Va. Feb. 13, 2017).

> sentenced to 30 years in prison for attempting to use a weapon of mass destruction[.]" *Id.* Iraq is no longer included in the ambit of the travel ban, *id*., and the Order states that a waiver could be granted for a foreign national that is a "young child." *Id.* § 3(c)(v).

TRO Mem. 13. Other indicia of pretext asserted by Plaintiffs include the delayed timing of the Executive Order, which detracts from the national security urgency claimed by the Administration, and the Executive Order's focus on nationality, which could have the paradoxical effect of "bar[ring] entry by a Syrian national who has lived in Switzerland for decades, but not a Swiss national who has immigrated to Syria during its civil war," revealing a "gross mismatch between the [Executive] Order's ostensible purpose and its implementation and effects." Pls.' Reply 20 (citation omitted).

While these additional assertions certainly call the motivations behind the Executive Order into greater question,[16] they are not necessary to the Court's Establishment Clause determination. *See Aziz,* 2017 WL 580855, at *8 (the Establishment Clause concerns addressed by the district court's order "do not involve an assessment of the merits of the president's national security judgment. Instead, the question is whether [Executive Order No. 13,769] was animated by

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[16]*See also* Br. of T.A., a U.S. Resident of Yemeni Descent, as Amicus Curiae in Supp. of Pls.' Mot. for TRO, ECF No. 200, at 15-25 (detailing evidence contrary to the Executive Order's national security justifications).

national security concerns at all, as opposed to the impermissible notion of, in the context of entry, disfavoring one religious group, and in the context of refugees, favoring another religious group").

Nor does the Court's preliminary determination foreclose future Executive action. As the Supreme Court noted in *McCreary*, in preliminarily enjoining the third iteration of a Ten Commandments display, "we do not decide that the [government's] past actions forever taint any effort on their part to deal with the subject matter." *McCreary*, 545 U.S. at 873 74; *see also Felix v. City of Bloomfield*, 841 F.3d 848, 863 (10th Cir. 2016) ("In other words, it is possible that a government may begin with an impermissible purpose, or create an unconstitutional effect, but later take affirmative actions to neutralize the endorsement message so that "adherence to a religion [is not] relevant in any way to a person's standing in the political community." (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring))). Here, it is not the case that the Administration's past conduct must forever taint any effort by it to address the security concerns of the nation. Based upon the current record available, however, the Court cannot find the actions taken during the interval between revoked Executive Order No. 13,769 and the new Executive Order to be "genuine changes in constitutionally significant

conditions." *McCreary*, 545 U.S. at 874.[17] The Court recognizes that "purpose needs to be taken seriously under the Establishment Clause and needs to be understood in light of context; an implausible claim that governmental purpose has changed should not carry the day in a court of law any more than in a head with common sense." *Id.* Yet, context may change during the course of litigation, and the Court is prepared to respond accordingly.

Last, the Court emphasizes that its preliminary assessment rests on the peculiar circumstances and specific historical record present here. *Cf. Aziz,* 2017 WL 580855, at *9 ("The Court's conclusion rests on the highly particular 'sequence of events' leading to this specific [Executive Order No. 13,769] and the dearth of evidence indicating a national security purpose. The evidence in this record focuses on the president's statements about a 'Muslim ban' and the link Giuliani

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[17]The Tenth Circuit asked: "What would be enough to meet this standard?"

> The case law does not yield a ready answer. But from the above principles we conclude that a government cure should be (1) purposeful, (2) public, and (3) at least as persuasive as the initial endorsement of religion. It should be purposeful enough for an objective observer to know, unequivocally, that the government does not endorse religion. It should be public enough so that people need not burrow into a difficult-to-access legislative record for evidence to assure themselves that the government is not endorsing a religious view. And it should be persuasive enough to countermand the preexisting message of religious endorsement.

Felix, 841 F.3d 863 64.

established between those statements and the [Executive Order].") (citing *McCreary*, 545 U.S. at 862).

V. Analysis of TRO Factors: Irreparable Harm

Dr. Elshikh has made a preliminary showing of direct, concrete injuries to the exercise of his Establishment Clause rights. *See, e.g.*, SAC ¶¶ 88 90; Elshikh Decl. ¶¶ 1, 3. These alleged injuries have already occurred and likely will continue to occur upon implementation of the Executive Order.

Indeed, irreparable harm may be *presumed* with the finding of a violation of the First Amendment. *See Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury") (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also Washington*, 847 F.3d at 1169 (citing *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'")) (additional citations omitted). Because Dr. Elshikh is likely to succeed on the merits of his Establishment Clause claim, the Court finds that the second factor of the *Winter* test is satisfied that Dr. Elshikh is likely to suffer irreparable injury in the absence of a TRO.

VI. Analysis of TRO Factors: The Balance of Equities and Public Interest Weigh in Favor of Granting Emergency Relief

The final step in determining whether to grant the Plaintiffs' Motion for TRO is to assess the balance of equities and examine the general public interests that will be affected. Here, the substantial controversy surrounding this Executive Order, like its predecessor, illustrates that important public interests are implicated by each party's positions. *See Washington*, 847 F.3d at 1169. For example, the Government insists that the Executive Order is intended "to protect the Nation from terrorist activities by foreign nationals admitted to the United States[.]" Exec. Order, preamble. National security is unquestionably important to the public at large. Plaintiffs and the public, on the other hand, have a vested interest in the "free flow of travel, in avoiding separation of families, and in freedom from discrimination." *Washington*, 847 F.3d at 1169 70.

As discussed above, Plaintiffs have shown a strong likelihood of succeeding on their claim that the Executive Order violates First Amendment rights under the Constitution. "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres*, 695 F.3d at 1002 (emphasis added) (citing *Elrod*, 427 U.S. at 373); *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) ("[E]nforcement of an unconstitutional law is always contrary to the public

interest." (citing *Lamprecht v. FCC*, 958 F.2d 382, 390 (D.C. Cir. 1992); *G & V Lounge v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994).

When considered alongside the constitutional injuries and harms discussed above, and the questionable evidence supporting the Government's national security motivations, the balance of equities and public interests justify granting the Plaintiffs' TRO. *See Aziz*, 2017 WL 580855, at * 10. Nationwide relief is appropriate in light of the likelihood of success on the Establishment Clause claim.

CONCLUSION

Based on the foregoing, Plaintiffs' Motion for TRO is hereby GRANTED.

TEMPORARY RESTRAINING ORDER

It is hereby ADJUDGED, ORDERED, and DECREED that:

Defendants and all their respective officers, agents, servants, employees, and attorneys, and persons in active concert or participation with them, are hereby enjoined from enforcing or implementing Sections 2 and 6 of the Executive Order across the Nation. Enforcement of these provisions in all places, including the United States, at all United States borders and ports of entry, and in the issuance of visas is prohibited, pending further orders from this Court.

No security bond is required under Federal Rule of Civil Procedure 65(c).

The Court declines to stay this ruling or hold it in abeyance should an emergency appeal of this order be filed.

Pursuant to Federal Rule of Civil Procedure 65(b)(2), the Court intends to set an expedited hearing to determine whether this Temporary Restraining Order should be extended. The parties shall submit a stipulated briefing and hearing schedule for the Court's approval forthwith.

IT IS SO ORDERED.

Dated: March 15, 2017 at Honolulu, Hawai'i.

Derrick K. Watson
United States District Judge

Washington v. Trump, No. 17 35105

REINHARDT, J., concurring in the denial of en banc rehearing:

I concur in our court's decision regarding President Trump's first Executive Order the ban on immigrants and visitors from seven Muslim countries. I also concur in our court's determination to stand by that decision, despite the effort of a small number of our members to overturn or vacate it. Finally, I am proud to be a part of this court and a judicial system that is independent and courageous, and that vigorously protects the constitutional rights of all, regardless of the source of any efforts to weaken or diminish them.

Washington v. Trump, No. 17-35105 (Motions Panel February 9, 2017)

BYBEE, Circuit Judge, with whom KOZINSKI, CALLAHAN, BEA, and IKUTA, Circuit Judges, join, dissenting from the denial of reconsideration *en banc*.

I regret that we did not decide to reconsider this case *en banc* for the purpose of vacating the panel's opinion. We have an obligation to correct our own errors, particularly when those errors so confound Supreme Court and Ninth Circuit precedent that neither we nor our district courts will know what law to apply in the future.

The Executive Order of January 27, 2017, suspending the entry of certain aliens, was authorized by statute, and presidents have frequently exercised that authority through executive orders and presidential proclamations. Whatever we, as individuals, may feel about the President or the Executive Order,[1] the President's decision was well within the powers of the presidency, and "[t]he wisdom of the policy choices made by [the President] is not a matter for our consideration." *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 165 (1993).

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[1] Our personal views are of no consequence. I note this only to emphasize that I have written this dissent to defend an important constitutional principle that the political branches, informed by foreign affairs and national security considerations, control immigration subject to limited judicial review and not to defend the administration's policy.

This is not to say that presidential immigration policy concerning the entry of aliens at the border is immune from judicial review, only that our review is limited by *Kleindienst v. Mandel*, 408 U.S. 753 (1972) and the panel held that limitation inapplicable. I dissent from our failure to correct the panel's manifest error.

I

In this section I provide background on the source of Congress's and the President's authority to exclude aliens, the Executive Order at issue here, and the proceedings in this case. The informed reader may proceed directly to Part II.

A

"The exclusion of aliens is a fundamental act of sovereignty." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950); *see also Landon v. Plasencia*, 459 U.S. 21, 32 (1982). Congress has the principal power to control the nation's borders, a power that follows naturally from its power "[t]o establish an uniform rule of Naturalization," U.S. Const. art. I, § 8, cl. 4, and from its authority to "regulate Commerce with foreign Nations," *id.* art. I, § 8, cl. 3, and to "declare War," *id.* art. I, § 8, cl. 11. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588 89 (1952) ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations [and] the war power . . . ."). The

President likewise has some constitutional claim to regulate the entry of aliens into the United States. "Although the source of the President's power to act in foreign affairs does not enjoy any textual detail, the historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.'" *Garamendi*, 539 U.S. at 414 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 11 (1952) (Frankfurter, J., concurring)). The foreign policy powers of the presidency derive from the President's role as "Commander in Chief," U.S. Const. art. II, § 2, cl. 1, his right to "receive Ambassadors and other public Ministers," *id.* art. II, § 3, and his general duty to "take Care that the Laws be faithfully executed," *id.* *See Garamendi*, 539 U.S. at 414. The "power of exclusion of aliens is also inherent in the executive." *Knauff*, 338 U.S. at 543.

In the Immigration and Nationality Act of 1952, Congress exercised its authority to prescribe the terms on which aliens may be admitted to the United States, the conditions on which they may remain within our borders, and the requirements for becoming naturalized U.S. citizens. 8 U.S.C. § 1101 *et seq.* Congress also delegated authority to the President to suspend the entry of "any class of aliens" as he deems appropriate:

Whenever the President finds that the entry of any aliens or of any

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

Id. § 1182(f). Many presidents have invoked the authority of § 1182(f) to bar the entry of broad classes of aliens from identified countries.[2]

In Executive Order No. 13769, the President exercised the authority granted in § 1182(f). Exec. Order No. 13769 § 3(c) (Jan. 27, 2017), *revoked by* Exec. Order No. 13780 § 1(i) (Mar. 6, 2017). The Executive Order covered a number of subjects. Three provisions were particularly relevant to this litigation. First, the Executive Order found that "the immigrant and nonimmigrant entry into the United States of aliens from [seven] countries . . . would be detrimental to the interests of the United States" and ordered the suspension of entry for nationals (with certain exceptions) from those countries for 90 days. *Id.* The seven countries were Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen. Second, it directed the Secretary of State to suspend the U.S. Refugee Admissions Program (USRAP) for 120 days.

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[2] *See*, *e.g.*, Exec. Order No. 12324 (Sept. 29, 1981) (Reagan and Haiti); Proclamation No. 5517 (Aug. 22, 1986) (Reagan and Cuba); Exec. Order No. 12807 (May 24, 1992) (George H.W. Bush and Haiti); Proclamation No. 6958 (Nov. 22, 1996) (Clinton and Sudan); Proclamation No. 7359 (Oct. 10, 2000) (Clinton and Sierra Leone); Exec. Order No. 13276 (Nov. 15, 2002) (George W. Bush and Haiti); Exec. Order No. 13692 (Mar. 8, 2015) (Obama and Venezuela); Exec. Order No. 13726 (Apr. 19, 2016) (Obama and Libya).

However, exceptions could be made "on a case-by-case basis" in the discretion of the Secretaries of State and Homeland Security. Once USRAP resumed, the Secretary of State was "to prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual [was] a minority religion in the individual's country of nationality." *Id.* § 5(a), (b), (e). Third, it suspended indefinitely the entry of Syrian refugees. *Id.* § 5(c).

B

Three days after the President signed the Executive Order, the States of Washington and Minnesota brought suit in the Western District of Washington seeking declaratory and injunctive relief on behalf of their universities, businesses, citizens, and residents that were affected by the Executive Order in various ways. The States also sought a temporary restraining order (TRO). On February 3, 2017, following a hearing, the district court, without making findings of fact or conclusions of law with respect to the merits of the suit, issued a nationwide TRO against the enforcement of §§ 3(c), 5(a) (c), (e). The district court proposed further briefing by the parties and a hearing on the States' request for a preliminary injunction.[3]

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[3] That same day, the district court for the District of Massachusetts denied a preliminary injunction to petitioners challenging the Executive Order on equal protection, Establishment Clause, due process, and APA grounds. *Louhghalam v.*

The United States sought a stay of the district court's order pending an appeal. A motions panel of our court, on an expedited basis (including oral argument by phone involving four time zones), denied the stay. *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017).

Among other things, the panel drew three critical conclusions. First, the panel held that, although we owe deference to the political branches, we can review the Executive Order for constitutionality under the same standards as we would review challenges to domestic policies. *See id.* at 1161 64. Second, the panel found that the States were likely to succeed on their due process arguments because "the Executive Order [does not] provide[] what due process requires, such as notice and a hearing prior to restricting an individual's ability to travel." *Id.* at 1164. Third, the panel found that there were at least "significant constitutional questions" under the Establishment Clause raised by the fact that the seven countries identified in the Executive Order are principally Muslim countries and the President, before and after his election, made reference to "a Muslim ban." *Id.* at 1168.

Trump, No. 17-10154-NMG, 2017 WL 479779 (D. Mass. Feb. 3, 2017). The following week, the district court for the Eastern District of Virginia granted a preliminary injunction against enforcement of the Executive Order in Virginia. The court's sole grounds were based on the Establishment Clause. *Aziz v. Trump*, No. 1:17-cv-116 (LMB/TCB), 2017 WL 580855 (E.D. Va. Feb. 13, 2017).

In response to the panel's decision not to stay the district court's TRO pending appeal, a judge of our court asked for *en banc* review. The court invited the parties to comment on whether the entire court should review the judgment. The U.S. Department of Justice asked that the panel hold the appeal while the administration considered the appropriate next steps and vacate the opinion upon the issuance of any new executive order. A majority of the court agreed to stay the *en banc* process. In the end, the President issued a new Executive Order on March 6, 2017, that referred to the panel's decision and addressed some of the panel's concerns. In light of the new Executive Order, the Department of Justice moved to dismiss the appeal in this case. The panel granted the motion to dismiss but did not vacate its precedential opinion.[4]

Ordinarily, when an appeal is dismissed because it has become moot, any opinions previously issued in the case remain on the books. *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994) ("Judicial precedents are presumptively correct and valuable to the legal community as a whole. They . . . should stand unless a court concludes that the public interest would be served by a

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[4] Proceedings in the original suit filed by Washington and Minnesota are still pending in the Western District of Washington. The State of Hawaii also filed suit in the District of Hawaii and has asked for a TRO enjoining the second Executive Order. *See* Plaintiffs' Motion for Temporary Restraining Order, *Hawai'i v. Trump*, No. 1:17-cv-00050-DKW-KSC (D. Haw. Mar. 8, 2017), ECF No. 65.

vacatur." (citation omitted)). The court, however, has discretion to vacate its opinion to "clear[] the path for future relitigation of the issues between the parties," *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950), or where "exceptional circumstances . . . counsel in favor of such a course," *U.S. Bancorp Mortg.*, 513 U.S. at 29. We should have exercised that discretion in this case because the panel made a fundamental error.[5] It neglected or overlooked critical cases by the Supreme Court and by our court making clear that when we are reviewing decisions about who may be admitted into the United States, we must defer to the judgment of the political branches.[6] That does not mean that we have no power of judicial review at all, but it does mean that our authority to second guess or to probe the decisions of those branches is carefully circumscribed. The panel's analysis conflicts irreconcilably with our prior cases. We had an obligation to

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[5] We have previously said that it is procedurally proper for a judge "to seek an en banc rehearing for the purpose of vacating [a panel's] decision." *United States v. Payton*, 593 F.3d 881, 886 (9th Cir. 2010).

[6] To be clear, the panel made several other legal errors. Its holding that the States were likely to succeed on the merits of their procedural due process claims confounds century-old precedent. And its unreasoned assumption that courts should simply plop Establishment Clause cases from the domestic context over to the foreign affairs context ignores the realities of our world. But these errors are not what justified vacatur. Instead, it is the panel's treatment of *Kleindienst v. Mandel*, 408 U.S. 753 (1972), that called for an extraordinary exercise of our discretion to vacate the panel's opinion.

vacate the panel's opinion in order to resolve that conflict and to provide consistent guidance to district courts and future panels of this court.

II

The panel began its analysis from two important premises: first, that it is an "uncontroversial principle" that we "owe substantial deference to the immigration and national security policy determinations of the political branches," *Washington*, 847 F.3d at 1161; second, that courts can review constitutional challenges to executive actions, *see id.* at 1164. I agree with both of these propositions. Unfortunately, that was both the beginning and the end of the deference the panel gave the President.

How do we reconcile these two titan principles of constitutional law? It is indeed an "uncontroversial principle" that courts must defer to the political judgment of the President and Congress in matters of immigration policy. The Supreme Court has said so, plainly and often. *See*, *e.g.*, *Mathews v. Diaz*, 426 U.S. 67, 81 (1976) ("[T]he responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government."); *Harisiades*, 342 U.S. at 590 ("[N]othing in the structure of our Government or the text of our Constitution would warrant judicial review by standards which would require us to equate our political judgment with

that of Congress."); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953) ("Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."); *Henderson v. Mayor of N.Y.*, 92 U.S. (2 Otto) 259, 270 71 (1876). On the other hand, it seems equally fundamental that the judicial branch is a critical backstop to defend the rights of individuals against the excesses of the political branches. *See INS v. Chadha*, 462 U.S. 919, 941 (1983) (reviewing Congress's use of power over aliens to ensure that "the exercise of that authority does not offend some other constitutional restriction" (quoting *Buckley v. Valeo*, 424 U.S. 1, 132 (1976))).

The Supreme Court has given us a way to analyze these knotty questions, but it depends on our ability to distinguish between two groups of aliens: those who are present within our borders and those who are seeking admission. As the Court explained in *Leng May Ma v. Barber*,

> It is important to note at the outset that our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission, . . . and those who are within the United States after an entry, irrespective of its legality. In the latter instance the Court has recognized additional rights and privileges not extended to those in the former category who are merely "on the threshold of initial entry."

357 U.S. 185, 187 (1958) (quoting *Mezei*, 345 U.S. at 212). The panel did not

recognize that critical distinction and it led to manifest error. The panel's decision is not only inconsistent with clear Supreme Court authority, but the panel missed a whole bunch of our own decisions as well.

A

The appropriate test for judging executive and congressional action affecting aliens who are outside our borders and seeking admission is set forth in *Kleindienst v. Mandel*, 408 U.S. 753 (1972). In *Mandel*, the government had denied a visa to a Marxist journalist who had been invited to address conferences at Columbia, Princeton, and Stanford, among other groups. Mandel and American university professors brought facial and as-applied challenges under the First and Fifth Amendments. The Court first made clear that Mandel himself, "as an unadmitted and nonresident alien, had no constitutional right of entry." *Id.* at 762. Then it addressed the First Amendment claims of the professors who had invited him. Recognizing that "First Amendment rights [were] implicated" in the case, the Court declined to revisit the principle that the political branches may decide whom to admit and whom to exclude. *Id.* at 765. It concluded that when the executive has exercised its authority to exclude aliens "on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment

interests of those who seek personal communication with the applicant." *Id.* at 770.

In this case, the government argued that *Mandel* provided the proper framework for analyzing the States' claims. The panel, however, tossed *Mandel* aside because it involved only a decision by a consular officer, not the President. *See Washington*, 847 F.3d at 1162 ("The present case, by contrast, is not about the application of a specifically enumerated congressional policy to the particular facts presented in an individual visa application. Rather the States are challenging the President's *promulgation* of sweeping immigration policy."). Two responses. First, the panel's declaration that we cannot look behind the decision of a consular officer, but can examine the decision of the President stands the separation of powers on its head. We give deference to a consular officer making an individual determination, but not the President when making a broad, national security-based decision? With a moment's thought, that principle cannot withstand the gentlest inquiry, and we have said so. *See Bustamante v. Mukasey*, 531 F.3d 1059, 1062 n.1 (9th Cir. 2008) ("We are unable to distinguish *Mandel* on the grounds that the exclusionary decision challenged in that case was not a consular visa denial, but rather the Attorney General's refusal to waive Mandel's inadmissibility. The holding is plainly stated in terms of the power delegated by Congress to 'the

Executive.' The Supreme Court said nothing to suggest that the reasoning or outcome would vary according to which executive officer is exercising the Congressionally-delegated power to exclude."). Second, the promulgation of broad policy is precisely what we expect the political branches to do; Presidents rarely, if ever, trouble themselves with decisions to admit or exclude individual visa-seekers. *See Knauff*, 338 U.S. at 543 ("[B]ecause the power of exclusion of aliens is also inherent in the executive department of the sovereign, Congress may in broad terms authorize the executive to exercise the power . . . for the best interests of the country during a time of national emergency."). If the panel is correct, it just wiped out any principle of deference to the executive.

Worse, the panel's decision missed entirely *Fiallo v. Bell*, 430 U.S. 787 (1977), and *Fiallo* answers the panel's reasons for brushing off *Mandel*. In *Fiallo*, the plaintiff brought a facial due process challenge to immigration laws giving preferential treatment to natural mothers of illegitimate children. As in *Mandel*, the constitutional challenge in *Fiallo* was "based on [the] constitutional rights of citizens." *Id.* at 795. The Court acknowledged that the challenge invoked "'double-barreled' discrimination based on sex and illegitimacy." *Id.* at 794. Either ground, if brought in a suit in a domestic context, would have invoked some kind of heightened scrutiny. *See Craig v. Boren*, 429 U.S. 190, 197 (1976) (sex

discrimination); *Trimble v. Gordon*, 430 U.S. 762, 769 (1977) (illegitimacy). Rejecting the claim that "the Government's power in this area is never subject to judicial review," *Fiallo*, 430 U.S. at 795 96, 795 n.6, the Court held that *Mandel*'s "facially legitimate and bona fide reason" test was the proper standard: "We can see no reason to review the broad congressional policy choice at issue here under a more exacting standard than was applied in *Kleindienst v. Mandel*, a First Amendment case." *Id.* at 795; *see also id.* at 794 (rejecting "the suggestion that more searching judicial scrutiny is required"). Importantly, the Court reached that conclusion despite the fact the immigration laws at issue promulgated "sweeping immigration policy," *Washington*, 847 F.3d at 1162, just as the Executive Order did.

The panel's holding that "exercises of policymaking authority at the highest levels of the political branches are plainly not subject to the *Mandel* standard," *id.*, is simply irreconcilable with the Supreme Court's holding that it could "see no reason to review the broad congressional policy choice at issue [there] under a more exacting standard than was applied in *Kleindienst v. Mandel*," *Fiallo*, 430 U.S. at 795.

Fiallo wasn't the only Supreme Court case applying *Mandel* that the panel missed. In *Kerry v. Din*, 135 S. Ct. 2128 (2015), the Court confronted a case in

which Din (a U.S. citizen) claimed that the government's refusal to grant her Afghani husband a visa violated her own constitutional right to live with her husband. A plurality held that Din had no such constitutional right. *Id.* at 2131 (plurality opinion). Justice Kennedy, joined by Justice Alito, concurred in the judgment, and we have held that his opinion is controlling. *Cardenas v. United States*, 826 F.3d 1164, 1171 (9th Cir. 2016). For purposes of the case, Justice Kennedy assumed that Din had a protected liberty interest, but he rejected her claim to additional procedural due process. "The conclusion that Din received all the process to which she was entitled finds its most substantial instruction in the Court's decision in *Kleindienst v. Mandel*." *Din*, 135 S. Ct. at 2139 (Kennedy, J., concurring in the judgment) (citation omitted). After reciting *Mandel*'s facts and holding, Justice Kennedy concluded that "[t]he reasoning and the holding in *Mandel* control here. That decision was based upon due consideration of the congressional power to make rules for the exclusion of aliens, and the ensuing power to delegate authority to the Attorney General to exercise substantial discretion in that field." *Id.* at 2140. Once the executive makes a decision "on the basis of a facially legitimate and bona fide reason," the courts may "'neither look behind the exercise of that discretion, nor test it by balancing its justification against' the constitutional interests of citizens the visa denial might implicate." *Id.*

(quoting *Mandel*, 408 U.S. at 770). Applying *Mandel*, Justice Kennedy concluded that "the Government satisfied any obligation it might have had to provide Din with a facially legitimate and bona fide reason for its action when it provided notice that her husband was denied admission to the country under [8 U.S.C.] § 1182(a)(3)(B)." *Id.* at 2141. No more was required, and "[b]y requiring the Government to provide more, the [Ninth Circuit] erred in adjudicating Din's constitutional claims." *Id.*

The importance and continuing applicability of the framework set out in *Mandel* and applied in *Fiallo* and *Din* has been recognized in circumstances remarkably similar to the Executive Order. After the attacks of September 11, 2001, the Attorney General instituted the National Security Entry-Exit Registration System. That program required non-immigrant alien males (residing in the United States) over the age of sixteen from twenty-five countries twenty-four Muslim-majority countries plus North Korea to appear for registration and fingerprinting. One court referred to the program as "enhanced monitoring." *See Rajah v. Mukasey*, 544 F.3d 427, 433 34, 439 (2d Cir. 2008) (describing the program).[7] The aliens subject to the program filed a series of suits in federal courts across the

[7] The aliens subject to the program were designated by country in a series of notices. The first notice covered five countries: Iran, Iraq, Libya, Sudan, and Syria. *See Rajah*, 544 F.3d at 433 n.3.

United States. They contended that the program unconstitutionally discriminated against them on the basis of "their religion, ethnicity, gender, and race." *Id.* at 438. Similar to the claims here, the petitioners argued that the program "was motivated by an improper animus toward Muslims." *Id.* at 439.

Citing *Fiallo* and applying the *Mandel* test, the Second Circuit held that "[t]he most exacting level of scrutiny that we will impose on immigration legislation is rational basis review." *Id.* at 438 (alteration in original) (citation omitted). The court then found "a facially legitimate and bona fide reason for" the registration requirements because the countries were "selected on the basis of national security criteria." *Id.* at 438 39. The court rejected as having "no basis" the petitioners' claim of religious animus. *Id.* at 439. The court observed that "one major threat of terrorist attacks comes from radical Islamic groups." *Id.* It added:

> Muslims from non-specified countries were not subject to registration. Aliens from the designated countries who were qualified to be permanent residents in the United States were exempted whether or not they were Muslims. The program did not target only Muslims: non-Muslims from the designated countries were subject to registration.

Id. Finally, the court refused to review the program for "its effectiveness and wisdom" because the court "ha[d] no way of knowing whether the Program's enhanced monitoring of aliens ha[d] disrupted or deterred attacks. In any event,

such a consideration [was] irrelevant because an *ex ante* rather than *ex post* assessment of the Program [was] required under the rational basis test." *Id.* The Second Circuit thus unanimously rejected the petitioners' constitutional challenges and "join[ed] every circuit that ha[d] considered the issue in concluding that the Program [did] not violate Equal Protection guarantees." *Id.*; *see Malik v. Gonzales*, 213 F. App'x 173, 174 75 (4th Cir. 2007); *Kandamar v. Gonzales*, 464 F.3d 65, 72 74 (1st Cir. 2006); *Zafar v. U.S. Attorney Gen.*, 461 F.3d 1357, 1367 (11th Cir. 2006); *Hadayat v. Gonzales*, 458 F.3d 659, 664 65 (7th Cir. 2006); *Shaybob v. Attorney Gen.*, 189 F. App'x 127, 130 (3d Cir. 2006); *Ahmed v. Gonzales*, 447 F.3d 433, 439 (5th Cir. 2006); *see also Adenwala v. Holder*, 341 F. App'x 307, 309 (9th Cir. 2009); *Roudnahal v. Ridge*, 310 F. Supp. 2d 884, 892 (N.D. Ohio 2003). The panel was oblivious to this important history.

The combination of *Mandel*, *Fiallo*, and *Din*, and the history of their application to the post-9/11 registration program, is devastating to the panel's conclusion that we can simply apply ordinary constitutional standards to immigration policy. Compounding its omission, the panel missed all of our own cases applying *Mandel* to constitutional challenges to immigration decisions. *See*, *e.g.*, *Cardenas*, 826 F.3d at 1171 (discussing *Mandel* and *Din* extensively as the "standard of judicial review applicable to the visa denial" where petitioner alleged

due process and equal protection violations); *An Na Peng v. Holder*, 673 F.3d 1248, 1258 (9th Cir. 2012) (applying the *Mandel* standard to reject a lawful permanent resident's equal protection challenge against a broad policy); *Bustamante*, 531 F.3d at 1060 (applying *Mandel* to a due process claim and describing *Mandel* as "a highly constrained review"); *Padilla Padilla v. Gonzales*, 463 F.3d 972, 978 79 (9th Cir. 2006) (applying *Mandel* to a due process challenge to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996); *Nadarajah v. Gonzales*, 443 F.3d 1069, 1082 (9th Cir. 2006) (using the *Mandel* standard to address an alien's challenge to the executive's denial of parole to temporarily enter the United States, and finding the executive's reasons "were not facially legitimate and bona fide"); *Barthelemy v. Ashcroft*, 329 F.3d 1062, 1065 (9th Cir. 2003) (applying *Fiallo* to a facial equal protection challenge based on "former marital status"); *Noh v. INS*, 248 F.3d 938, 942 (9th Cir. 2001) (applying *Mandel* when an alien challenged the revocation of his visa); *see also Andrade Garcia v. Lynch*, 828 F.3d 829, 834 35 (9th Cir. 2016) (discussing review under *Mandel*). Like the Second Circuit in *Rajah*, we too have repeatedly "equated [the *Mandel*] standard of review with rational basis review." *Barthelemy*, 329 F.3d at 1065; *see An Na Peng*, 673 F.3d at 1258; *Ablang v. Reno*, 52 F.3d 801, 805 (9th Cir. 1995). It is equally clear from our cases that we apply *Mandel* whether we are

dealing with an individual determination by the Attorney General or a consular officer, as in *Mandel* and *Din*, or with broad policy determinations, as in *Fiallo*. The panel's clear misstatement of law justifies vacating the opinion.

B

Applying *Mandel* here, the panel's error becomes obvious: the Executive Order was easily "facially legitimate" and supported by a "bona fide reason." As I have quoted above, § 1182(f) authorizes the President to suspend the entry of "any class of aliens" as he deems appropriate:

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

8 U.S.C. § 1182(f).[8] Invoking this authority and making the requisite findings, the President "proclaim[ed] that the immigrant and nonimmigrant entry into the United States of aliens from [seven] countries . . . would be detrimental to the interests of

[8] Regrettably, the panel never once mentioned § 1182(f), nor did it acknowledge that when acting pursuant it to it, the government's "authority is at its maximum, for it includes all that [the President] possesses in his own right plus all the Congress can delegate." *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring); *see Knauff*, 338 U.S. at 542 ("When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power.").

the United States," and he suspended their entry for 90 days. Exec. Order No. 13769 § 3(c). As the Executive Order further noted, the seven countries Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen had all been previously identified by either Congress, the Secretary of State, or the Secretary of Homeland Security (all in prior administrations) as "countries or areas of concern" because of terrorist activity.[9] The President noted that we "must be vigilant" in light of "deteriorating conditions in certain countries due to war, strife, disaster, and civil unrest." *Id.* § 1. The President's actions might have been more aggressive than those of his predecessors, but that was his prerogative. Thus, the President's actions were supported by a "facially legitimate and bona fide" reason.

Justice Kennedy indicated in *Din* that it might have been appropriate to "look behind" the government's exclusion of Din's husband if there were "an affirmative showing of bad faith on the part of the consular officer who denied [the

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[9] *Iraq and Syria*: Congress has disqualified nationals or persons who have been present in Iraq and Syria from eligibility for the Visas Waiver Program. 8 U.S.C. § 1187(a)(12)(A)(i)(I), (ii)(I).

Iran, Sudan, and Syria: Under § 1187(a)(12)(A)(i)(II), (ii)(II), the Secretary of State has designated Iran, Sudan, and Syria as state sponsors of terrorism because the "government . . . repeatedly provided support of acts of international terrorism."

Libya, Somalia, and Yemen: Similarly, under § 1187(a)(12)(A)(i)(III), (ii)(III), the Secretary of Homeland Security has designated Libya, Somalia, and Yemen as countries where a foreign terrorist organization has a significant presence in the country or where the country is a safe haven for terrorists.

husband's] visa." *Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring in the judgment). Because the panel never discussed *Din*, let alone claimed that Justice Kennedy's comment might allow us to peek behind the facial legitimacy of the Executive Order, I need not address the argument in detail. Suffice it to say, it would be a huge leap to suggest that *Din*'s "bad faith" exception also applies to the motives of broad-policy makers as opposed to those of consular officers.

Even if we have questions about the basis for the President's ultimate findings whether it was a "Muslim ban" or something else we do not get to peek behind the curtain. So long as there is *one* "facially legitimate and bona fide" reason for the President's actions, our inquiry is at an end. As the Court explained in *Reno v. American Arab Anti Discrimination Committee*, 525 U.S. 471 (1999):

> The Executive should not have to disclose its "real" reasons for deeming nationals of a particular country a special threat or indeed for simply wishing to antagonize a particular foreign country by focusing on that country's nationals and even it if did disclose them a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy.

Id. at 491; *see Mezei*, 345 U.S. at 210 12; *Knauff*, 338 U.S. at 543.

The panel faulted the government for not coming forward in support of the Executive Order with evidence including "classified information." *Washington*, 847 F.3d at 1168 & nn.7 8. First, that is precisely what the Court has told us we

should not do. Once the facial legitimacy is established, we may not "look behind the exercise of that discretion." *Fiallo*, 430 U.S. at 795 96 (quoting *Mandel*, 408 U.S. at 770). The government may provide more details "when it sees fit" or if Congress "requir[es] it to do so," but we may not require it. *Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring in the judgment). Second, that we have the capacity to hold the confidences of the executive's secrets does not give us the right to examine them, even under the most careful conditions. As Justice Kennedy wrote in *Din*, "in light of the national security concerns the terrorism bar addresses[,] . . . even if . . . sensitive facts could be reviewed by courts *in camera*, the dangers and difficulties of handling such delicate security material further counsel against requiring disclosure." *Id.*; *see Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit in camera in order to be taken into executive confidences."). When we apply the correct standard of review, the President does not have to come forward with supporting documentation to explain the basis for the Executive Order.

The panel's errors are many and obvious. Had it applied the proper standard, the panel should have stopped here and issued the stay of the district

court's TRO. Instead, the panel opinion stands contrary to well-established separation-of-powers principles. We have honored those principles in our prior decisions; the panel failed to observe them here. If for no other reason, we should have gone *en banc* to vacate the panel's opinion in order to keep our own decisions straight.

III

We are all acutely aware of the enormous controversy and chaos that attended the issuance of the Executive Order. People contested the extent of the national security interests at stake, and they debated the value that the Executive Order added to our security against the real suffering of potential emigres. As tempting as it is to use the judicial power to balance those competing interests as we see fit, we cannot let our personal inclinations get ahead of important, overarching principles about who gets to make decisions in our democracy. For better or worse, every four years we hold a contested presidential election. We have all found ourselves disappointed with the election results in one election cycle or another. But it is the best of American traditions that we also understand and respect the consequences of our elections. Even when we disagree with the judgment of the political branches and perhaps *especially* when we disagree we have to trust that the wisdom of the nation as a whole will prevail in the end.

Above all, in a democracy, we have the duty to preserve the liberty of the people by keeping the enormous powers of the national government separated. We are judges, not Platonic Guardians. It is our duty to say what the law is, and the meta-source of our law, the U.S. Constitution, commits the power to make foreign policy, including the decisions to permit or forbid entry into the United States, to the President and Congress. We will yet regret not having taken this case *en banc* to keep those lines of authority straight.

Finally, I wish to comment on the public discourse that has surrounded these proceedings. The panel addressed the government's request for a stay under the worst conditions imaginable, including extraordinarily compressed briefing and argument schedules and the most intense public scrutiny of our court that I can remember. Even as I dissent from our decision not to vacate the panel's flawed opinion, I have the greatest respect for my colleagues. The personal attacks on the distinguished district judge and our colleagues were out of all bounds of civic and persuasive discourse particularly when they came from the parties. It does no credit to the arguments of the parties to impugn the motives or the competence of the members of this court; *ad hominem* attacks are not a substitute for effective advocacy. Such personal attacks treat the court as though it were merely a political forum in which bargaining, compromise, and even intimidation are acceptable

principles. The courts of law must be more than that, or we are not governed by law at all.

I dissent, respectfully.

FILED

MAR 15 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STATE OF WASHINGTON; STATE OF MINNESOTA, Plaintiffs Appellees, v. DONALD J. TRUMP, President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; REX W. TILLERSON, Secretary of State; JOHN F. KELLY, Secretary of the Department of Homeland Security; UNITED STATES OF AMERICA, Defendants Appellants.	No. 17 35105 D.C. No. 2:17 cv 00141 Western District of Washington, Seattle ORDER

Before: CANBY, CLIFTON, and FRIEDLAND, Circuit Judges.

This court in a published order previously denied a motion of the government for a stay of a restraining order pending appeal. 847 F.3d 1151 (9th Cir. 2017). That order became moot when this court granted the government's unopposed motion to dismiss its underlying appeal. Order, Mar. 8, 2017. No party has moved to vacate the published order. A judge of this court called for a vote to determine whether the court should grant

en banc reconsideration in order to vacate the published order denying the stay. The matter failed to receive a majority of the votes of the active judges in favor of en banc reconsideration. Vacatur of the stay order is denied. *See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, (1994) (holding that the "extraordinary remedy of vacatur" is ordinarily unjustified when post-decision mootness is caused by voluntary action of the losing party).

This order is being filed along with the concurrence of Judge Reinhardt and the dissent of Judge Bybee. Filings by other judges may follow.

Supreme Court of California
350 McALLISTER STREET
SAN FRANCISCO, CA 94102-4797

TANI G. CANTIL-SAKAUYE
CHIEF JUSTICE OF CALIFORNIA

(415) 865-7060

March 16, 2017

Attorney General Jeff Sessions
The United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

The Honorable John F. Kelly
U.S. Department of Homeland Security
Secretary of Homeland Security
Washington, DC 20528

RE: Immigration Enforcement Tactics at State Courthouses

Dear Attorney General Sessions and Secretary Kelly:

As Chief Justice of California responsible for the safe and fair delivery of justice in our state, I am deeply concerned about reports from some of our trial courts that immigration agents appear to be stalking undocumented immigrants in our courthouses to make arrests.

Our courthouses serve as a vital forum for ensuring access to justice and protecting public safety. Courthouses should not be used as bait in the necessary enforcement of our country's immigration laws.

Our courts are the main point of contact for millions of the most vulnerable Californians in times of anxiety, stress, and crises in their lives. Crime victims, victims of sexual abuse and domestic violence, witnesses to crimes who are aiding law enforcement, limited-English speakers, unrepresented litigants, and children and families all come to our courts seeking justice and due process of law. As finders of fact, trial courts strive to

mitigate fear to ensure fairness and protect legal rights. Our work is critical for ensuring public safety and the efficient administration of justice.

Most Americans have more daily contact with their state and local governments than with the federal government, and I am concerned about the impact on public trust and confidence in our state court system if the public feels that our state institutions are being used to facilitate other goals and objectives, no matter how expedient they may be.

Each layer of government – federal, state, and local – provides a portion of the fabric of our society that preserves law and order and protects the rights and freedoms of the people. The separation of powers and checks and balances at the various levels and branches of government ensure the harmonious existence of the rule of law.

The federal and state governments share power in countless ways, and our roles and responsibilities are balanced for the public good. As officers of the court, we judges uphold the constitutions of both the United States and California, and the executive branch does the same by ensuring that our laws are fairly and safely enforced. But enforcement policies that include stalking courthouses and arresting undocumented immigrants, the vast majority of whom pose no risk to public safety, are neither safe nor fair. They not only compromise our core value of fairness but they undermine the judiciary's ability to provide equal access to justice. I respectfully request that you refrain from this sort of enforcement in California's courthouses.

Sincerely,

T. Cantil-Sakauye

TANI G. CANTIL-SAKAUYE

cc: Hon. Dianne Feinstein, Senator
Hon. Kamala Harris, Senator
Hon. Jerry Brown, Governor

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

STATE OF HAWAI‘I and ISMAIL ELSHIKH, Plaintiffs, vs. DONALD J. TRUMP, *et al.*, Defendants.	CV. NO. 17-00050 DKW-KSC **ORDER GRANTING MOTION TO CONVERT TEMPORARY RESTRAINING ORDER TO A PRELIMINARY INJUNCTION**

INTRODUCTION

On March 15, 2017, the Court temporarily enjoined Sections 2 and 6 of Executive Order No. 13,780, entitled, “Protecting the Nation from Foreign Terrorist Entry into the United States,” 82 Fed. Reg. 13209 (Mar. 6, 2017). *See* Order Granting Mot. for TRO, ECF No. 219 [hereinafter TRO]. Plaintiffs State of Hawai‘i and Ismail Elshikh, Ph.D., now move to convert the TRO to a preliminary injunction. *See* Pls.’ Mot. to Convert TRO to Prelim. Inj., ECF No. 238 [hereinafter Motion].

Upon consideration of the parties’ submissions, and following a hearing on March 29, 2017, the Court concludes that, on the record before it, Plaintiffs have met

their burden of establishing a strong likelihood of success on the merits of their Establishment Clause claim, that irreparable injury is likely if the requested relief is not issued, and that the balance of the equities and public interest counsel in favor of granting the requested relief. Accordingly, Plaintiffs' Motion (ECF No. 238) is GRANTED.

BACKGROUND

The Court briefly recounts the factual and procedural background relevant to Plaintiffs' Motion. A fuller recitation of the facts is set forth in the Court's TRO. *See* TRO 3 14, ECF No. 219.

I. The President's Executive Orders

A. Executive Order No. 13,769

On January 27, 2017, the President of the United States issued Executive Order No. 13,769 entitled, "Protecting the Nation from Foreign Terrorist Entry into the United States," 82 Fed. Reg. 8977 (Jan. 27, 2017).[1] On March 6, 2017, the

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[1]On February 3, 2017, the State filed its complaint and an initial motion for TRO, which sought to enjoin Sections 3(c), 5(a) (c), and 5(e) of Executive Order No. 13,769. Pls.' Mot. for TRO, Feb. 3, 2017, ECF No. 2. The Court stayed the case (*see* ECF Nos. 27 & 32) after the United States District Court for the Western District of Washington entered a nationwide preliminary injunction enjoining the Government from enforcing the same provisions of Executive Order No. 13,769 targeted by the State. *See Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017). On February 4, 2017, the Government filed an emergency motion in the United States Court of Appeals for the Ninth Circuit seeking a stay of the *Washington* TRO, pending appeal. That emergency motion was denied on February 9, 2017. *See Washington v. Trump*, 847 F.3d 1151 (9th Cir.) (per curium), *denying reconsideration en banc*, --- F.3d ---, 2017

President issued another Executive Order, No. 13,780, identically entitled, "Protecting the Nation from Foreign Terrorist Entry into the United States" (the "Executive Order"), 82 Fed. Reg. 13209. Like its predecessor, the Executive Order restricts the entry of foreign nationals from specified countries and suspends the United States refugee program for specified periods of time.

B. Executive Order No. 13,780

Section 1 of the Executive Order declares that its purpose is to "protect [United States] citizens from terrorist attacks, including those committed by foreign nationals." By its terms, the Executive Order also represents a response to the Ninth Circuit's per curiam decision in *Washington v. Trump*, 847 F.3d 1151. According to the Government, it "clarifies and narrows the scope of Executive action regarding immigration, extinguishes the need for emergent consideration, and eliminates the potential constitutional concerns identified by the Ninth Circuit." Notice of Filing of Executive Order 4 5, ECF No. 56.

Section 2 suspends from "entry into the United States" for a period of 90 days, certain nationals of six countries referred to in Section 217(a)(12) of the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq*.: Iran, Libya, Somalia,

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WL 992527 (9th Cir. 2017). On March 8, 2017, the Ninth Circuit granted the Government's unopposed motion to voluntarily dismiss the appeal. *See* Order, Case No. 17-35105 (9th Cir. Mar. 8, 2017), ECF No. 187.

Sudan, Syria, and Yemen. 8 U.S.C. § 1187(a)(12); Exec. Order § 2(c). The suspension of entry applies to nationals of these six countries who (1) are outside the United States on the new Executive Order's effective date of March 16, 2017; (2) do not have a valid visa on that date; and (3) did not have a valid visa as of 5:00 p.m. Eastern Standard Time on January 27, 2017 (the date of Executive Order No. 13,769). Exec. Order § 3(a). The 90-day suspension does not apply to: (1) lawful permanent residents; (2) any foreign national admitted to or paroled into the United States on or after the Executive Order's effective date (March 16, 2017); (3) any individual who has a document other than a visa, valid on the effective date of the Executive Order or issued anytime thereafter, that permits travel to the United States, such as an advance parole document; (4) any dual national traveling on a passport not issued by one of the six listed countries; (5) any foreign national traveling on a diplomatic-type or other specified visa; and (6) any foreign national who has been granted asylum, any refugee already admitted to the United States, or any individual granted withholding of removal, advance parole, or protection under the Convention Against Torture. *See* Exec. Order § 3(b). Under Section 3(c)'s waiver provision, foreign nationals of the six countries who are subject to the suspension of entry may nonetheless seek entry on a case-by-case basis.

Section 6 of the Executive Order suspends the U.S. Refugee Admissions Program for 120 days. The suspension applies both to travel into the United States and to decisions on applications for refugee status. *See* Exec. Order § 6(a). It excludes refugee applicants who were formally scheduled for transit by the Department of State before the March 16, 2017 effective date. Like the 90-day suspension, the 120-day suspension includes a waiver provision that allows the Secretaries of State and Homeland Security to admit refugee applicants on a case-by-case basis. *See* Exec. Order § 6(c). Unlike Executive Order No. 13,769, the new Executive Order does not expressly refer to an individual's status as a "religious minority" or refer to any particular religion, and it does not include a Syria-specific ban on refugees.

II. Plaintiffs' Claims

Plaintiffs filed a Second Amended Complaint for Declaratory and Injunctive Relief ("SAC") on March 8, 2017 (ECF No. 64) simultaneous with their Motion for TRO (ECF No. 65). The State asserts that the Executive Order inflicts constitutional and statutory injuries upon its residents, employers, and educational institutions, while Dr. Elshikh alleges injuries on behalf of himself, his family, and members of his Mosque. SAC ¶ 1.

According to Plaintiffs, the Executive Order results in "their having to live in a country and in a State where there is the perception that the Government has established a disfavored religion." SAC ¶ 5. Plaintiffs assert that by singling out nationals from the six predominantly Muslim countries, the Executive Order causes harm by stigmatizing not only immigrants and refugees, but also Muslim citizens of the United States. Plaintiffs point to public statements by the President and his advisors regarding the implementation of a "Muslim ban," which Plaintiffs contend is the tacit and illegitimate motivation underlying the Executive Order. *See* SAC ¶¶ 35 60. Plaintiffs argue that, in light of these and similar statements "where the President himself has repeatedly and publicly espoused an improper motive for his actions, the President's action must be invalidated." Pls.' Mem. in Supp. of Mot. for TRO 2, ECF No. 65-1. Plaintiffs additionally present evidence that they contend undermines the purported national security rationale for the Executive Order and demonstrates the Administration's pretextual justification for the Executive Order. *E.g.*, SAC ¶ 61 (citing Draft DHS Report, SAC, Ex. 10, ECF No. 64-10).

III. March 15, 2017 TRO

The Court's nationwide TRO (ECF No. 219) temporarily enjoined Sections 2 and 6 of the Executive Order, based on the Court's preliminary finding that Plaintiffs

demonstrated a sufficient likelihood of succeeding on their claim that the Executive Order violates the Establishment Clause. *See* TRO 41 42. The Court concluded, based upon the showing of constitutional injury and irreparable harm, the balance of equities, and public interest, that Plaintiffs met their burden in seeking a TRO, and directed the parties to submit a stipulated briefing and preliminary injunction hearing schedule. *See* TRO 42 43.

On March 21, 2017, Plaintiffs filed the instant Motion (ECF No. 238) seeking to convert the TRO to a preliminary injunction prohibiting Defendants from enforcing and implementing Sections 2 and 6 of the Executive Order until the matter is fully decided on the merits. They argue that both of these sections are unlawful in all of their applications and that both provisions are motivated by anti-Muslim animus. Defendants oppose the Motion. *See* Govt. Mem. in Opp'n to Mot. to Convert TRO to Prelim. Inj., ECF No. 251. After full briefing and notice to the parties, the Court held a hearing on the Motion on March 29, 2017.

DISCUSSION

The Court's TRO details why Plaintiffs are entitled to preliminary injunctive relief. *See* TRO 15 43. The Court reaffirms and incorporates those findings and conclusions here, and addresses the parties' additional arguments on Plaintiffs' Motion to Convert.

I. Plaintiffs Have Demonstrated Standing At This Preliminary Phase

The Court previously found that Plaintiffs satisfied Article III standing requirements at this preliminary stage of the litigation. *See* TRO 15 21 (State), 22 25 (Dr. Elshikh). The Court renews that conclusion here.

A. Article III Standing

Article III, Section 2 of the Constitution permits federal courts to consider only "cases" and "controversies." *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007). "[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. 167, 180 81 (2000) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 61 (1992)).

"At this very preliminary stage of the litigation, the [Plaintiffs] may rely on the allegations in their Complaint and whatever other evidence they submitted in support of their TRO motion to meet their burden." *Washington*, 847 F.3d at 1159 (citing *Lujan*, 504 U.S. at 561). "With these allegations and evidence, the [Plaintiffs] must make a 'clear showing of each element of standing.'" *Id.* (quoting

Townley v. Miller, 722 F.3d 1128, 1133 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 907 (2014)). On the record presented at this preliminary stage of the proceedings, Plaintiffs meet the threshold Article III standing requirements.

B. The State Has Standing

For the reasons stated in the TRO, the State has standing based upon injuries to its proprietary interests. *See* TRO 16 21.[2]

The State sufficiently identified monetary and intangible injuries to the University of Hawaii. *See, e.g.*, Suppl. Decl. of Risa E. Dickson, Mot. for TRO, Ex. D-1, ECF No. 66-6; Original Dickson Decl., Mot. for TRO, Ex. D-2, ECF No. 66-7. The Court previously found these types of injuries to be nearly indistinguishable from those found sufficient to confer standing according to the Ninth Circuit's *Washington* decision. *See* 847 F.3d at 1161 ("The necessary connection can be drawn in at most two logical steps: (1) the Executive Order prevents nationals of seven countries from entering Washington and Minnesota; (2) as a result, some of these people will not enter state universities, some will not join those universities as faculty, some will be prevented from performing research, and some will not be

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[2]The Court once again does not reach the State's alternative standing theory based on protecting the interests of its citizens as *parens patriae*. *See Washington*, 847 F.3d at 1168 n.5 ("The States have asserted other proprietary interests and also presented an alternative standing theory based on their ability to advance the interests of their citizens as *parens patriae*. Because we conclude that the States' proprietary interests as operators of their public universities are sufficient to support standing, we need not reach those arguments.").

permitted to return if they leave. And we have no difficulty concluding that the States' injuries would be redressed if they could obtain the relief they ask for: a declaration that the Executive Order violates the Constitution and an injunction barring its enforcement."). The State also presented evidence of injury to its tourism industry. *See, e.g.,* SAC ¶ 100; Suppl. Decl. of Luis P. Salaveria, Mot. for TRO, Ex. C-1, ECF No. 66-4; Suppl. Decl. of George Szigeti, ¶¶ 5 8, Mot. for TRO, Ex. B-1, ECF No. 66-2.

For purposes of the instant Motion, the Court concludes that the State has preliminarily demonstrated that: (1) its universities will suffer monetary damages and intangible harms; (2) the State's economy is likely to suffer a loss of revenue due to a decline in tourism; (3) such harms can be sufficiently linked to the Executive Order; and (4) the State would not suffer the harms to its proprietary interests in the absence of implementation of the Executive Order. *See* TRO 21. These preliminary findings apply to each of the challenged Sections of the Executive Order. Accordingly, at this early stage of the litigation, the State has satisfied the requirements of Article III standing.

C. Dr. Elshikh Has Standing

Dr. Elshikh likewise has met his preliminary burden to establish standing to assert an Establishment Clause violation. *See* TRO 22 25. "The standing

question, in plain English, is whether adherents to a religion have standing to challenge an official condemnation by their government of their religious views[.] Their 'personal stake' assures the 'concrete adverseness' required." *See Catholic League for Religious & Civil Rights v. City & Cty. of San Francisco*, 624 F.3d 1043, 1048 49 (9th Cir. 2010) (en banc). Dr. Elshikh attests that the effects of the Executive Order are "devastating to me, my wife and children." Elshikh Decl. ¶ 6, Mot. for TRO, Ex. A, ECF No. 66-1; *see also id.* ¶¶ 1, 3 ("I am deeply saddened . . . . by the message that both [Executive Orders] convey that a broad travel-ban is 'needed' to prevent people from certain Muslim countries from entering the United States."); SAC ¶ 90 ("Muslims in the Hawai'i Islamic community feel that the new Executive Order targets Muslim citizens because of their religious views and national origin. Dr. Elshikh believes that, as a result of the new Executive Order, he and members of the Mosque will not be able to associate as freely with those of other faiths."). The alleged injuries are sufficiently personal, concrete, particularized, and actual to confer standing in the Establishment Clause context. *E.g.,* SAC ¶¶ 88 90; Elshikh Decl. ¶¶ 1, 3. These injuries have already occurred and will continue to occur if the Executive Order is implemented and enforced; the injuries are neither contingent nor speculative.

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

The Court turns to the factors for granting preliminary injunctive relief.

II. Legal Standard: Preliminary Injunctive Relief

The underlying purpose of a preliminary injunction is to preserve the status quo and prevent irreparable harm. *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70*, 415 U.S. 423, 439 (1974); *see also Reno Air Racing Ass'n v. McCord*, 452 F.3d 1126, 1130 31 (9th Cir. 2006).

The Court applies the same standard for issuing a preliminary injunction as it did when considering Plaintiffs' Motion for TRO. *See Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). A "plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the

balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 20 (2008) (citation omitted).

The Court, in its discretion, may convert a temporary restraining order into a preliminary injunction. *See, e.g.*, *ABX Air, Inc. v. Int'l Bhd. of Teamsters*, No. 1:16-CV-1096, 2016 WL 7117388, at *5 (S.D. Ohio Dec. 7, 2016) (granting motion to convert TRO into a preliminary injunction because "Defendants fail to allege any material fact suggesting that, if a hearing were held, this Court would reach a different outcome"; "[n]othing has occurred to alter the analysis in the Court's original TRO, and since this Court has already complied with the requirements for the issuance of a preliminary injunction, it can simply convert the nature of its existing Order."); *Productive People, LLC v. Ives Design*, No. CV-09-1080-PHX-GMS, 2009 WL 1749751, at *3 (D. Ariz. June 18, 2009) ("Because Defendants have given the Court no reason to alter the conclusions provided in its previous Order [granting a TRO], and because '[t]he standard for issuing a temporary restraining order is identical to the standard for issuing a preliminary injunction,' the Court will enter a preliminary injunction." (quoting *Brown Jordan Int'l, Inc. v. Mind's Eye Interiors, Inc*., 236 F. Supp. 2d 1152, 1154 (D. Haw. 2002))). Here, the parties were afforded notice, a full-briefing on the

merits, and a hearing both prior to entry of the original TRO and prior to consideration of the instant Motion.

For the reasons that follow and as set forth more fully in the Court's TRO, Plaintiffs have met their burden here.

III. Analysis of Factors: Likelihood of Success on the Merits

The Court's prior finding that Plaintiffs sufficiently established a likelihood of success on the merits of their Count I claim that the Executive Order violates the Establishment Clause remains undisturbed. *See* TRO 30 40.[3]

A. Establishment Clause

Lemon v. Kurtzman, 403 U.S. 602, 612 13 (1971), provides the benchmark for evaluating whether governmental action is consistent with or at odds with the Establishment Clause. According to *Lemon*, government action (1) must have a primary secular purpose, (2) may not have the principal effect of advancing or inhibiting religion, and (3) may not foster excessive entanglement with religion. *Id.* "Failure to satisfy any one of the three prongs of the *Lemon* test is sufficient to invalidate the challenged law or practice." *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1076 77 (9th Cir. 2010).

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[3]The Court again expresses no view on Plaintiffs' additional statutory or constitutional claims.

The Court determined in its TRO that the preliminary evidence demonstrates the Executive Order's failure to satisfy *Lemon*'s first test. *See* TRO 33 36. The Court will not repeat that discussion here. As no *new* evidence contradicting the purpose identified by the Court has been submitted by the parties since the issuance of the March 15, 2017 TRO, there is no reason to disturb the Court's prior determination.

Instead, the Federal Defendants take a different tack. They once more urge the Court not to look beyond the four corners of the Executive Order. According to the Government, the Court must afford the President deference in the national security context and should not "'look behind the exercise of [the President's] discretion' taken 'on the basis of a facially legitimate and bona fide reason.'" Govt. Mem. in Opp'n to Mot. for TRO 42 43 (quoting *Kliendienst v. Mandel*, 408 U.S. 753, 770 (1972)), ECF No. 145. No binding authority, however, has decreed that Establishment Clause jurisprudence ends at the Executive's door. In fact, *every court* that has considered whether to apply the Establishment Clause to either the Executive Order or its predecessor (regardless of the ultimate outcome) has done so.[4] Significantly, this Court is constrained by the binding precedent and guidance

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[4]*See Sarsour v. Trump*, No. 1:17-cv-00120 AJT-IDD, 2017 WL 1113305, at *11 (E.D. Va. Mar. 27, 2017) ("[T]he Court rejects the Defendants' position that since President Trump has offered a legitimate, rational, and non-discriminatory purpose stated in EO-2, this Court must confine its

offered in *Washington.* There, citing *Lemon*, the Ninth Circuit clearly indicated that the Executive Order is subject to the very type of secular purpose review conducted by this Court in considering the TRO. *Washington*, 847 F.3d at 1167 68; *id.* at 1162 (stating that *Mandel* does not apply to the "promulgation of sweeping immigration policy" at the "highest levels of the political branches").

The Federal Defendants' arguments, advanced from the very inception of this action, make sense from this perspective where the "historical context and 'the specific sequence of events leading up to'" the adoption of the challenged Executive Order are as full of religious animus, invective, and obvious pretext as is the record here, it is no wonder that the Government urges the Court to altogether ignore that history and context. *See McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 862 (2005). The Court, however, declines to do so. *Washington,* 847

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analysis of the constitutional validity of EO-2 to the four corners of the Order.") (citations omitted); *Int'l Refugee Assistance Project v. Trump*, No. TDC-17-0361, 2017 WL 1018235, at *16 (D. Md. Mar. 16, 2017) ("Defendants argue that because the Establishment Clause claim implicates Congress's plenary power over immigration as delegated to the President, the Court need only consider whether the Government has offered a 'facially legitimate and bona fide reason' for its action. *Mandel*, 408 U.S. at 777 . . . . [A]lthough '[t]he Executive has broad discretion over the admission and exclusion of aliens,' that discretion 'may not transgress constitutional limitations,' and it is 'the duty of the courts' to 'say where those statutory and constitutional boundaries lie.' *Abourezk[v. Reagan]*, 785 F.2d [1043,] 1061 [(D.C. Cir. 1986)]."); *Aziz v. Trump*, No. 1:17-CV-116 LMB-TCB, 2017 WL 580855, at *8 (E.D. Va. Feb. 13, 2017) ("Moreover, even if Mandel[, 408 U.S. at 770,] did apply, it requires that the proffered executive reason be 'bona fide.' As the Second and Ninth Circuits have persuasively held, if the proffered 'facially legitimate' reason has been given in 'bad faith,' it is not 'bona fide.' *Am. Academy of Religion v. Napolitano*, 573 F.3d 115, 126 (2d Cir. 2009); *Bustamante v. Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008). That leaves the Court in the same position as in an ordinary secular purpose case: determining whether the proffered reason for the EO is the real reason.")).

F.3d at 1167 ("It is well established that evidence of purpose beyond the face of the challenged law may be considered in evaluating Establishment and Equal Protection Clause claims."). The Court will not crawl into a corner, pull the shutters closed, and pretend it has not seen what it has.[5] The Supreme Court and this Circuit both dictate otherwise, and that is the law this Court is bound to follow.

B. Future Executive Action

The Court's preliminary determination does not foreclose future Executive action. The Court recognizes that it is not the case that the Administration's past conduct must forever taint any effort by it to address the security concerns of the nation. *See* TRO 38 39. Based upon the preliminary record available, however, one cannot conclude that the actions taken during the interval between revoked Executive Order No. 13,769 and the new Executive Order represent "*genuine* changes in constitutionally significant conditions." *McCreary*, 545 U.S. at 874 (emphasis added).

The Government emphasizes that "the Executive Branch revised the new Executive Order to avoid any Establishment Clause concerns," and, in particular,

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[5] *See Int'l Refugee Assistance Project*, 2017 WL 1018235, at *14 ("Defendants have cited no authority concluding that a court assessing purpose under the Establishment Clause may consider only statements made by government employees at the time that they were government employees. Simply because a decisionmaker made the statements during a campaign does not wipe them from the 'reasonable memory' of a 'reasonable observer.'" (quoting *McCreary*, 545 U.S. at 866)).

removed the preference for religious minorities provided in Executive Order No. 13,769. Mem. in Opp'n 21, ECF No. 251. These efforts, however, appear to be precisely what Plaintiffs characterize them to be: efforts to "sanitize [Executive Order No. 13,769's] refugee provision in order to 'be responsive to a lot of very technical issues that were brought up by the court.'" Mem. in Supp. of Mot. to Convert TRO to Prelim. Inj. 20, ECF No. 238-1 [hereinafter PI Mem.] (quoting SAC ¶ 74(a)). Plaintiffs also direct the Court to the President's March 15, 2017 description of the Executive Order as "a watered-down version of the first one." PI Mem. 20 (citing Katyal Decl. 7, Ex. A, ECF No. 239-1). "[A]n implausible claim that governmental purpose has changed should not carry the day in a court of law any more than in a head with common sense." *McCreary*, 545 U.S. at 874.

IV. Analysis of Factors: Irreparable Harm

Irreparable harm may be *presumed* with the finding of a violation of the First Amendment. *See Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976))). Because Dr. Elshikh is likely to succeed on the merits of his Establishment Clause claim, the Court finds that the second factor of the *Winter* test is satisfied that Dr. Elshikh is likely to suffer irreparable, ongoing, and significant

injury in the absence of a preliminary injunction. *See* TRO 40 (citing SAC ¶¶ 88 90; Elshikh Decl. ¶¶ 1, 3).

V. Analysis of Factors: Balance of Equities And Public Interest

The final step in determining whether to grant Plaintiffs' Motion is to assess the balance of equities and examine the general public interests that will be affected. The Court acknowledges Defendants' position that the Executive Order is intended "to protect the Nation from terrorist activities by foreign nationals admitted to the United States[.]" Exec. Order, preamble. National security is unquestionably of vital importance to the public interest. The same is true with respect to affording appropriate deference to the President's constitutional and statutory responsibilities to set immigration policy and provide for the national defense. Upon careful consideration of the totality of the circumstances, however, the Court reaffirms its prior finding that the balance of equities and public interest weigh in favor of maintaining the status quo. As discussed above and in the TRO, Plaintiffs have shown a strong likelihood of succeeding on their claim that the Executive Order violates First Amendment rights under the Constitution. *See* TRO 41 42; *see also Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("[I]t is *always* in the public interest to prevent the violation of a party's constitutional rights." (emphasis added) (citing *Elrod*, 427 U.S. at 373)).

VI. Scope of Preliminary Injunction: Sections 2 And 6

Having considered the constitutional injuries and harms discussed above, the balance of equities, and public interest, the Court hereby grants Plaintiffs' request to convert the existing TRO into a preliminary injunction. The requested nationwide relief is appropriate in light of the likelihood of success on Plaintiffs' Establishment Clause claim. *See, e.g., Texas v. U.S.*, 809 F.3d 134, 188 (5th Cir. 2015) ("[Because] the Constitution vests [district courts] with 'the judicial Power of the United States' . . . , [i]t is not beyond the power of the court, in appropriate circumstances, to issue a nationwide injunction." (citing U.S. Const. art. III, § 1)), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016); *see also Washington*, 847 F.3d at 1167 ("Moreover, even if limiting the geographic scope of the injunction would be desirable, the Government has not proposed a workable alternative form of the TRO that accounts for the nation's multiple ports of entry and interconnected transit system and that would protect the proprietary interests of the States at issue here while nevertheless applying only within the States' borders.").

The Government insists that the Court, at minimum, limit any preliminary injunction to Section 2(c) of the Executive Order. It makes little sense to do so. That is because the entirety of the Executive Order runs afoul of the Establishment Clause where "openly available data support[] a commonsense conclusion that a

religious objective permeated the government's action," and not merely the promulgation of Section 2(c). *McCreary*, 545 U.S. at 863; *see* SAC ¶¶ 36 38, 58, 107; TRO 16, 24 25, 42. Put another way, the historical context and evidence relied on by the Court, highlighted by the comments of the Executive and his surrogates, does not parse between Section 2 and Section 6, nor does it do so between subsections within Section 2. Accordingly, there is no basis to narrow the Court's ruling in the manner requested by the Federal Defendants.[6] *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 539 40 (1993) ("[It would be] implausible to suggest that [Section 2(c)] but not the [other Sections] had as [its] object the suppression of [or discrimination against a] religion. . . . We need not decide whether the Ordinance 87 72 could survive constitutional scrutiny if it existed separately; it must be invalidated because it functions, with the rest of the enactments in question, to suppress Santeria religious worship.").

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[6]Plaintiffs further note that the Executive Order "bans refugees at a time when the publicized refugee crisis is focused on Muslim-majority nations." Reply in Supp. of Mot. to Convert TRO to Prelim. Inj. 14. Indeed, according to Pew Research Center analysis of data from the State Department's Refugee Processing Center, a total of 38,901 Muslim refugees entered the United States in fiscal year 2016, accounting for nearly half of the almost 85,000 refugees who entered the country during that period. *See* Br. of Chicago, Los Angeles, New York, Philadelphia, & Other Major Cities & Counties as Amici Curiae in Supp. of Pls.' Mot. to Convert TRO to Prelim. Inj. 12, ECF No. 271-1 (citing Phillip Connor, *U.S. Admits Record Number of Muslim Refugees in 2016*, Pew Research Center (Oct. 5, 2016), http://www.pewresearch.org/fact-tank/2016/10/05/u-s-admits-record-number-ofmuslim-refugees-in-2016). "That means the U.S. has admitted the highest number of Muslim refugees of any year since date of self-reported religious affiliations first became publicly available in 2002." *Id.*

The Court is cognizant of the difficult position in which this ruling might place government employees performing what the Federal Defendants refer to as "inward-facing" tasks of the Executive Order. Any confusion, however, is due in part to the Government's failure to provide a workable framework for narrowing the scope of the enjoined conduct by specifically identifying those portions of the Executive Order that are in conflict with what it merely argues are "internal governmental communications and activities, most if not all of which could take place in the absence of the Executive Order but the status of which is now, at the very least, unclear in view of the current TRO." Mem. in Opp'n 29. The Court simply cannot discern, on the present record, a method for determining which enjoined provisions of the Executive Order are causing the alleged confusion asserted by the Government. *See, e.g.*, Mem. in Opp'n 28 ("[A]n internal review of procedures obviously can take place independently of the 90-day suspension-of-entry provision (though doing so would place additional burdens on the Executive Branch, which is one of the several reasons for the 90-day suspension (citing Exec. Order No. 13,780, § 2(c)). Without more, "even if the [preliminary injunction] might be overbroad in some respects, it is not our role to try, in effect, to rewrite the Executive Order." *Washington*, 847 F.3d at 1167.

CONCLUSION

Based on the foregoing, Plaintiffs' Motion to Convert Temporary Restraining Order to A Preliminary Injunction is hereby GRANTED.

PRELIMINARY INJUNCTION

It is hereby ADJUDGED, ORDERED, and DECREED that:

Defendants and all their respective officers, agents, servants, employees, and attorneys, and persons in active concert or participation with them, are hereby enjoined from enforcing or implementing Sections 2 and 6 of the Executive Order across the Nation. Enforcement of these provisions in all places, including the United States, at all United States borders and ports of entry, and in the issuance of visas is prohibited, pending further orders from this Court.

No security bond is required under Federal Rule of Civil Procedure 65(c).

The Court declines to stay this ruling or hold it in abeyance should an appeal of this order be filed.

IT IS SO ORDERED.

Dated: March 29, 2017 at Honolulu, Hawai‘i.

Derrick K. Watson
United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

COUNTY OF SANTA CLARA,

Plaintiff,

v.

DONALD J. TRUMP, et al.,

Defendants.

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff,

v.

DONALD J. TRUMP, et al.,

Defendants.

ORDER GRANTING THE COUNTY OF SANTA CLARA'S AND CITY AND COUNTY OF SAN FRANCISCO'S MOTIONS TO ENJOIN SECTION 9(a) OF EXECUTIVE ORDER 13768

Case No. 17-cv-00574-WHO

Case No. 17-cv-00485-WHO

INTRODUCTION

This case involves Executive Order 13768, "Enhancing Public Safety in the Interior of the United States," which, in addition to outlining a number of immigration enforcement policies, purports to "[e]nsure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law" and to establish a procedure whereby "sanctuary jurisdictions" shall be ineligible to receive federal grants. Executive Order 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017) (the "Executive Order"). In two related actions, the County of Santa Clara and the City and County of San Francisco have challenged Section 9 of the Executive Order as facially unconstitutional and have brought motions for preliminary injunction seeking to enjoin its enforcement. *See County of Santa Clara v. Trump*, No. 17-cv-0574-WHO; *City and County of San Francisco v. Trump*, 17-cv-0485-WHO.

The Counties challenge the enforcement provision of the Order, Section 9(a), on several grounds: first, it violates the separation of powers doctrine enshrined in the Constitution because it improperly seeks to wield congressional spending powers; second, it is so overbroad and coercive that even if the President had spending powers, the Order would clearly exceed them and violate the Tenth Amendment's prohibition against commandeering local jurisdictions; third, it is so vague and standardless that it violates the Fifth Amendment's Due Process Clause and is void for vagueness; and, finally, because it seeks to deprive local jurisdictions of congressionally allocated funds without any notice or opportunity to be heard, it violates the procedural due process requirements of the Fifth Amendment.[1]

The Government does not respond to the Counties' constitutional challenges but argues that the Counties lack standing because the Executive Order did not change existing law and because the Counties have not been named "sanctuary jurisdictions" pursuant to the Order. It explained for the first time at oral argument that the Order is merely an exercise of the President's "bully pulpit" to highlight a changed approach to immigration enforcement. Under this interpretation, Section 9(a) applies only to three federal grants in the Departments of Justice and Homeland Security that already have conditions requiring compliance with 8 U.S.C. 1373. This interpretation renders the Order toothless; the Government can already enforce these three grants by the terms of those grants and can enforce 8 U.S.C. 1373 to the extent legally possible under the terms of existing law. Counsel disavowed any right through the Order for the Government to affect any other part of the billions of dollars in federal funds the Counties receive every year.

It is heartening that the Government's lawyers recognize that the Order cannot do more constitutionally than enforce existing law. But Section 9(a), by its plain language, attempts to

[1] San Francisco also brings a facial challenge to 8 U.S.C. § 1373, arguing that the statute is unconstitutional under the Tenth Amendment because "the whole object" of that section is to "direct the functioning" of state governments. It seeks an injunction enjoining enforcement of Section 1373, or alternatively, because it believes it complies with Section 1373, an injunction preventing the Government from taking adverse action against it on the basis that it has failed to comply with that Section. Briefing on this issue was intermingled with the attack on the Executive Order, and did not adequately address the important issues raised. At the Case Management Conference on May 2, 2017, at 1:30 p.m. we will discuss litigation of this portion of the City's case.

reach all federal grants, not merely the three mentioned at the hearing. The rest of the Order is broader still, addressing all federal funding. And if there was doubt about the scope of the Order, the President and Attorney General have erased it with their public comments. The President has called it "a weapon" to use against jurisdictions that disagree with his preferred policies of immigration enforcement, and his press secretary has reiterated that the President intends to ensure that "counties and other institutions that remain sanctuary cites don't get federal government funding in compliance with the executive order." The Attorney General has warned that jurisdictions that do not comply with Section 1373 would suffer "withholding grants, termination of grants, and disbarment or ineligibility for future grants," and the "claw back" of any funds previously awarded. Section 9(a) is not reasonably susceptible to the new, narrow interpretation offered at the hearing.

Although the Government's new interpretation of the Order is not legally plausible, in effect it appears to put the parties in general agreement regarding the Order's constitutional limitations. The Constitution vests the spending powers in Congress, not the President, so the Order cannot constitutionally place new conditions on federal funds. Further, the Tenth Amendment requires that conditions on federal funds be unambiguous and timely made; that they bear some relation to the funds at issue; and that the total financial incentive not be coercive. Federal funding that bears no meaningful relationship to immigration enforcement cannot be threatened merely because a jurisdiction chooses an immigration enforcement strategy of which the President disapproves.

To succeed in their motions, the Counties must show that they are likely to face immediate irreparable harm absent an injunction, that they are likely to succeed on the merits, and that the balance of harms and public interest weighs in their favor. The Counties have met this burden. They have demonstrated that they have standing to challenge the Order and are currently suffering irreparable harm, not only because the Order has caused and will cause them constitutional injuries by violating the separation of powers doctrine and depriving them of their Tenth and Fifth Amendment rights, but also because the Order has caused budget uncertainty by threatening to deprive the Counties of hundreds of millions of dollars in federal grants that support core services

in their jurisdictions. They have established that they are likely to succeed on the merits of their claims and that the balance of harms and public interest decisively weigh in favor of an injunction. The Counties' motions for preliminary injunction against Section 9(a) of the Executive Order are GRANTED as further described below.

That said, this injunction does nothing more than implement the effect of the Government's flawed interpretation of the Order. It does not affect the ability of the Attorney General or the Secretary to enforce existing conditions of federal grants or 8 U.S.C. 1373, nor does it impact the Secretary's ability to develop regulations or other guidance defining what a sanctuary jurisdiction is or designating a jurisdiction as such. It does prohibit the Government from exercising Section 9(a) in a way that violates the Constitution.

BACKGROUND

I. THE EXECUTIVE ORDER

On January 25, 2017, President Donald J. Trump issued Executive Order 13768, "Enhancing Public Safety in the Interior of the United States." *See* Harris Decl. ¶ 2; Ex. A ("EO") (SC Dkt. No. 36-1). In outlining the Executive Order's purpose, Section 1 reads, in part, "Sanctuary jurisdictions across the United States willfully violate Federal law in an attempt to shield aliens from removal from the United States." EO §1. Section 2 states that the policy of the executive branch is to "[e]nsure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law." EO §2(c).

Section 9, titled "Sanctuary Jurisdictions" lays out this policy in more detail. It reads:

> Sec. 9. Sanctuary Jurisdictions. It is the policy of the executive branch to ensure, to the fullest extent of the law, that a State, or a political subdivision of a State, shall comply with 8 U.S.C. 1373.
>
> (a) In furtherance of this policy, the Attorney General and the Secretary, in their discretion and to the extent consistent with law, shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary. The Secretary has the authority to designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction. The Attorney General shall take appropriate enforcement action against any entity that violates 8 U.S.C. 1373, or which has in effect a statute, policy, or practice that prevents or hinders the enforcement

> of Federal law.
>
> (b) To better inform the public regarding the public safety threats associated with sanctuary jurisdictions, the Secretary shall utilize the Declined Detainer Outcome Report or its equivalent and, on a weekly basis, make public a comprehensive list of criminal actions committed by aliens and any jurisdiction that ignored or otherwise failed to honor any detainers with respect to such aliens.
>
> (c) The Director of the Office of Management and Budget is directed to obtain and provide relevant and responsive information on all Federal grant money that currently is received by any sanctuary jurisdiction.

EO §9.

Section 3 of the Order, titled "Definitions," incorporates the definitions listed in 8 U.S.C. § 1101. EO §3. Section 1101 does not define "sanctuary jurisdiction." The term is not defined anywhere in the Executive Order. Similarly, neither section 1101 nor the Order defines what it means for a jurisdiction to "willfully refuse to comply" with Section 1373 or for a policy to "prevent[] or hinder[] the enforcement of Federal law." EO §9(a).

II. SECTION 1373

Section 1373, to which Section 9 refers, prohibits local governments from restricting government officials or entities from communicating immigration status information to ICE. It states in relevant part:

> (a) In General. Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.
>
> (b) Additional Authority of Government Entities. Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:
>
> > (1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.
> >
> > (2) Maintaining such information.
> >
> > (3) Exchanging such information with any other Federal, State, or local government entity.

8 U.S.C. 1373.

In July, 2016, the U.S. Department of Justice issued guidance linking two federal grant programs, the State Criminal Alien Assistance Program ("SCAAP") and Edward Byrne Memorial Justice Assistance Grant ("JAG") to compliance with Section 1373.[2] This guidance states that all applicants for these two grant programs are required to "assure and certify compliance with all applicable federal statutes, including Section 1373, as well as all applicable federal regulations, policies, guidelines, and requirements." *Id.* The Department has indicated that the Community Oriented Policing Services Grant (COPS) is also conditioned on compliance with Section 1373.

III. CIVIL DETAINER REQUESTS

An ICE civil detainer request asks a local law enforcement agency to continue to hold an inmate who is in local jail because of actual or suspected violations of state criminal laws for up to 48 hours after his or her scheduled release so that ICE can determine if it wants to take that individual into custody. *See* 8 C.F.R. § 287.7; Neusel Decl. ¶9; Marquez Decl., Ex. C at 3 (SC Dkt. No. 29-3). ICE civil detainer requests are voluntary and local governments are not required to honor them. *See* 8 C.F.R. § 287.7(a); *Galarza v. Szalczyk*, 745 F.3d 634, 643 (3d Cir. 2014) ("[S]ettled constitutional law clearly establishes that [immigration detainers] must be deemed requests" because any other interpretation would render them unconstitutional under the Tenth Amendment). Several courts have held that it is a violation of the Fourth Amendment for local jurisdictions to hold suspected or actual removable aliens subject to civil detainer requests because civil detainer requests are often not supported by an individualized determination of probable cause that a crime has been committed. *See Morales v. Chadbourne*, 793 F.3d 208, 215-217 (1st Cir. 2015); *Miranda-Olivares v. Clackamas Cnty.*, No. 3:12-cv-02317-ST, 2014 WL 1414305, at *9-11 (D. Or. Apr. 11, 2014). ICE does not reimburse local jurisdictions for the cost of detaining individuals in response to a civil detainer request and does not indemnify local jurisdictions for

[2] *See* Letter from Peter J. Kadzik, Asst. Att'y Gen. U.S. Dep't of Justice, to Hon John A. Culberson, Chairman of the Subcomm. On Commerce, Justice, Sci & Related Agencies, (Jul. 7, 2016), http://culberson.house.gov/uploadedfiles/2016-7-7_section_1373-_doj_letter_to_culberson.pdf. I take judicial notice of Peter Kadzik's letter as courts may judicially notice information and official documents contained on official government websites. *See Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998-999 (9th Cir. 2010).

potential liability they could face for related Fourth Amendment violations. *See* 8 C.F.R. § 287.7(e); Marquez Decl. ¶¶ 21-15 & Exs. B-D.

IV. THE COUNTIES' POLICIES

A. Santa Clara's Policies

Santa Clara asserts that its local policies and practices with regard to federal immigration enforcement are at odds with the Executive Order's provisions regarding Section 1373. SC Mot. at 5. (SC Dkt. No. 26). In 2010, the Santa Clara County Board of Supervisors adopted a Resolution prohibiting Santa Clara employees from using County resources to transmit any information to ICE that was collected in the course of providing critical services or benefits. Marquez Decl. ¶27 (SC Dkt. No. 29) & Ex. G (SC Dkt. No. 29-7); Neusel Decl. ¶7 (SC Dkt. No. 31); L. Smith Decl. ¶6 (SC Dkt. No. 35). The Resolution also prohibits employees from initiating an inquiry or enforcement action based solely on the individual's actual or suspected immigration status, national origin, race or ethnicity, or English-speaking ability, or from using County resources to pursue an individual solely because of an actual or suspected violation of immigration law. *Id.* In October, 2016, after receiving DOJ guidance that JAG and SCAAP funds would be conditioned on compliance with Section 1373, Santa Clara decided not to participate in those programs. Marquez Decl. ¶ 29 & Ex. H (SC Dkt. No. 29-8).

Santa Clara also asserts that its policies with regard to ICE civil detainer requests are inconsistent with the Executive Order and the President's stated immigration enforcement agenda. Prior to late 2011, Santa Clara responded to and honored ICE civil detainer requests, housing an average of 135 additional inmates each day at a daily cost of approximately $159 per inmate. Neusel Decl. ¶4. When the County raised concerns about the costs associated with complying with detainer requests and potential civil liability, ICE confirmed that it would not reimburse the County or indemnify it for the associated costs and liabilities. Marquez Decl. ¶¶ 21-15 & Exs. B-D.

Santa Clara subsequently convened a task force and adopted a new policy where the County agreed to honor requests for individuals with serious or violent felony convictions, but only if ICE would reimburse the County for the cost of holding those individuals. Neusel Decl.

¶6; Marquez Decl. ¶26 & Ex. E. ICE has never agreed to reimburse the County for any costs, so since November 2011 the County has declined to honor all ICE detainer requests. *Id.*

B. San Francisco's Policies

San Francisco's sanctuary city policies are contained in Chapters 12H and 12I of its Administrative Code. Eisenberg Decl. Exs. A-B (SF Dkt. No. 28). The stated purpose of these laws is "to foster respect and trust between law enforcement and residents, to protect limited local resources, to encourage cooperation between residents and City officials, including especially law enforcement and public health officers and employees, and to ensure community security, and due process for all." S.F. Admin Code § 12I.1.

As relevant to Section 1373, Chapter 12H prohibits San Francisco departments, agencies, commissions, officers, and employees from using San Francisco funds or resources to assist in enforcing federal immigration law or gathering or disseminating information regarding an individual's release status, or other confidential identifying information (which as defined does not include immigration status), unless such assistance is required by federal or state law. S.F. Admin Code § 12H.2. Although Chapter 12H previously prohibited city employees from sharing information regarding individuals' immigration status, the San Francisco Board of Supervisors removed this restriction in July, 2016, due to concerns that the provision violated Section 1373.

With regard to civil detainer requests, Chapter 12I prohibits San Francisco law enforcement from detaining an individual, otherwise eligible for release from custody, solely on the basis of a civil immigration detainer request. S.F. Admin Code § 12I.3. It also prohibits local law enforcement from providing ICE with advanced notice that an individual will be released from custody, unless the individual meets certain criteria. S.F. Admin Code § 12I.3. Chapter 12I.3.(e) provides that a "[l]aw enforcement official shall not arrest or detain an individual, or provide any individual's personal information to a federal immigration officer, on the basis of an administrative warrant, prior deportation order, or other civil immigration document based solely on alleged violations of the civil provisions of immigration laws." S.F. Admin Code § 12I.3.(e). San Francisco explains that it adopted these policies due to concerns that holding people in response to civil detainers would violate the Fourth Amendment and require it to dedicate scarce

law enforcement personnel and resources to holding these individuals. Hennessy Decl. ¶11 (SF Dkt. No. 24).

V. THE COUNTIES' FEDERAL FUNDING

A. Santa Clara's Federal Funding

In the 2015-2016 fiscal year, Santa Clara received approximately $1.7 billion in federal and federally dependent funds, making up roughly 35% of the County's total revenues. J. Smith Decl. ¶6; Marquez Decl. ¶8. This figure includes federal funds provided through entitlement programs.

Most of the County's federal funds are used to provide essential services to its residents. Marquez Decl. ¶¶ 5-8. In support of its motion, the County includes a number of declarations outlining how a loss of any substantial amount of federal funding would force it to make substantial cut backs to safety-net programs and essential services and would require it to lay off thousands of employees. It highlights that the County's Valley Medical Center, the only public safety-net healthcare provider in the County, relies on $1 billion in federal funds each year, which covers up to 70% of its total annual costs. Lorenz Decl. ¶¶ 3, 7 (SC Dkt. No. 28). A loss of all federal funds would shut down Valley Medical Center and cut off the only healthcare option for thousands of poor, elderly, and vulnerable people in the County. *Id.* ¶ 8. It further highlights that Santa Clara's Social Services Agency, which provides various services to vulnerable residents, including child welfare and protection, aid to needy families, and support for disabled children, adults and the elderly, receives roughly 40% of its budget, $300 million, from federal funds. Menicocci Decl. ¶5 (SC Dkt. No. 30). The County's Public Health Department receives 40% of its budget and $38 million in federal funds. And the County's Office of Emergency Services, whose job is to prepare for and respond to disasters such as earthquakes and terrorism, receives more than two-thirds of its budget from federal funds. Reed Decl. ¶¶ 3-20 (SC Dkt. No. 32).

In the 2014-2015 fiscal year, the County received over $565 million in non-entitlement federal grants. *See* Marquez Decl. Ex. A at 11-12 (SC Dkt. No. 29-1) (showing $338 million in federal grants subject to OMB auditing requirements and an additional $227 million in federal grants through the Department of Housing and Urban Development). This $565 million

represents approximately 11% of the County's budget.

B. San Francisco's Federal Funding

San Francisco's yearly budget is approximately $9.6 billion; it receives approximately $1.2 billion of this from the federal government. Rosenfield Decl. ¶9 (SF Dkt. No. 22). San Francisco uses these federal funds to provide vital services such as medical care, social services, and meals to vulnerable residents, to maintain and upgrade roads and public transportation, and to make needed seismic upgrades. Whitehouse Decl. ¶16 (SF Dkt. No. 23). Losing all, or a substantial amount, of federal funds would have significant effects on core San Francisco programs: federal funds make up 100% of Medicare for San Francisco residents, Rosenfield Decl. ¶ 29; 30% of the budget for San Francisco's Department of Emergency Management, *id.* ¶¶25-27; 33% of the budget for San Francisco's Human Services Agency, *id.* ¶¶13-18; and 40% of the budget for San Francisco's Department of Public Health, *id.* ¶¶19-24.

Approximately 20% of these federal funds, or $240 million, are from federal grants. *Id.* ¶29. San Francisco also receives $800 million each year in federal multi-year grants, primarily for public infrastructure projects. *Id.* ¶11.

San Francisco must adopt a balanced budget for the fiscal year beginning July 1, 2017. Whitehouse Decl. ¶16. Under local law, the Mayor must submit a balanced budget to the Board of Supervisors by June 1 and make fundamental budget decisions by May 15, including whether to create a budget reserve to account for the potential loss of significant funds. *Id.* ¶5-6, 8. Any money placed in the budget reserve would not be available to be used for other programs or services in the coming fiscal year. *Id.* ¶9.

LEGAL STANDARD

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). This has been interpreted as a four-part conjunctive test, not a four-factor balancing test. However, the Ninth Circuit has held that a plaintiff may also obtain an injunction if he has demonstrated "serious questions going to the

merits" that the balance of hardships "tips sharply" in his favor, that he is likely to suffer irreparable harm, and that an injunction is in the public interest. *See Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-35 (9th Cir. 2011).

DISCUSSION

I. JUSTICIABILITY

The Government argues that the Counties' claims against the Executive Order are not justiciable because the Counties cannot establish an injury-in-fact, which is necessary to establish standing, and because their claims are not ripe for review. These principles of standing and ripeness go to whether this court has jurisdiction to hear the Counties' claims. I conclude that the Counties have demonstrated Article III standing to challenge the Executive Order and that their claims are ripe for review.

A. Standing

Article III, section 2 of the Constitution limits the jurisdiction of the federal courts to "Cases" and "Controversies." *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007); *see* U.S. Const. art. III, §, cl. 1. "Standing is an essential and unchanging part of the case-or-controversy requirement." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). To establish standing a plaintiff must demonstrate "that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury." *Massachusetts*, 549 U.S. at 517 (citing *Lujan*, 504 U.S. at 560-61).

The Counties contend that they have standing to challenge the Executive Order because the Order threatens to defund, or otherwise bring enforcement action against, states and local jurisdictions that are "sanctuary jurisdictions." Although the Order does not clearly define "sanctuary jurisdictions," it directs the Attorney General and Secretary to ensure that jurisdictions that "willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants" and elsewhere equates jurisdictions that refuse to honor detainer requests with the term "sanctuary jurisdictions." It further directs the Attorney General to bring "enforcement action" against jurisdictions with policies that "hinder[] the enforcement of Federal

law."

The Counties represent that they have "sanctuary policies" that are likely to subject them to enforcement or defunding under the Order. They assert that enforcement under the Order would result in injury-in-fact in the form of cuts to federal funds and whatever other penalty the Government seeks to impose through its "enforcement action." As a result of this threat of major cuts to federal funding, the Order is also causing present injury-in-fact in the form of budget uncertainty. Alternatively, attempting to comply with the Order would also cause injury, as it would require them to change their local policies in ways that conflict with their local judgment on how best to ensure public safety and require them to commit substantial resources to assist in enforcing federal immigration laws.

The Government raises two primary arguments against the Counties' claims of standing. First, it asserts that the Counties cannot demonstrate injury-in-fact traceable to the Executive Order because the Order does not change the law in any way, but merely directs the Attorney General and Secretary to enforce existing law. Second, it argues that the Counties' claims of injury are not sufficiently "concrete" or "imminent" because the Government has not designated either County as a "sanctuary jurisdiction" and has not withheld any federal funds. I will address these arguments in turn.

1. Whether the Executive Order Changes the Law

The Government's primary defense is that the Order does not change the law, but merely directs the Attorney General and Secretary to enforce existing law. In its briefing, the Government emphasized Section 9(a)'s provision that it will be implemented "to the extent consistent with law." It argued that to the extent the Order directs the Attorney General and Secretary to newly condition federal funds on compliance with Section 1373, it could not lawfully do so and so it does not. It asserted, "If the grant language does not require compliance with Section 1373, the Executive Order does not purport to give the Secretary or Attorney General the unilateral authority to alter those terms." SC Oppo. at 13. By this interpretation, Section 9 simply directs the Attorney General and Secretary to ensure that grants that are already conditioned on compliance with Section 1373 are not remitted to jurisdictions that fail to meet that requirement.

At the hearing, the Government went further and explicitly disclaimed the ability under the Executive Order to add conditions to grants authorized by Congress or to enforce the Order against any but three grant programs, SCAAP, JAG and COPS. Government counsel urged me to adopt this narrow reading of the Order, arguing that well-established rules of construction require courts to adopt narrow readings when broader ones would read in constitutional problems.

Where a construction of a statute "would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988).[3] "[A]s between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act." *Blodgett v. Holden*, 275 U.S. 142, 148 (1927). The primary purpose of the doctrine is to "minimize disagreement between the branches by preserving congressional enactments that might otherwise founder on constitutional objections." *Almendarez-Torres v. U.S.*, 523 U.S. 224, 238 (1998).

"This canon is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991). This canon of construction is limited; to adopt an alternate construction the statute must be "readily susceptible" to that construction. *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 409 (1909). It is not the job of the courts "to insert missing terms into the statute or adopt an interpretation precluded by [its] plain language." *Foti v. City of Menlo Park*, 146 F.3d 629, 639 (9th Cir. 1998).

As a preliminary matter, a narrow construction does not limit a plaintiffs' standing to challenge a law that is subject to multiple interpretations. *See Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 392 (1988) (noting that a plaintiff's standing may be based on its interpretation of the statute even when a narrower interpretation is offered). Therefore, the

[3] The Supreme Court has declined to apply this canon of construction to agency actions and it is unclear that it would apply to an Executive Order. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009) ("We know of no precedent for applying [the canon of constitutional avoidance] to limit the scope of an authorized executive action.").

Government's proposed narrow construction does not destroy justiciability.

With regards to the merits of the Government's construction, the Order is not readily susceptible to the Government's narrow interpretation. Indeed, "[t]o read [the Order] as the Government desires requires rewriting, not just reinterpretation." *U.S. v. Stevens*, 559 U.S. 460, 481 (2010).

While the Government urges that the Order "does not purport to give the Secretary or Attorney General the unilateral authority" to impose new conditions on federal grants, that is exactly what the Order purports to do. It directs the Attorney General and the Secretary to ensure that "sanctuary jurisdictions" are "*not eligible to receive*" federal grants. EO §9(a)(emphasis added). Whether a jurisdiction is eligible to receive federal grants is determined by the conditions on those grants and the characteristics, acts, and choices of the jurisdiction. *See* BLACK'S LAW DICTIONARY 634 (10th ed. 2014) (defining "eligible" as "Fit and proper to be selected or to receive a benefit."). Section 9(a)'s language directing the Attorney General and Secretary to ensure that jurisdictions that "willfully refuse to comply" with Section 1373 are "not eligible" for federal grants therefore purports to delegate to the Attorney General and the Secretary the authority to place a new condition on federal grants, compliance with Section 1373. And as Government counsel agreed at the hearing, the power to place conditions on funds belongs exclusively to Congress.

The Government attempts to read out all of Section 9(a)'s unconstitutional directives to render it an ominous, misleading, and ultimately toothless threat. It urges that Section 9(a) can be saved by reading the defunding provision narrowly and "consistent with law," so that all it does is direct the Attorney General and Secretary to enforce existing grant conditions. But this interpretation is in conflict with the Order's express language and is plainly not what the Order says. The defunding provision is entirely inconsistent with law in its stated purpose and directives because it instructs the Attorney General and the Secretary to do something that only Congress has the authority to do place new conditions on federal funds. If Section 9(a) does not direct the Attorney General and Secretary to place new conditions on federal funds then it only authorizes them to do something they already have the power to do, enforce existing grant requirements.

Effectively, the Government argues that Section 9(a) is "valid" and does not raise constitutional issues as long as it does nothing at all. But a construction so narrow that it renders a legal action legally meaningless cannot possibly be reasonable and is clearly inconsistent with the Order's broad intent.

At the hearing, Government counsel argued that the Order applies only to grants issued by the Department of Justice and the Department of Homeland Security because it is directed only at the Attorney General and Secretary of Homeland Security. This reading is similarly implausible. Nothing in Section 9(a) limits the "Federal grants" affected to those only given though the Departments of Justice and Homeland Security. The Department of Justice is responsible for federal law enforcement throughout the country, not just within its own Department. So when the Attorney General is directed to "ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary" and to "take appropriate enforcement action against any entity that violates 8 U.S.C. 1373, or which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law," it is not reasonable to interpret the directive as applying solely to law enforcement grants that the Attorney General and Secretary are specifically given authority to exempt from the Order.

Nor is counsel's narrow interpretation supported by the rest of the Order. Two examples suffice. Section 9(c) instructs the Director of the Office of Management and Budget "to obtain and provide relevant and responsive information on all Federal grant money that currently is received by any sanctuary jurisdiction." This directive is not limited to grants issued by the Departments of Justice and Homeland Security. And Section 2(c) announces a policy to "ensure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law." The Order's structure and language make clear that a "sanctuary jurisdiction," which the Secretary will eventually define, should change its policies or risk loss of all federal grants, and Section 9(a) provides the means to do so.

The purpose of adopting a plausible valid construction over one that would result in constitutional issues is to *save* an Act that would otherwise fall on constitutional grounds. A

construction so narrow that it reads out any legal force does not save the Act and obviates the entire purpose of adopting a narrow reading. At the hearing, Government counsel explained that the Order is an example of the President's use of the bully pulpit and, even if read narrowly to have no legal effect, serves the purpose of highlighting the President's focus on immigration enforcement. While the President is entitled to highlight his policy priorities, an Executive Order carries the force of law. Adopting the Government's proposed reading would transform an Order that purports to create real legal obligations into a mere policy statement and would work to mislead individuals who are not able to conclude, by reading Section 9(a) itself, that it is fully self-cancelling and carries no legal weight.

The Supreme Court has acknowledged that applying a narrow construction to an unconstitutionally overbroad statute does not address the confusion and potential deterrent effect caused by the language of the law itself. *See*, *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975) (concluding, in a First Amendment case, that a narrow construction of an overbroad statute was likely inappropriate because the "deterrent effect on legitimate expression is both real and substantial."). As discussed below, the coercive effects of the Order's broad language counsel against adopting a narrow construction that deprives it of any legal meaning.

The Government's construction is not reasonable. It requires a complete rewriting of the Order's language and does not "save" any part of Section 9(a)'s legal effect. There is no doubt that Section 9(a), as written, changes the law.

2. Pre-enforcement Standing

The Counties argue that they have standing to challenge the Executive Order because they have demonstrated a well-founded belief that the Order will be enforced against them. In turn, the Government argues that the Counties lack standing because the Government has not yet designated the Counties as "sanctuary jurisdictions" or withheld funds.

Because the Counties have not yet suffered a loss of funds or other enforcement action under the Executive Order, this case is analogous to the many cases addressing pre-enforcement standing. These cases establish that a plaintiff may demonstrate pre-enforcement standing by showing "an intention to engage in a course of conduct arguably affected with a constitutional

interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979); *see Steffel v. Thompson*, 415 U.S. 452, 459 (1974) ("[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights"); *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014) (plaintiffs can demonstrate standing by alleging "a credible threat of enforcement"); *American Booksellers*, 484 U.S. at 392 (plaintiffs can establish standing by demonstrating a "well-founded fear that the law will be enforced against them.").

At the hearing, the Government suggested that pre-enforcement review is generally only available when there are criminal penalties or First Amendment issues at stake. While pre-enforcement cases often fall into these categories, pre-enforcement review is not so limited. In a pre-enforcement case, just like any other case, courts are limited by "the primary conception that federal judicial power is to be exercised . . . only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action." *Poe v. Ullman*, 367 U.S. 497, 504 (1961). The Court has repeatedly recognized that "where threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat for example, the constitutionality of a law threatened to be enforced." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007). When a threatened injury has not yet been felt, "the question becomes whether any perceived threat to respondents is sufficiently real and immediate to show an existing controversy" *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974), or whether it is merely "imaginary or speculative," *Younger v. Harris*, 401 U.S. 37, 42 (1971).

The pre-enforcement line of cases outlines a framework for answering this question in the context of threatened civil or criminal enforcement action. Just as Article III standing is not reserved for individuals who have suffered criminal penalties or First Amendment restrictions, pre-enforcement review is not reserved for such individuals. *See e.g. Terrace v. Thompson*, 263 U.S. 197, 214 (1923) (noting that a plaintiff has standing to enjoin a law when the government "threatens and is about to commence proceedings, either civil or criminal, to enforce such a law

against parties affected"); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926) (holding that a landowner bringing Fourteenth Amendment claims and facing only civil penalties had pre-enforcement standing).

Many of the pre-enforcement cases recognize that First Amendment challenges raise an additional consideration for standing purposes because a statute restricting First Amendment rights may cause harm without any enforcement by "chilling speech." *See American Booksellers*, at 393 ("[T]he alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution."). While this "chilling" effect is particularly important in the First Amendment context, analogous concerns have been recognized in other situations. For example, that a threat of legal action may coerce individuals to abandon their legal rights is well recognized outside of First Amendment restrictions and was one of the driving factors behind the creation of the Declaratory Judgment Act. *See MedImmune*, 549 U.S. at 129 ("The dilemma posed by that coercion putting the challenger to the choice between abandoning his rights or risking prosecution is a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate."). And courts have recognized that, outside the First Amendment context, a law's threat of enforcement may, on its own, cause present injury. *See Village of Euclid*, 272 U.S. at 386. In *Village of Euclid*, the Court considered whether a landowner had pre-enforcement standing to challenge a local zoning ordinance that it alleged had drastically reduced the market value of a particular piece of property by limiting its use and threatening to impose penalties for zoning violations. *Id.* at 384. Although the landowner had not faced any enforcement under the ordinance, the Court concluded the claims were justiciable because "injury is inflicted by the mere existence and threatened enforcement of the ordinance" as "prospective buyers . . . are deterred from buying any part of this land." *Id.* 384-385.

In sum, the pre-enforcement cases reveal that an individual facing enforcement action may establish standing by demonstrating a well-founded fear of enforcement and a threatened injury that is "sufficiently real and imminent." *O'Shea*, 414 U.S. at 496. One may also establish standing by demonstrating that a well-founded fear of enforcement action is itself causing present injury. *See American Booksellers*, at 393; *Village of Euclid*, 272 U.S. at 385.

As I discuss below, review of the Counties' allegations demonstrates that they have a well-founded fear of enforcement under the Executive Order. They have further demonstrated that enforcement under the Order would deprive them of federal grants that they use to provide critical services to their residents and that the "mere existence and threatened enforcement" of the Order is causing them present injury in the form of budget uncertainty. They have demonstrated Article III standing to challenge the Order.

a. The Counties' policies are proscribed by the language of the Executive Order

Where it is not fully clear what conduct is proscribed by a statute, a well-founded fear of enforcement may be based in part on a plaintiff's reasonable interpretation of what conduct is proscribed. *See American Booksellers*, 484 U.S. at 392. This is true even if a narrower reading of the statute may be available. *Id.* at 397.

In *American Booksellers*, the Supreme Court concluded that a group of booksellers had standing to challenge a Virginia law that made it unlawful for any person to "knowingly display for commercial purpose" visual or written material depicting sexual conduct "which is harmful to juveniles." *Id.* at 386 (citing Va. Code § 18.2-391(a) (Supp. 1987)). The booksellers challenged the statute on First Amendment grounds and alleged that they had standing because they had identified 16 books that they intended to display and that they believed would be covered by the statute. *Id.* Even though the statute had not been made effective and the State had not identified specific materials that would be implicated by the statute, the Court concluded that this was sufficient to establish Article III standing because "the law is aimed directly at plaintiffs, who, if their interpretation of the statute is correct, will have to take significant and costly compliance measures or risk criminal prosecution." *Id.* at 392. Further, while the government put forward a narrow construction of the law that would have made the burden to booksellers and the public "significantly less than that feared and asserted by plaintiffs," the Court did not consider this construction in assessing the plaintiffs' standing. *Id.* at 397.

The Counties' policies are likely to subject them to enforcement given their reasonable interpretation of what conduct and policies the Order purports to proscribe. Section 9(a) of the

Executive Order directs the Attorney General and the Secretary to "ensure" that "sanctuary jurisdictions" are "not eligible to receive Federal grants." EO §9(a). The Counties acknowledge that the Executive Order does not clearly define "sanctuary jurisdictions" but note that the Order's language indicates that a "sanctuary jurisdiction" is, at a minimum, any jurisdiction that "willfully refuse[s] to comply with 8 U.S.C. 1373." The Government has not clarified what it means to "willfully refuse to comply" with Section 1373, and indeed argues that the Counties lack standing because the Attorney General and Secretary of Homeland Security have not yet figured that out. SC Oppo. at 11 ("[T]he Attorney General and the Secretary of Homeland Security must determine exactly what constitutes 'willful refusal to comply with 8 U.S.C. § 1373'"). Despite this, on March 27, 2017, Attorney General Sessions "urg[ed] states and local jurisdictions to comply with these federal laws, including 8 U.S.C. Section 1373" and confirmed that "failure to remedy violations could result in withholding grants, termination of grants, and disbarment or ineligibility for future grants." *See* RJN-2, Ex. D ("Sessions Press Conference") (SF Dkt. No. 61-4).[4]

The Attorney General also stated that this policy was "entirely consistent with the Department of Justice's Office of Justice Program's guidance that was issued just last summer under the previous government." *Id.* In the process of developing that guidance, the Inspector General of the Department of Justice, Michael Horowitz, prepared a memorandum entitled "Department of Justice Referral of Allegations of Potential Violations of 8 U.S.C. § 1373 by Grant Recipients." *See* RJN-1, Ex. A (Dkt. No. 29-1).[5] The memorandum studies the policies of several jurisdictions and discusses whether they might violate Section 1373. It supports a broad reading of Section 1373 and specifically notes that San Francisco's policy prohibiting City employees from using "City funds or resources to assist in the enforcement of federal immigration law or to

[4] I take judicial notice of Attorney General Sessions's press conference statements which "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. § 201 (b)(2).

[5] I take judicial notice of the Horowitz memorandum as a government memorandum that is not subject to reasonable dispute. *Mack v. S. Bay Beer Distribs., Inc.*, 789 F.2d 1279, 1282 (9th Cir. 1986) (courts may judicially notice records and reports prepared by administrative bodies); *Daniels-Hall*, 629 F.3d at 998-999 (courts may judicially notice information contained on official government websites).

gather or disseminate information regarding the immigration status of individuals . . . unless such assistance is required by federal or State statute" could run afoul of Section 1373 unless San Francisco employees are aware that they are permitted to share immigration status information with ICE. *Id.* The memo further suggests that policies prohibiting civil detainer requests, even if they do not explicitly restrict sharing of immigration status information, may nevertheless affect ICE's interactions with local officials regarding immigration status requests and therefore raise Section 1373 concerns. *Id.*

In addition to the potential that, under the Order, compliance with Section 1373 requires compliance with detainer requests, the Order may also directly require states and local governments to honor ICE detainer requests to avoid being designated "sanctuary jurisdictions." While the defunding provision in Section 9(a) seems to define "sanctuary jurisdictions" as those that run afoul of Section 1373, Section 9(b) equates "sanctuary jurisdictions" with "any jurisdiction that ignored or otherwise failed to honor any detainers with respect to [aliens that have committed criminal actions]." This language raises the reasonable concern that a state or local government may be designated a sanctuary jurisdiction, and subject to defunding, if it fails to honor ICE detainer requests. This interpretation is supported by Section 9(a)'s broad grant of discretion to the Secretary to designate jurisdictions as "sanctuary jurisdictions." While the Order states that the Secretary's designation authority must be exercised "consistent with law," with the exception of the Order there are no laws regarding "sanctuary jurisdiction" designations: Section 9 gives the Secretary unlimited discretion.

This reading is also supported by Section 9(a)'s directive to the Attorney General to take "appropriate enforcement action" against any jurisdiction that has a policy or practice that "hinders the enforcement of federal law." While the Order does not outline what policies "hinder[] the enforcement of Federal law," Attorney General Sessions recently suggested that a local policy that prohibits compliance with detainer requests would constitute a "policy, or practice that prevents or hinders the enforcement of Federal law." *See* Sessions Press Conference at 2 ("Unfortunately, some states and cities have adopted policies designed to frustrate this enforcement of immigration laws. This includes refusing to detain known felons on the federal

detainer request, or otherwise failing to comply with these laws."). Given Section 9(b)'s language equating "sanctuary jurisdictions" with jurisdictions that fail to honor detainer requests, the Secretary's unlimited discretion in designating jurisdictions as "sanctuary jurisdictions," and the Order's instruction that the Attorney General shall take "enforcement action" against jurisdictions that hinder the enforcement of federal law, which the Attorney General has indicated includes, at a minimum, failure to honor detainer requests, the Order appears to proscribe states and local jurisdictions from adopting policies that refuse to honor detainer requests.

Santa Clara's policy, prohibiting local officials from using County funds to transmit information collected in the course of providing critical services or benefits, could be considered a restriction on the intergovernmental exchange of information regarding immigration status in violation of Section 1373. Similar to Santa Clara, San Francisco prohibits the use of City funds or resources "to assist in the enforcement of Federal immigration law." S.F. Admin. Code § 12H.2. Although these policies do not directly prohibit communications with ICE, given the breadth of the Order and the statements of the Attorney General, the Counties have a well-founded fear that the Government may argue that they may sufficiently interfere with those communications in a way that violates Section 1373. Further, the Counties do not honor civil detainer requests. Under a broad reading, these policies may be considered an improper restriction on the intergovernmental exchange of information in violation of Section 1373, falling within Section 9(b)'s language that jurisdictions that fail to honor detainer requests are "sanctuary jurisdictions."

In short, the Counties are likely to be designated "sanctuary jurisdictions" under their reasonable interpretation of the Executive Order.

b. The Government has indicated an intent to enforce the Order generally and against the Counties more specifically

In assessing whether enforcement action is likely, courts look to the past conduct of the government, as well as the government's statements and representations, to determine whether enforcement is likely or simply "chimerical." *See Steffel*, 415 U.S. at 459 (petitioner that had twice been warned to stop handbilling, and whose companion had been arrested, had well-founded fear of enforcement); *Poe*, 367 U.S. at 508 (1961) ("the fear of enforcement of provisions that

have during so many years gone uniformly and without exception unenforced" was "chimerical"). A plaintiff does not need to have been specifically threatened with enforcement action to show that enforcement action is likely. *See Susan B. Anthony List*, 134 S. Ct. at 2345 (plaintiffs demonstrated credible threat of enforcement where the law had previously been enforced against them); *American Booksellers*, 484 U.S. at 393 (plaintiffs had credible threat of enforcement even though newly enacted law had not become effective and no enforcement action had been brought or threatened under it). However, "the threat of enforcement must at least be 'credible,' not simply 'imaginary or speculative.' " *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1140 (9th Cir. 2000) (en banc) (citing *Babbitt*, 442 U.S. at 298).

Although the Government now takes the position that the Order carries no legal force, in its public statements and through its actions it has repeatedly indicated its intent to enforce the Order. The Executive Order was passed on January 27, 2017. Although the defunding provision has not yet been enforced against any jurisdiction, governmental leaders have made numerous statements reaffirming the Government's intent to enforce the Order and to use the threat of withholding federal funds as a tool to coerce states and local jurisdictions to change their policies. On February 5, 2017, after signing the Executive Order, President Trump confirmed that he was willing and able to use "defunding" as a "weapon" so that sanctuary cities would change their policies. *See* Harris Decl. Ex. B (Tr. of Feb. 5, 2017 Bill O'Reilly Interview with President Donald J. Trump) at 4 (SC Dkt. No. 36-2) ("I don't want to defund anybody. I want to give them the money they need to properly operate as a city or a state. If they're going to have sanctuary cities, we may have to do that. Certainly that would be a weapon.").[6]

Sean Spicer, the White House press secretary, has confirmed that the Government intends to enforce the order, stating that the President intended to ensure that "counties and other institutions that remain sanctuary cities don't get federal government funding in compliance with

[6] I take judicial notice of President Trump's interview statements as the veracity of these statements "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. § 201 (b)(2).

the executive order." Harris Decl. Ex. C at 4-5 (SC Dkt. No. 36-3).[7] In the same briefing, Spicer cited favorably the actions of Miami-Dade County Mayor Carlos Giménez who, one day after the Executive Order, instructed his Interim Director of Corrections to "honor all immigration detainer requests" "[i]n light of the Executive Order." *See* RJN-1, Ex. C (SF Dkt. No. 29-3).[8] Lauding Miami-Dade's actions, Spicer noted that Miami-Dade "understand[s] the importance of this order" and encouraged other jurisdictions to follow its lead. Harris Decl. Ex. C at 4-5.

Attorney General Sessions recently reaffirmed the Government's intent to enforce the defunding provisions, stating that if jurisdictions do not comply with Section 1373, such violations would result in "withholding grants, termination of grants, and disbarment or ineligibility for future grants," and that the Government would seek to "claw back any funds awarded to a jurisdiction that willfully violates 1373." Sessions Press Conference at 2.[9] When asked at a subsequent press briefing about this claw back process, Spicer confirmed that the Government's "priority is clear, is to get cities into into compliance and to make sure we understand there's not just a financial impact of this, but also a very clear security aspect of this." RJN-3, Ex. C at 15 (SF Dkt. No. 74-3).[10]

The statements of the President, his press secretary and the Attorney General belie the

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[7] I take judicial notice of Spicer's February 8, 2017 press briefing as courts may judicially notice information contained on official government websites. *See Daniels-Hall*, 629 F.3d at 998-999.

[8] I take judicial notice of Mayor Giménez's memorandum as a government memorandum and record. *See Mack*, 789 F.2d at 1282.

[9] In addition to these statements, the Government began to implement Section 9(b) of the Executive Order, which is designed to "better inform the public regarding the public safety threats associated with sanctuary jurisdictions" and requires ICE to publish a weekly "Declined Detainer Outcome Report" containing a public list of all "criminal actions committed by aliens and any jurisdiction that ignored or otherwise failed to honor any detainers with respect to such aliens." *See* RJN-2, Ex. H. (SF Dkt. No. 61-8). Due to concerns that the weekly reports contained inaccurate information, the Declined Detainer Outcome Report has been "temporarily suspended" but "ICE remains committed to publishing the most accurate information available regarding declined detainers across the country." *Declined Detainer Outcome Report*, ICE, https://www.ice.gov/declined-detainer-outcome-report (last visited April 12, 2017). I take judicial notice of the ICE's Declined Detainer Outcome Reports as courts may judicially notice information contained on official government websites. *See Daniels-Hall*, 629 F.3d at 998-999.

[10] I take judicial notice of Spicer's March 31, 2017 press briefing as courts may judicially notice information contained on official government websites. *See Daniels-Hall*, 629 F.3d at 998-999.

Government's argument in the briefing that the Order does not change the law. They have repeatedly indicated an intent to defund sanctuary jurisdictions in compliance with the Executive Order. The Counties' concerns that the Government will enforce the defunding provision are well supported by the Government's public statements and actions, all of which are consistent with enforcing the Order.

Finally, in addition to demonstrating that the Government is likely to enforce the Order, the Counties have demonstrated that the Government is particularly likely to target them and the funds on which they rely. In a February 5, 2017 interview, President Trump specifically threatened to defund California, stating: "I'm very much opposed to sanctuary cities. They breed crime. There's a lot of problems. If we have to we'll defund, we give tremendous amounts of money to California . . . California in many ways is out of control." *See* Harris Decl. Ex. B. The Counties have established that they both receive large percentages of their federal funding through the State of California, and that they would suffer injury if California was "defunded." In a recent joint letter to Chief Justice Cantil-Sakauye of the California Supreme Court, Attorney General Sessions and Secretary Kelly again called out the State of California, as well as its cities and counties, for their sanctuary policies: "Some jurisdictions, including the State of California and many of its largest counties and cities, have enacted statutes and ordinances designed to specifically prohibit or hinder ICE from enforcing immigration law by prohibiting communication with ICE, and denying requests by ICE officers and agents to enter prisons and jails to make arrests." RJN-3, Ex. A (SF Dkt. No. 74-1).[11] ICE has identified California, Santa Clara County, and San Francisco as jurisdictions with policies that "Restrict Cooperation with ICE" and has identified Santa Clara County Main Jail and San Francisco County Jail as two of eleven detention centers with the "highest volume of detainers issued" that "do not comply with detainers on a routine basis." RJN-3, Ex. B (SF Dkt. No. 74-2).

The President and the Attorney General have also repeatedly held up San Francisco

[11] I take judicial notice of Attorney General Sessions's and Secretary Kelly's letter as an official government document. *See Mack*, 789 F.2d at 1282.

specifically as an example of how sanctuary policies threaten public safety. In his statements to the press on March 27, 2017, Attorney General Sessions referenced the tragic death of Kate Steinle and noted that her killer "admitted the only reason he came to San Francisco was because it was a sanctuary city." Sessions Press Conference at 1. In an op-ed recently published in the San Francisco Chronicle, the Attorney General wrote that "Kathryn Steinle might be alive today if she had not lived in a 'sanctuary city' " and implored "San Francisco and other cities to re-evaluate these policies." RJN-3, Ex. D (SF Dkt. No. 74-4).[12] These statements indicate not only the belief that San Francisco is a "sanctuary jurisdiction" but that its policies are particularly dangerous and in need of change. They also reveal a choice by the Government to hold up San Francisco as an exemplar of a sanctuary jurisdiction.

The Government argues that despite these public statements, San Francisco and Santa Clara cannot demonstrate a credible threat of enforcement because the Government has not actually threatened to enforce the Executive Order against them. It points to *Thomas v. Anchorage Equal Rights Commission*, in which the Ninth Circuit, sitting *en banc*, concluded that plaintiffs lacked standing to challenge an Alaska law prohibiting landlords from discriminating against tenants on the basis of their marital status. *Thomas*, 220 F.3d at 1137. In finding the case was non-justiciable, the court highlighted that "[n]o action has ever been brought against the landlords to enforce the marital status provision." *Id.* at 1140. However, this was not the only fact informing the court's analysis: it also noted that plaintiffs could not point to concrete facts showing that they had ever violated the law or were planning to violate it, it stressed that the enforcement agency tasked with enforcing the Alaska law had never heard of plaintiffs before the case was filed, and it emphasized that in 25-years on the books the law had been minimally enforced (resulting in only two civil enforcement actions and no criminal prosecutions). *Id.* None of these facts are present here.

The Government's specific criticisms of San Francisco, Santa Clara, and California

[12] I take judicial notice of Attorney General Sessions's statements in his op-ed as the veracity of these statements "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. § 201 (b)(2).

support a well-founded fear that San Francisco and Santa Clara will face enforcement directly under the Executive Order, or could be subject to defunding indirectly through enforcement against California.[13] San Francisco and Santa Clara have shown that their current practices and policies are targeted by the Order. They have demonstrated that, in the less-than-three months since the Order was signed, the Government has repeatedly indicated its intent to enforce it. And they have established that the Government has specifically highlighted Santa Clara and San Francisco as jurisdictions with sanctuary policies. On these facts, Santa Clara and San Francisco have demonstrated that the "threat of enforcement [is] credible, not simply imaginary or speculative." *Id.* (internal quotation marks omitted).

c. The Counties' claims implicate a constitutional interest

The Counties' claims implicate a constitutional interest, the rights of states and local governments to determine their own local policies and enforcement priorities pursuant to the Tenth Amendment. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 601 (1982) (highlighting that states have a sovereign interest in "the exercise of sovereign power over individuals and entities within the relevant jurisdiction this involves the power to create and enforce a legal code, both civil and criminal"); *see also New York v. United States*, 505 U.S. 144, 157-158 (1992) ("[T]he Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States.").

The Counties explain that their sanctuary policies "reflect local determinations about the best way to promote public health and safety." SF Mot. at 19 (SF Dkt. No. 21). In contrast to the Order's assertion that sanctuary jurisdictions are a "public safety threat[]," the Counties contend that, in their judgment and experience, sanctuary policies make the community safer by fostering trust between residents and local law enforcement. Among other things, this community trust encourages undocumented residents to cooperate with police and report crimes, *see* Individual Sheriffs and Police Chiefs' Amicus Brief at 3-10 (SF Dkt. No. 59-1); Southern Poverty Law

[13] Amicus briefs on behalf of numerous California cities and counties, public school districts and the State Superintendent of Instruction echo the reasons given by the Counties to demonstrate standing here.

Center Amicus Brief at 5 (SF Dkt. No. 38-2) and to obtain preventative medical care and immunizations, which has major implications for public health and works to reduce emergency medical care costs, s*ee* Nonprofit Associations' Amicus Brief at 11(SF Dkt. No. 68-1); SEIU Amicus Brief at 5-6 (SF Dkt. No. 33-1). It also improves schools' ability to provide quality education to all children. *See* State Superintendent of Public Instruction's Amicus Brief at 1-2 (SF Dkt. No. 64-1); Public Schools' Amicus Brief at 7 (SF Dkt. No. 58-1).[14]

The Counties have demonstrated that their sanctuary policies reflect their local judgment of what policies and practices are most effective for maintaining public safety and community health. Because they argue that the Executive Order seeks to undermine this judgment by attempting to compel them to change their policies and enforce the Federal government's immigration laws in violation of the Tenth Amendment, their claims implicate a constitutional interest. *See Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 269 (4th Cir. 2011) ("when a federal law interferes with a state's exercise of its sovereign 'power to create and enforce a legal code' [] it inflict[s] on the state the requisite injury-in-fact."); *Ohio ex rel. Celebrezze v. U.S. Dep't of Transp.*, 766 F.2d 228, 233 (6th Cir. 1985) (Ohio had standing to litigate the constitutionality of its own law where "effective enforcement of the Ohio statute" was rendered "uncertain by the formal position of the [U.S. Department of Transportation] that the Ohio statute is preempted" as "threatened injury to a State's enforcement of its safety laws" constitutes an injury-in-fact).

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[14] The Counties have received support from dozens of Amici, who collectively filed 16 briefs in support of each motion for preliminary injunction. *See*, SEIU Amicus Brief (SF Dkt. No. 33-1)(SF Dkt. No. 59-1); Professors of Constitutional Law Amicus Brief (SF Dkt. No. 36-1) (SC Dkt. No. 68-1); Southern Poverty Law Center, et al. Amicus Brief (SF Dkt. No. 38-1)(SC Dkt. No. 67-1); Technology Companies Amicus Brief (SF Dkt. No. 39-1)(SC Dkt. No. 73-1); California Cities and Counties Amicus Brief (SF Dkt. No. 40)(SC Dkt. No. 74-1); Tahirih Justice Center et al. Amicus Brief (SF Dkt. No. 41-1)(SC Dkt. No. 76-1); International Municipal Lawyers Amicus Brief (SF Dkt. No. 47-1); Public Schools Amicus Brief (SF Dkt. No. 58-1)(SC Dkt. No. 77-1); Individual Sheriffs and Police Chiefs Amicus Brief (SF Dkt. No. 59-1)(SC Dkt. No. 65-1); 34 Cities and Counties Amicus Brief (SF Dkt. No. 62-1)(SC Dkt. No. 61-1); Constitutional Law Scholars Amicus Brief (SF Dkt. No. 63-1)(SC Dkt. No. 69-1); California Superintendent of Public Instruction Amicus Brief (SF Dkt. No. 64-1)(SC Dkt. No. 75); State of California Amicus Brief (SF Dkt. No. 66-1)(SC Dkt. No. 71-1); Anti-Defamation League Amicus Brief (SF Dkt. No. 67-1)(SC Dkt. No. 72-1); Bay Area Non-Profits (SF Dkt. No. 68-1)(SC Dkt. No. 78-1); SIREN Amicus Brief (SC Dkt. No. 64-1); *see also* NAACP Joinder re Southern Poverty Law Amicus Brief (SF Dkt. No. 69)(SC Dkt. No. 86); Young Women's Christian Association Joinder re Motion for Preliminary Injunction (SC Dkt. No. 43-3). I GRANT all of Amici's administrative motions for leave to file Amicus Briefs.

d. The Counties are threatened with the loss of federal grants and face a present injury in the form of budgetary uncertainty

The Counties assert that the Order threatens to penalize them for failing to comply with Section 1373 and for failing to honor detainer requests by withholding all federal funds, or at least all federal grants. Section 9(a) does not threaten all federal funding, but it does include all federal grants, which still make up a significant part of the Counties' budgets. This threatened injury meets Article III's standing requirements. A "loss of funds promised under federal law [] satisfies Article III's standing requirement." *Organized Village of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 965 (9th Cir. 2015).

The Counties also explain that the need to mitigate a potential sudden loss of federal funds has thrown their budgeting processes into uproar: they cannot make informed decisions about whether to keep spending federal funds on needed services for which they may not be reimbursed; they are forced to make contingency plans to deal with a potential loss of funds, including placing funds in a budget reserve in lieu of spending that money on needed programs; and the obligation to mitigate potential harm to their residents and drastic cuts to services may ultimately compel them to change their local policies to comply with what they believe to be an unconstitutional Order. The potential loss of all federal grants creates a contingent liability large enough to have real and concrete impacts on the Counties' ability to budget and plan for the future. As discussed in more detail below, the Counties have demonstrated that they are suffering a present "injury [] inflicted by the mere existence and threatened enforcement of the [Order]." *Village of Euclid*, 272 U.S. at 385. In addition to the threatened loss of funds, this may also establish Article III standing.

A sudden loss of grant funding would have another effect. The Counties receive large portions of their federal grants through reimbursement structures the Counties first spend their own money on particular services and then receive reimbursements from the federal government based on the actual services provided. Marquez Decl. ¶ 15. Because these funds are spent on an ongoing basis, at all times the Counties are expecting, and relying on, millions of dollars in federal reimbursements for services already provided. A sudden cut to funding, including a cut to these reimbursements, could place them immediately in significant debt. A sudden and unanticipated cut mid-fiscal year would substantially increase the injury to the Counties by forcing them to make

even more drastic cuts to absorb the loss of funds during a truncated period in order to stay on budget. Whitehouse Decl. ¶ 9.

San Francisco explains that a mid-year loss of only $120 million in federal funding would: require the City to make significant cuts to critical services and would result in reductions in the numbers of first responders, such as police officers, firefighters, and paramedics; require severe cuts to the City's MUNI transportation system; threaten the Mayor's program to end chronic veterans' homelessness by 2018; and likely require cuts to social services, such as senior meals, safety net services for low-income children, and domestic violence prevention services. Whitehouse Decl. ¶17. Because federal grants support key government services, San Francisco asserts that, without clarity about the funds the Order could withhold or claw back, it will need to allocate millions of dollars to a budget reserve on May 15, 2017 to prepare for the potential loss of significant funds during the 2017 fiscal year. Whitehouse Decl. ¶8, 10, 15. Any funds placed in a reserve fund will not be available to fund other City programs and services for the 2017 fiscal year, which would result in a dollar-for-dollar reduction in services the City is able to provide its residents. *Id.* 13-14.

Santa Clara asserts that the current budgetary uncertainty puts it in an "untenable position." Marquez Decl. ¶4. It explains that Santa Clara's budget for the current fiscal year is already in place and was developed based on careful weighing of various factors, including anticipated revenues, specific service needs, salary and benefits for the County's 19,000 employees, and the County's fiscal priorities. *Id.* ¶12. Because Santa Clara operates federally funded programs on a daily basis, and incurs costs in anticipation that it will be reimbursed, its ability to provide these services depends on the County having some confidence that it will continue to receive the federal reimbursements and funds on which it depends. With the Order's unclear and broad language threatening a significant cut to funding, the County does not know "whether to (1) continue incurring hundreds of millions of dollars in costs that may never be reimbursed by the federal government, (2) discontinue basic safety-net services delivered to its most vulnerable residents, or (3) in an attempt to avoid either of these outcomes, be effectively conscripted into using local law enforcement and other resources to assist the federal government in its immigration enforcement

efforts." *Id.* at 11.

The Government argues that governmental budgeting always suffers from some uncertainty due to fluctuations in cost and tax revenues so any uncertainty caused by the Executive Order does not make "an otherwise certain endeavor [] less certain." While local budgeting always suffers from some uncertainty, as addressed immediately above, it is the magnitude of the present uncertainty and the fact that the Executive Order places at risk funds on which the Counties could previously rely that is causing them harm. The Government also argues that the Counties' concerns would not be addressed by enjoining the Executive Order because "the Order does not alter or expand existing law governing the Federal Government's discretion to revoke or deny a grant where the grantee violates legal requirements." As discussed *supra* in Section I.A.1, I reject this unpersuasive interpretation of the Order.

Finally, the Government asserts that budgetary uncertainty is too abstract to meet Article III's standing requirements and cites *Los Angeles Memorial Coliseum Commission v. National Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980). The facts of that case are not analogous to this one. There, the Coliseum Commission alleged that there was a reasonable likelihood that the Raiders were "seriously interested" in moving to Los Angeles but that they were unlikely to get the necessary votes from the NFL to approve a transfer under the existing rules. The Ninth Circuit concluded that the Commission's speculative allegations were not sufficient to establish standing to challenge the transfer approval rules. *Id.* While the Commission alleged it was likely to suffer losses in revenues as a result of the transfer rules, it made no argument that the NFL's rules caused the type of significant budget uncertainty alleged here.

The Counties cite *Clinton v. City of New York*, 524 U.S. 417, 438 (1998), which is on point. There, the Court considered whether the City of New York was injured when President Clinton cancelled a section of the Balanced Budget Act of 1997 that waived the federal government's right to recover certain past taxes from New York. *Id.* at 422. This cancellation meant that the state was again potentially liable for remitting close to $2.6 billion to the Department of Health and Human Services ("HHS"), and would have to wait for a determination from the HHS as to whether it would grant the state's requests to waive those taxes. *Id.* The

Court rejected the government's argument that the City's injuries were too speculative. It concluded that although there was still a potential that New York's taxes would be waived, the President's cancellation had deprived New York of the benefits of the law, which were akin to the certainty of a favorable final judgment. *Id.* at 430-31. It reasoned, "the revival of a substantial contingent liability immediately and directly affects the borrowing power, financial strength, and fiscal planning of the potential obligor" and constitutes an injury-in-fact. *Id.* at 430-31.

While President Clinton's cancellation in *City of New York* revived a contingent liability, President Trump's Executive Order creates a contingent liability, potentially placing hundreds of millions of dollars of the Counties' federal grants at risk. The Counties have explained the concrete impact this new liability has had in disrupting their ability to budget, make decisions regarding what services to provide, and plan for the future. The potential loss of funds also impacts the Counties potential borrowing power and financial strength San Francisco notes that it has already received inquiries from credit rating agencies about the Executive Order and its impact on San Francisco's finances. Rosenfield Decl. ¶31. This budget uncertainty is not abstract. It has caused the Counties real and tangible harms. They have adequately demonstrated that budgetary uncertainty of the type threatened by the Executive Order can constitute an injury-in-fact sufficient for Article III standing.

e. The Counties meet the requirements for pre-enforcement standing

In sum, the Counties have established a well-founded fear of enforcement under the Executive Order. They have demonstrated that, under their reasonable interpretation of the Order, their local policies are proscribed by Section 9's language. They have demonstrated that the Government intends to enforce the Order against them specifically. And they have demonstrated that their claims against the Order implicate a constitutional interest their Tenth Amendment rights to self-governance. The Counties have shown "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Babbitt*, 442 U.S. at 298. Further, the Counties have demonstrated that the Order threatens to withhold federal grant money and that the

threat of the Order is presently causing the Counties injury in the form of significant budget uncertainty. The Counties' well-founded fear of enforcement of Section 9(a) is sufficient to demonstrate Article III standing.

B. Ripeness

The Government also argues that the Counties' claims are not justiciable because they are not "prudentially ripe." In assessing prudential ripeness, a court considers "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (9th Cir. 1989). The Supreme Court has called into question "the continuing vitality of the prudential ripeness doctrine" and highlighted that prudential ripeness is distinct from constitutional ripeness. *Susan B. Anthony List*, 134 S. Ct. at 2347 (holding that a claim was justiciable, even though the Court had not yet assessed its prudential ripeness, because "we have already concluded that petitioners have alleged a sufficient Article III injury"). Regardless, the Counties' claims meet the "fitness" and "hardship" factors of prudential ripeness.

"A claim is fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *Standard Alaska Prod. Co. v. Schaible*, 874 F.2d 624, 627 (9th Cir. 1989). The Government asserts that the Counties' claims are not yet fit for review because "[i]mplementation of Section 9 'rests upon [several] contingent future events' including clarification of some of its terms and those terms may ultimately be defined such as to exclude the County or its grants or otherwise to greatly diminish the Order's 'anticipated' impact." SC Oppo. at 17 (citing *Texas v. United States*, 523 U.S. 296, 300 (1998)).

In *Texas v. United States*, Texas sought a declaration that a state provision allowing the State Commissioner of Education to appoint a special master to impose sanctions against school districts falling below the state's accreditation requirements did not violate Section 5 of the Voting Rights Act. 523 U.S. at 299. The Court concluded that this claim was not ripe for review because the relevant statute would only come into play if a school district fell below the state's standard, if the Commissioner had unsuccessfully attempted to impose a number of other less intrusive measures first, and if the Commissioner then decided a special master was necessary. *Id.* at 300.

Given the various uncertain future events, and that the state could not identify any school district to which the Commissioner was likely to appoint a special master, the Court concluded that the claim was not yet fit for review. *Id.*

The Government argues that, because it must still determine what the terms of the Order mean and how it will enforce it, the Counties' claims are not fit for review, just like the state's claim in *Texas*. This argument is not convincing. The "contingent future events" the Government identifies are always at issue in a pre-enforcement case; before actual enforcement occurs the enforcing agency must determine what the statute means and to whom it applies. Under the Government's line of reasoning, virtually all pre-enforcement cases would be non-justiciable on prudential ripeness grounds. But the possibility that the Government "may" choose to interpret the Order's broad language narrowly or "may" choose not to enforce it against the Counties does not justify deferring review. This is especially true here because, as the Counties highlight, the uncertainty concerning how the Government will enforce the Order is currently causing them injury. Given the statements of the President and Attorney General, the Counties have every reason to be concerned about budgeting decisions, are struggling to determine whether to continue to provide, or cut services, and are expending time and resources planning for the contingency of losing federal funds. The Counties challenge the Executive Order as written; a decision to enforce it sparingly cannot impact whether it is unconstitutional on its face. The Counties' claims do not require further factual development, are legal in nature, and are brought against a final Executive Order. They are fit for review.

"To meet the hardship requirement, a litigant must show that withholding review would result in direct and immediate hardship and would entail more than possible financial loss." *Winter v. Cal. Med. Review, Inc.*, 900 F.2d 1322, 1325 (9th Cir. 1989) (internal quotation marks omitted). The Government argues that the "uncertainties surrounding the implementation of Section 9 and the need for 'factual development' greatly outweigh any 'hardship' to the Count[ies] from awaiting those developments." SC Oppo. at 17-18. But the "uncertainties" created by the broad, vague language of the Order, its unconstitutional directives, and the comments of the President and Attorney General about what type of conduct and which jurisdictions it targets are

causing the Counties present harm. Without clarity the Counties do not know whether they should start slashing essential programs or continue to spend millions of dollars and risk a financial crisis in the near future. They are forced to choose "between taking immediate action to [their] detriment and risking substantial future penalties for non-compliance." *Chamber of Commerce of U.S. v. Reich*, 57 F.3d 1099, 1100-01 (D.C. Cir. 1995). Waiting for the Government to decide how it wants to apply the Order would only cause more hardship and would not resolve the legal question at issue: whether Section 9(a) as written is unconstitutional. The Counties' claims are prudentially ripe.

The Counties have established Article III standing and their claims are justiciable. They have also demonstrated that their claims are prudentially ripe for review.

II. LIKELIHOOD OF SUCCESS ON THE MERITS

The Counties challenge the Executive Order on several constitutional grounds and bear the burden of demonstrating a likelihood of success on the merits. The Government presents no defense to these constitutional arguments; it focused on standing and ripeness. I conclude that the Counties have demonstrated likely success on the merits in several ways.

A. Separation of Powers

The Counties argue that the Executive Order is unconstitutional because it seeks to wield powers that belong exclusively to Congress, the spending powers. Article I of the Constitution grants Congress the federal spending powers. *See* U.S. Const. art. I, § 8, cl. 1. "Incident to this power, *Congress* may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.' " *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (citing *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980) (emphasis added). While the President may veto a Congressional enactment under the Presentment Clause, he must "either 'approve all the parts of a Bill, or reject it in toto.' " *City of New York*, 524 U.S. at 438 (quoting 33 Writings of George Washington 96 (J. Fitzpatrick ed., 1940)). He cannot "repeal[] or amend[] parts of duly enacted statues" after they become law. *Id.* at 439.

This is true even if Congress has attempted to expressly delegate such power to the President. *Id.* In *City of New York*, the Supreme Court concluded that the Line Item Veto Act, which sought to grant the President the power to cancel particular direct spending and tax benefit provisions in bills, was unconstitutional as it ran afoul of the " 'finely wrought' procedures commanded by the Constitution" for enacting laws. *Id.* at 448 (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983)). While Congress can delegate some discretion to the President to decide how to spend appropriated funds, any delegation and discretion is cabined by these constitutional boundaries.

After a bill becomes law, the President is required to "take Care that the Law be faithfully executed." *See* U.S. Const. art. II, § 3, cl. 5. Where Congress has failed to give the President discretion in allocating funds, the President has no constitutional authority to withhold such funds and violates his obligation to faithfully execute the laws duly enacted by Congress if he does so. *See City of New York*, 524 U.S. at 439; U.S. Const. art. I, § 8, cl. 1. Further, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb . . ." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). Congress has intentionally limited the ability of the President to withhold or "impound" appropriated funds and has provided that the President may only do so after following particular procedures and after receiving Congress's express permission. S*ee* Impoundment Control Act of 1974, 2 U.S.C. §§ 683 *et seq.*

The Executive Order runs afoul of these basic and fundamental constitutional structures. The Order's stated purpose is to "ensure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law." EO §2. To effectuate this purpose, the Order directs that "the Attorney General and the Secretary, in their discretion and to the extent consistent with law, shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary." EO §9(a). Section 9 purports to give the Attorney General and the Secretary the power to place a new condition on federal funds (compliance with Section 1373) not provided for by Congress. But the

President does not have the power to place conditions on federal funds and so cannot delegate this power.

Section 9 is particularly problematic as Congress has repeatedly, and frequently, declined to broadly condition federal funds or grants on compliance with Section 1373 or other federal immigration laws as the Executive Order purports to do. *See, e.g.*, Ending Sanctuary Cities Act of 2016, H.R. 6252, 114th Cong. (2016); Stop Dangerous Sanctuary Cities Act, S. 3100, 114th Cong. (2016); Stop Dangerous Sanctuary Cities Act, H.R. 5654, 114th Cong. (2016); Stop Sanctuary Policies and Protect Americans Act, S. 2146, 114th Cong. (2016). This puts the President's power "at its lowest ebb." *Youngstown*, 343 U.S. at 637. The Order's attempt to place new conditions on federal funds is an improper attempt to wield Congress's exclusive spending power and is a violation of the Constitution's separation of powers principles.

B. Spending Clause Violations

The Counties also argue that, even if the President had the spending power, the Executive Order would be unconstitutional under the Tenth Amendment as it exceeds those powers. The Counties are likely to succeed on this claim as well.

While Congress has significant authority to encourage policy through its spending power, the Supreme Court has articulated a number of limitations to the conditions Congress can place on federal funds. The Executive Order likely violates at least three of these restrictions: (1) conditions must be unambiguous and cannot be imposed after funds have already been accepted; (2) there must be a nexus between the federal funds at issue and the federal program's purpose; and (3) the financial inducement cannot be coercive.

1. Unambiguous Requirement

When Congress places conditions on federal funds "it must do so unambiguously" so that states and local jurisdictions contemplating whether to accept such funds can "exercise their choice knowingly, cognizant of the consequences of their participation." *Dole*, 483 U.S. at 203 (internal quotation marks omitted). Because states must opt-in to a federal program willingly, fully aware of the associated conditions, Congress cannot implement new conditions after-the-fact. *See Nat'l Fed. of Indep. Bus. v. Sebelius ("NFIB")*, 132 S. Ct. 2566, 2602-04 (2012). "The

legitimacy of Congress's exercise of the spending power thus rests on whether the state voluntarily and knowingly accepts the terms of the contract" at the time Congress offers the money. *Id.* at 2602.

The Executive Order purports to retroactively condition all "federal grants" on compliance with Section 1373. As this condition was not an unambiguous condition that the states and local jurisdictions voluntarily and knowingly accepted at the time Congress appropriated these funds, it cannot be imposed now by the Order. In addition, while the Order's language refers to all federal grants, the Government's lawyers say it only applies to three grants issued through the Departments of Justice and Homeland Security. If the funds at stake are not clear, the Counties cannot voluntarily and knowingly choose to accept the conditions on those funds.

Finally, as discussed *infra* in Section II.D., the Order's vague language does not make clear what conduct it proscribes or give jurisdictions a reasonable opportunity to avoid its penalties. *See* discussion re vagueness *infra* Section II.D. The unclear and untimely conditions in the Executive Order fail the "unambiguous" restriction because the Order does not make clear to states and local governments what funds are at issue and what conditions apply to those funds, making it impossible for them to "voluntarily and knowingly accept[] the terms of the contract." *NFIB*, 132 S. Ct. at 2602.

2. Nexus Requirement

The conditions placed on congressional spending must have some nexus with the purpose of the implicated funds. "Congress may condition grants under the spending power only in ways reasonable related to the purpose of the federal program." *Dole*, 483 U.S. at 213. This means that funds conditioned on compliance with Section 1373 must have some nexus to immigration enforcement.

The Executive Order's attempt to condition all federal grants on compliance with Section 1373 clearly runs afoul of the nexus requirement: there is no nexus between Section 1373 and most categories of federal funding, including without limitation funding related to Medicare, Medicaid, transportation, child welfare services, immunization and vaccination programs, and emergency preparedness. The Executive Order inverts the nexus requirement, directing the

Attorney General and Secretary to cut off all federal grants to "sanctuary jurisdictions" but giving them discretion to allow "sanctuary jurisdictions" to receive grants "deemed necessary for law enforcement purposes." EO § 9(a). As the subset of grants "deemed necessary for law enforcement purposes" likely includes any federal funds related to immigration enforcement, the Executive Order expressly targets for defunding grants with no nexus to immigration enforcement at all. This is the precise opposite of what the nexus test requires.

3. Not Coercive Requirement

Finally, Congress cannot use the spending power in a way that compels local jurisdictions to adopt certain policies. Congress cannot offer "financial inducement . . . so coercive as to pass the point at which pressure turns to compulsion." *Dole*, 483 U.S. at 211 (internal quotation marks omitted). Legislation that "coerces a State to adopt a federal regulatory system as its own" "runs contrary to our system of federalism." *NFIB*, 132 S. Ct. at 2602. States must have a "legitimate choice whether to accept the federal conditions in exchange for federal funds." *Id.* at 2602-2603.

In *NFIB*, the Supreme Court concluded that the Affordable Care Act's threat of denying Medicaid funds, which constituted over 10 percent of the State's overall budget, was unconstitutionally coercive and represented a "gun to the head." *Id.* at 2604. The Executive Order threatens to deny sanctuary jurisdictions all federal grants, hundreds of millions of dollars on which the Counties rely. The threat is unconstitutionally coercive.

C. Tenth Amendment Violations

The Counties argue that Section 9(a) violates the Tenth Amendment because it attempts to conscript states and local jurisdictions into carrying out federal immigration law. The Counties are likely to succeed on this claim as well.

"The Federal Government may not compel the States to enact or administer a federal regulatory program." *New York*, 505 U.S. at 188. "The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Printz v. United States*, 521 U.S. 898, 935 (1997). "That is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own."

NFIB, 132 S. Ct. at 2602.

As discussed with regard to the Counties' standing arguments, the Counties have demonstrated that under their reasonable interpretation, the Order equates "sanctuary jurisdictions" with "any jurisdiction that ignored or otherwise failed to honor any detainers" and therefore places such jurisdictions at risk of losing all federal grants. *See* EO §9(b). The Counties have shown that losing all of their federal grant funding would have significant effects on their ability to provide services to their residents and that they may have no legitimate choice regarding whether to accept the government's conditions in exchange for those funds. To the extent the Executive Order seeks to condition all federal grants on honoring civil detainer requests, it is likely unconstitutional under the Tenth Amendment because it seeks to compel the states and local jurisdictions to enforce a federal regulatory program through coercion.

Even if the Order does not condition federal grants on honoring detainer requests, it certainly seeks to compel states and local jurisdictions to comply with civil detainers by directing the Attorney General to "take appropriate enforcement action against any entity that violates 8 U.S.C. 1373, or which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law." EO §9(a). Although the Order provides no further clarification on what this "enforcement" might entail or what policies might "hinder[] the enforcement of Federal law," Attorney General Sessions, who is tasked with implementing this provision, has equated failure to honor civil detainer requests with policies that "frustrate th[e] enforcement of immigration laws." *See* Sessions Press Conference at 2. Reading the Order in light of the Attorney General's public statements, it threatens "enforcement action" against any jurisdiction that refuses to comply with detainer requests or otherwise fails to enforce federal immigration law. While this threat of "enforcement" is left vague and unexplained, "enforcement" by its own definition means to "compel[] compliance." *See* BLACK'S LAW DICTIONARY 645 (10th ed. 2014) (defining "enforcement" as "The act or process of compelling compliance with a law, mandate, command, decree, or agreement.") By seeking to compel states and local jurisdictions to honor civil detainer requests by threatening enforcement action, the Executive Order violates the Tenth Amendment's provisions against conscription.

The Supreme Court has repeatedly held that, "The Federal Government cannot compel the States to enact or administer a federal regulatory program." *New York*, 505 U.S. at 188. The Government cannot command them to adopt certain policies, *id.* at 188, command them to carry out federal programs, *Printz*, 521 U.S. at 935, or otherwise to "coerce them into adopting a federal regulatory system as their own," *NFIB*, 132 S. Ct. at 2602. The Executive Order uses coercive means in an attempt to force states and local jurisdictions to honor civil detainer requests, which are voluntary "requests" precisely because the federal government cannot command states to comply with them under the Tenth Amendment. The Executive Order attempts to use coercive methods to circumvent the Tenth Amendment's direct prohibition against conscription. While the federal government may incentivize states to adopt federal programs voluntarily, it cannot use means that are so coercive as to compel their compliance. The Executive Order's threat to pull all federal grants from jurisdictions that refuse to honor detainer requests or to bring "enforcement action" against them violates the Tenth Amendment's prohibitions against commandeering.

D. Fifth Amendment Void for Vagueness

The Counties assert that the Executive Order is unconstitutionally vague in violation of the Fifth Amendment's Due Process Clause. A law is unconstitutionally vague and void under the Fifth Amendment if it fails to make clear what conduct it prohibits and if it fails to lay out clear standards for enforcement. *See Gaynard v. City of Rockford*, 408 U.S. 104, 108 (1972). To satisfy due process we insist that laws (1) "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly" and (2) "provide explicit standards for those who apply them." *Id.* The Executive Order does not meet either of these requirements.

The Executive Order does not make clear what conduct might subject a state or local jurisdiction to defunding or enforcement action, making it impossible for jurisdictions to determine how to modify their conduct, if at all, to avoid the Order's penalties. The Order clearly directs the Attorney General and Secretary to ensure that jurisdictions that "willfully refuse to comply" with Section 1373, "sanctuary jurisdictions," are not eligible to receive federal grants. The Government repeatedly emphasizes in its briefing that it does not know what it means to

"willfully refuse to comply" with Section 1373. *See,* SC Oppo. at 11. Past DOJ guidance and various court cases interpreting Section 1373 have not reached consistent conclusions as to what 1373 requires. In the face of conflicting guidance, and no clear standard from the Government, jurisdictions do not know how to avoid the Order's defunding penalty.

Further, because the Order does not clearly define "sanctuary jurisdictions" the conduct that will subject a jurisdiction to defunding under the Order is not fully outlined. This is further complicated because the Order gives the Secretary unlimited discretion to make "sanctuary jurisdiction" designations. But, at least as of two months ago, the Secretary himself stated that he "do[esn't] have a clue" how to define "sanctuary city." Harris Decl. ex. D (Dep't of Homeland Sec., *Pool Notes from Secretary Kelly's Trip to San Diego*, Feb. 10, 2017) at 3 (SC Dkt. No. 36-4). If the Secretary has unbounded discretion to designate "sanctuary jurisdictions" but has no idea how to define that term, states and local jurisdictions have no hope of deciphering what conduct might result in an unfavorable "sanctuary jurisdiction" designation.

In addition, the Order directs the Attorney General to take "appropriate enforcement action" against any jurisdiction that willfully refuses to comply with Section 1373 or otherwise has a policy or practice that "hinders the enforcement of Federal law." This provision vastly expands the scope of the Order. What does it mean to "hinder" the enforcement of federal law? What federal law is at issue: immigration laws? All federal laws? The Order offers no clarification.

The Order also fails to provide clear standards to the Secretary and the Attorney General to prevent "arbitrary and discriminatory enforcement." *Id.* As discussed above, the Order gives the Secretary discretion to designate jurisdictions as "sanctuary jurisdictions" to the extent consistent with law. But there are no laws, besides the Order, outlining what a sanctuary jurisdiction is, leaving the Secretary with unfettered discretion and the Order's vague language to make "sanctuary jurisdiction" designations. Similarly, the Order directs the Attorney General to take "appropriate enforcement action" against any jurisdiction that "hinders the enforcement of Federal law." This expansive, standardless language creates huge potential for arbitrary and discriminatory enforcement, leaving the Attorney General to figure out what "appropriate

enforcement action" might entail and what policies and practices might "hinder[] the enforcement of Federal law." This language is "so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008).

The Order gives the Counties no clear guidance on how to comply with its provisions or what penalties will result from non-compliance. Its standardless guidance and enforcement provisions are also likely to result in arbitrary and discriminatory enforcement. It does not "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Gaynard*, 408 U.S. at 108. The Counties are likely to succeed in their argument that Section 9(a) is void for vagueness under the Fifth Amendment.

E. Fifth Amendment Procedural Due Process Violations

The Counties assert that the Executive Order fails to provide them with procedural due process in violation of the Fifth Amendment. To sustain a valid procedural due process claim a person must demonstrate that he has a legally protectable property interest and that he has suffered or will suffer a deprivation of that property without adequate process. *See Thorton v. City of St. Helens*, 425 F.3d 1158, 1164 (9th Cir. 2005).

To have a legitimate property interest, a person "must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972). A state or local government has a legitimate claim of entitlement to congressionally appropriated funds, which are akin to funds owed on a contract. *See NFIB*, 132 S. Ct. at 2602 ("The legitimacy of Congress' power to legislate under the spending power [] rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' "). The Counties have a legitimate property interest in federal funds that Congress has already appropriated and that the Counties have accepted.

The Executive Order purports to make the Counties ineligible to receive these funds through a discretionary and undefined process. The Order directs the Attorney General and Secretary to designate various states and local jurisdictions as "sanctuary jurisdictions," ensure that such jurisdictions are "not eligible" to receive federal grants, and "take enforcement action" against them. EO §9(a). It does not direct the Attorney General or Secretary to provide

"sanctuary jurisdictions" with any notice of an unfavorable designation or impending cut to funding. And it does not set up any administrative or judicial procedure for states and local jurisdictions to be heard, to challenge enforcement action, or to appeal any action taken against them under the Order. This complete lack of process violates the Fifth Amendment's due process requirements. *Matthew v. Eldridge*, 424 U.S. 319, 349 (1976) ("The essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it.") (internal alterations and quotations omitted).

The Government's only defense of the Order's lack of process is to claim that Section 9's provision that it be implemented "consistent with law" reads in all necessary procedural requirements. Again, the Government's attempt to resolve all of the Order's constitutional infirmities with a "consistent with law" bandage is not convincing. There is no dispute that while the Order commands the Secretary to designate certain jurisdictions as ineligible for federal grants and directs the Attorney General to bring an "enforcement action" against them, it provides no process at all for notifying jurisdictions about such a determination and provides them no opportunity to be heard. The Counties are likely to succeed on their claim that the Order fails to provide adequate due process in violation of the Fifth Amendment.

III. IRREPARABLE HARM

The Counties assert that, absent an injunction enjoining Section 9, they are likely to suffer irreparable harm resulting from their current budget uncertainty. Alternatively, they argue that they are suffering a constitutional injury, as the Order improperly seeks to coerce them into changing their policies in violation of the Tenth Amendment. The Counties have adequately demonstrated that they are likely to suffer irreparable harm under both of these theories.

A. Budgetary Uncertainty

The Counties allege that they are currently suffering irreparable injury resulting from the substantial uncertainty caused by the Order's unclear terms and its broad and undefined scope. As discussed above, this uncertainty is causing the Counties present injury sufficient to satisfy Article III's standing requirements. *See* discussion *supra* Section I.A.2.d.

This budget uncertainty is also causing the Counties irreparable harm, and it will continue

to do so absent an injunction. The Order's uncertainty interferes with the Counties' ability to budget, plan for the future, and properly serve their residents. Without clarification regarding the Order's scope or legality, the Counties will be obligated to take steps to mitigate the risk of losing millions of dollars in federal funding, which will include placing funds in reserve and making cuts to services. These mitigating steps will cause the Counties irreparable harm. *See United States v. North Carolina*, 192 F. Supp. 3d 620, 629 (M.D.N.C. 2016) (there was irreparable harm where the unavailability of funds was "likely to have an immediate impact on [the state's] ability to provide critical resources to the public, causing damage that would persist regardless of whether funding [was] subsequently reinstated").

Although Government counsel has represented that the Order will be implemented consistent with law, this assurance is undermined by Section 9(a)'s clearly unconstitutional directives. Further, through public statements, the President and Attorney General have appeared to endorse the broadest reading of the Order. Is the Order merely a rhetorical device, as counsel suggested at the hearing, or a "weapon" to defund the Counties and those who have implemented a different law enforcement strategy than the Government currently believes is desirable? The result of this schizophrenic approach to the Order is that the Counties' worst fears are not allayed and the Counties reasonably fear enforcement under the Order.

The Order's broad directive and unclear terms, and the President's and Attorney General's endorsement of them, has caused substantial confusion and justified fear among states and local jurisdictions that they will lose all federal grant funding at the very least. The threat of the Order and the uncertainty it is causing impermissibly interferes with the Counties' ability to operate, to provide key services, to plan for the future, and to budget. The Counties have established that, absent an injunction, they are likely to suffer irreparable harm.

B. Constitutional Injury

The Counties also argue that they are likely to suffer irreparable harm because the Executive Order contravenes the separation of powers, conscripts the Counties to carry out federal immigration enforcement policies, and seeks to coerce the Counties into changing their local policies by imposing overwhelming financial penalties without due process. This "constitutional

injury" also constitutes irreparable harm.

The Ninth Circuit has repeatedly held that "the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.' " *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012); *Rodriguez v. Robbins*, 715 F.3d 1127, 1144-45 (9th Cir. 2013). A plaintiff can suffer a constitutional injury by being forced to comply with an unconstitutional law or else face financial injury or enforcement action. *See Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1058-59 (9th Cir. 2009) (plaintiffs were injured where they were faced with the choice of signing unconstitutional agreements or facing a loss of customer goodwill and significant business). The Supreme Court has similarly indicated that plaintiffs suffer irreparable injury under such circumstances. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 380-381 (1992) (injunctive relief was available where "respondents were faced with a Hobson's choice: continually violate the Texas law and expose themselves to potentially huge liability; or violate the law once as a test case and suffer the injury of obeying the law during the pendency of the proceedings and any further review"). Where an executive action causes constitutional injuries, injunctive relief is appropriate. *See Washington v. Trump*, 847 F.3d 1151, 1169 (9th Cir. 2017) (refusing to stay a preliminary injunction on Executive Order 13769 and reaffirming that a "deprivation of constitutional rights unquestionably constitutes irreparable injury").

The Counties currently must choose either to attempt to comply with the Executive Order, which they have alleged is unconstitutional under the Constitution's separation of powers structures and violates their Tenth and Fifth Amendment rights, or to defy the Order and risk losing hundreds of millions of dollars in federal grants. By forcing the Counties to make this unreasonable choice, the Order results in a constitutional injury sufficient to establish standing *and* irreparable harm.

The Government argues that while a "deprivation of constitutional rights unquestionably constitutes irreparable injury," the Counties have not alleged a "deprivation" of their constitutional rights but have instead alleged a violation of the constitutional structures that govern relationships among the branches of the Federal Government. It asserts that there is a distinction between violations of personal constitutional rights and violations of structural provisions. *See N.Y. State*

Rest. Ass'n v. N.Y. City Bd. of Health, 545 F. Supp. 2d 363, 367 (S.D.N.Y. 2008) ("[W]hile a violation of constitutional rights can constitute *per se* irreparable harm . . . *per se* irreparable harm is caused only by violations of 'personal' constitutional rights . . . to be distinguished from provisions of the Constitution that serve 'structural' purposes, like the Supremacy Clause.").

This argument fails for two reasons. First, this distinction between personal and structural constitutional rights is not recognized in the Ninth Circuit. Although the Government cites to *American Trucking Ass'ns v. City of Los Angeles*, 577 F. Supp. 2d 1110, 1127 (C.D. Cal. 2008) for the proposition that "in the case of Supremacy Clause violations," the presumption of irreparable harm "is not necessarily warranted," that case was reversed by the Ninth Circuit. On appeal the court concluded that, even where the constitutional injury is structural, "the constitutional violation alone, coupled with the damages incurred, can suffice to show irreparable harm." *American Trucking*, 559 F.3d at 1058. Second, the Counties *have* alleged a deprivation of their personal constitutional rights; they have alleged that the Executive Order is unconstitutionally coercive in violation of the Tenth Amendment and fails to provide them with Due Process in violation of the Fifth Amendment. The Government's challenges to the Counties' claims of constitutional injury are not supported by the facts of this case or the precedent that is binding on this court.

The Counties have adequately demonstrated a constitutional injury sufficient to establish a likelihood of irreparable harm.

IV. BALANCE OF HARMS AND PUBLIC INTEREST

A party seeking a preliminary injunction must "establish . . . that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. When the federal government is a party, these factors merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

The Government argues that the balance of harms and the public interest weigh against a preliminary injunction because the "most pertinent and concretely expressed public interest" in this case is contained in Section 1373, and Section 9 simply seeks to ensure compliance with that section. This argument is unconvincing given the Government's flawed argument that Section 9 does not change the law. If Section 9 does not change the law, or if the Government does not

intend to enforce Section 9's unlawful directives, then it provides the Government with no concrete benefit but to highlight the President's enforcement priorities. The President certainly has the right to use the bully pulpit to encourage his policies. But Section 9(a) is not simply rhetorical. The Counties have a strong interest in avoiding unconstitutional federal enforcement and the significant budget uncertainty that has resulted from the Order's broad and threatening language. To the extent the Government wishes to use all lawful means to enforce 8 U.S.C. 1373, it does not need Section 9(a) to do so. The confusion caused by Section 9(a)'s facially unconstitutional directives and its coercive effects weigh heavily against leaving it in place. The balance of harms weighs in favor of an injunction.

V. NATIONWIDE INJUNCTION

The Government argues that, if an injunction is issued, it should be issued only with regards to the plaintiffs and should not apply nationwide. But where a law is unconstitutional on its face, and not simply in its application to certain plaintiffs, a nationwide injunction is appropriate. *See Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) ("[T]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff."); *Washington*, 847 F.3d at 1166-67 (affirming nationwide injunction against executive travel ban order). The Counties have demonstrated that they are likely to succeed on their claims that the Executive Order purports to wield powers exclusive to Congress, and violates the Tenth and Fifth Amendments. These constitutional violations are not limited to San Francisco or Santa Clara, but apply equally to all states and local jurisdictions. Given the nationwide scope of the Order, and its apparent constitutional flaws, a nationwide injunction is appropriate.

VI. INJUNCTION AGAINST THE PRESIDENT

The Government also argues that, if an injunction is issued, it should not issue against the President. An injunction against the President personally is an "extraordinary measure not lightly to be undertaken." *Swan v. Clinton*, 100 F.3d 973, 978 (D.C. Cir. 1996); *see Newdow v. Bush*, 391 F. Supp. 2d 95, 106 (D.D.C. 2005) ("[T]he Supreme Court has sent a clear message that an injunction should not be issued against the President for official acts."). The Counties assert that the court "has discretion to determine whether the constitutional violations in the Executive Order

may be remedied by an injunction against the named inferior officers, or whether this is an extraordinary circumstance where injunctive relief against the President himself is warranted."

I conclude that an injunction against the President is not appropriate. The Counties seek to enjoin the Executive Order which directs the Attorney General and the Secretary to carry out the provisions of Section 9. The President has no role in implementing Section 9. It is not clear how an injunction against the President would remedy the constitutional violations the Counties have alleged. On these facts, the extraordinary remedy of enjoining the President himself is not appropriate.

CONCLUSION

The Counties have demonstrated that they are likely to succeed on the merits of their challenge to Section 9(a) of the Executive Order, that they will suffer irreparable harm absent an injunction, and that the balance of harms and public interest weigh in their favor. The Counties' motions for a nationwide preliminary injunction, enjoining enforcement of Section 9(a), are GRANTED. The defendants (other than the President) are enjoined from enforcing Section 9(a) of the Executive Order against jurisdictions they deem as sanctuary jurisdictions. This injunction does not impact the Government's ability to use lawful means to enforce existing conditions of federal grants or 8 U.S.C. 1373, nor does it restrict the Secretary from developing regulations or preparing guidance on designating a jurisdiction as a "sanctuary jurisdiction."

IT IS SO ORDERED.

Dated: April 25, 2017

William H. Orrick
United States District Judge

United States District Court
Northern District of California

U.S. Department of Justice
Office of Information Policy
441 G Street, NW
Sixth Floor
Washington, DC 20530

Telephone: (202) 514-3642

May 31, 2020

Austin Evers
American Oversight
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Suite B255
Washington, DC 20005
FOIA@americanoversight.org

Re: DOJ-2018-006172
18-cv-2846 (D.D.C.)
TAZ:JMS

Dear Austin Evers:

This is an interim response to your Freedom of Information Act (FOIA) request, dated and received in this Office on June 20, 2018, in which you requested email records containing specified search terms and search combinations, dating from March 6, 2017. This response is made on behalf of the Offices of the Attorney General (OAG) and Legal Policy (OLP).

Please be advised that a search has been conducted on behalf of OAG and OLP. At this time, pursuant to the narrowing agreement set forth in the October 1, 2019 Joint Status Report, see ECF No. 27, this Office has processed an additional 702 pages of potentially responsive material, and the material that has been initially found to be responsive has been sent out on consultation. We will respond to you after the consultation process is complete.

Additionally, we advised by letter dated April 30, 2020, that we processed potentially responsive material, that the material that was initially found to be responsive was sent out on consultation, and that we would respond to you after the consultation process was complete. For your information, the consultation process to which we referred in the April 30, 2020 response is now complete. As a result, I have determined that 221 pages are appropriate for release without excision, and copies are enclosed.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c) (2018). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

If you have any questions regarding this response, please contact Kristin Brudy-Everett of the United States Attorney's Office for the District of Columbia, at (202) 252-2536.

Sincerely,

Timothy Ziese
Senior Supervisory Attorney

Enclosures

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-1351

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, a project of the Urban Justice Center, Inc., on behalf of itself; HIAS, INC., on behalf of itself and its clients; MIDDLE EAST STUDIES ASSOCIATION OF NORTH AMERICA, INC., on behalf of itself and its members; MUHAMMED METEAB; PAUL HARRISON; IBRAHIM AHMED MOHOMED; JOHN DOES #1 & 3; JANE DOE #2,

Plaintiffs - Appellees,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; DEPARTMENT OF HOMELAND SECURITY; DEPARTMENT OF STATE; OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE; JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; REX W. TILLERSON, in his official capacity as Secretary of State; DANIEL R. COATS, in his official capacity as Director of National Intelligence,

Defendants - Appellants.

STATE OF TEXAS; STATE OF ALABAMA; STATE OF ARIZONA; STATE OF ARKANSAS; STATE OF FLORIDA; STATE OF KANSAS; STATE OF LOUISIANA; STATE OF MONTANA; STATE OF OKLAHOMA; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; STATE OF WEST VIRGINIA; PHIL BRYANT, Governor of the State of Mississippi; AMERICAN CENTER FOR LAW AND JUSTICE; SOUTHERN LEGAL FOUNDATION, INC.; AMERICAN CIVIL RIGHTS UNION; IMMIGRATION REFORM LAW INSTITUTE; U.S. JUSTICE FOUNDATION; CITIZENS UNITED; CITIZENS UNITED FOUNDATION; ENGLISH FIRST FOUNDATION; ENGLISH FIRST; PUBLIC ADVOCATE OF THE UNITED STATES; GUN OWNERS FOUNDATION; GUN OWNERS OF AMERICA; CONSERVATIVE LEGAL

DEFENSE AND EDUCATION FUND; U.S. BORDER CONTROL FOUNDATION; POLICY ANALYSIS CENTER; VICTOR WILLIAMS,

Amici Supporting Appellants,

INTERFAITH COALITION; COLLEGES AND UNIVERSITIES; T.A.; COMMONWEALTH OF VIRGINIA; STATE OF MARYLAND; STATE OF CALIFORNIA; STATE OF CONNECTICUT; STATE OF DELAWARE; STATE OF ILLINOIS; STATE OF IOWA; STATE OF MAINE; STATE OF MASSACHUSETTS; STATE OF NEW MEXICO; STATE OF NEW YORK; STATE OF NORTH CAROLINA; STATE OF OREGON; STATE OF RHODE ISLAND; STATE OF VERMONT; STATE OF WASHINGTON; DISTRICT OF COLUMBIA; CITY OF CHICAGO; CITY OF LOS ANGELES; CITY OF NEW YORK; CITY OF PHILADELPHIA; CITY COUNCIL OF NEW YORK; MAYOR OF THE CITY OF NEW YORK; CITY OF AUSTIN; CITY OF BOSTON; MARTIN J. WALSH, Mayor of Boston; TOWN OF CARRBORO; JAMES A. DIOSSA, Mayor of Central Falls, Rhode Island; COOK COUTNY, ILLINOIS; CITY OF GARY; CITY OF IOWA CITY; SVANTE L. MYRICK, Mayor of Ithaca; CITY OF JERSEY CITY; CITY OF MADISON; CITY OF MINNEAPOLIS; MONTGOMERY COUNTY; CITY OF NEW HAVEN; TONI N. HARP, Mayor of New Haven; CITY OF OAKLAND; CITY OF PORTLAND; CITY OF PROVIDENCE; JORGE O. ELORZA, Mayor of Providence; CITY OF ST. LOUIS; CITY OF SAINT PAUL; CITY OF SAN FRANCISCO; COUNTY OF SAN FRANCISCO; CITY OF SAN JOSE; SANTA CLARA COUNTY; CITY OF SANTA MONICA; CITY OF SEATTLE; VILLAGE OF SKOKIE; CITY OF SOUTH BEND; CITY OF TUCSON; CITY OF WEST HOLLYWOOD; FORMER NATIONAL SECURITY OFFICIALS; MEMBERS OF THE CLERGY; RIVERSIDE CHURCH IN THE CITY OF NEW YORK; AMERICANS UNITED FOR SEPARATION OF CHURCH & STATE; BEND THE ARC; A JEWISH PARTNERSHIP FOR JUSTICE; SOUTHERN POVERTY LAW CENTER; AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE; NEW YORK UNIVERSITY; RODERICK & SOLANGE MACARTHUR JUSTICE CENTER; HOWARD UNIVERSITY SCHOOL OF LAW CIVIL RIGHTS CLINIC; UNIVERSITY PROFESSORS & HIGHER EDUCATION ASSOCIATIONS; INTERNATIONAL LAW SCHOLARS; NONGOVERNMENTAL ORGANIZATIONS; ISMAIL ELSHIKH; ANT-DEFAMATION LEAGUE; JEWISH COUNCIL FOR PUCLIC AFFAIRS; UNION FOR REFORM JUDAISM; CENTRAL CONFERENCE OF AMERICAN RABBIS; WOMEN OF REFORM JUDAISM; AMERICAN BAR ASSOCIATION; MUSLIM JUSTICE LEAGUE; MUSLIM PUBLIC AFFAIRS COUNCIL; ISLAMIC CIRCLE OF NORTH AMERICA; COUNCIL ON AMERICAN-ISLAMIC RELATIONS; ASIAN AMERICANS ADVANCING JUSTICE-ASIAN LAW CAUCUS; NATIONAL IMMIGRANT JUSTICE

CENTER; ASISTA; AMERICANS FOR IMMIGRANT JUSTICE; FUTURES WITHOUT VIOLENCE; NORTH CAROLINA COALITION AGAINST DOMESTIC VIOLENCE; SANCTUARY FOR FAMILIES; MEMBERS OF CONGRESS; SERVICE EMPLOYEES INTERNATIONAL UNION; AMERICAN FEDERATION OF STATE,COUNTY & MUNICIPAL EMPLOYEES, AMERICAN FEDERATION OF TEACHERS; HISTORY PROFESSORS & SCHOLARS; LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW; CENTER FOR REPRODUCTIVE RIGHTS; SOUTHERN COALITION FOR SOCIAL JUSTICE; NATIONAL CENTER FOR LESBIAN RIGHTS; JUDGE DAVID L. BAZELTON CENTER FOR MENTAL HEALTH LAW; CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW; MISSISSIPPI CENTER FOR JUSTICE; WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS; TECHNOLOGY COMPANIES; FRED T. KOREMATSU CENTER FOR LAW & EQUALITY; JAY HIRABAYASHI; HOLLY YASUI; KAREN KOREMATSU; CIVIL RIGHTS ORGANIZATIONS; NATIONAL BAR ASSOCIATIONS OF COLOR; FOUNDATION FOR THE CHILDREN OF IRAN; IRANIAN ALLIANCES ACROSS BORDERS; MASSACHUSETTS TECHNOLOGY LEADERSHIP COUNCIL; EPISCOPAL BISHOPS; IMMIGRATION LAW SCHOLARS & CLINICIANS ON STATUTORY CLAIMS; FORMER FEDERAL IMMIGRATION & HOMELAND SECURITY OFFICIALS; CONSTITUTIONAL LAW SCHOLARS; MEDICAL INSTITUTIONS; ADVOCACY ORGANIZATIONS; INDIVIDUAL PHYSICIANS; TAHIRIH JUSTICE CENTER; ASIAN PACIFIC INSTITUTE ON GENDER-BASED VIOLENCE; CASA DE ESPERANZA; NATIONAL DOMESTIC VIOLENCE HOTLINE; INTERFAITH GROUP OF RELIGIOUS & INTERRELIGIOUS ORGANIZATIONS; OXFAM AMERICA, INC.; CONSTITUTIONAL LAW PROFESSORS; AMERICAN JEWISH COMMITTEE; MUSLIM RIGHTS, PROFESSIONAL & PUBLIC HEALTH ORGANIZATIONS; CATO INSTITUTE; NATIONAL ASSIAN PACIFIC AMERICAN BAR ASSOCIATION; ASSOCIATION OF ART MUSEUM DIRECTORS; AMERICAN ALLIANCE OF MUSEUMS; COLLEGE ART ASSOCIATION; 94 ART MUSEUMS; AMERICAN PROFESSIONAL SOCIETY ON THE ABUSE OF CHILDREN; ADVOCATES FOR HUMAN RIGHTS; ASIAN LAW ALLIANCE; ASIAN PACIFIC AMERICAN NETWORK OF OREGON; CASA; COMMUNITY REFUGEE & IMMIGRATION SERVICES; INTEGRATED REFUGEE & IMMIGRANT SERVICES; IMMIGRANT LAW CENTER OF MINNESOTA; SOUTHEAST ASIA RESOURCE ACTION CENTER; IMMIGRANT RIGHTS CLINIC OF WASHINGTON; SQUARE LEGAL SERVICES, INC.; AIRPORT ATTORNEYS COALITION,

Amici Supporting Appellees.

Appeal from the United States District Court for the District of Maryland, at Greenbelt. Theodore D. Chuang, District Judge. (8:17-cv-00361-TDC)

Argued: May 8, 2017 Decided: May 25, 2017

Before GREGORY, Chief Judge, and NIEMEYER, MOTZ, TRAXLER, KING, SHEDD, AGEE, KEENAN, WYNN, DIAZ, FLOYD, THACKER, and HARRIS, Circuit Judges.

Affirmed in part, vacated in part by published opinion. Chief Judge Gregory wrote the opinion, in which Judges Motz, King, Wynn, Diaz, Floyd, and Harris joined in full. Judge Traxler wrote an opinion concurring in the judgment. Judge Keenan wrote an opinion concurring in part and concurring in the judgment, in which Judge Thacker joined except as to Part II.A.i. Judge Wynn wrote a concurring opinion. Judge Thacker wrote a concurring opinion. Judge Niemeyer wrote a dissenting opinion, in which Judges Shedd and Agee joined. Judge Shedd wrote a dissenting opinion, in which Judges Niemeyer and Agee joined. Judge Agee wrote a dissenting opinion, in which Judges Niemeyer and Shedd joined.

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GREGORY, Chief Judge[1]:

The question for this Court, distilled to its essential form, is whether the Constitution, as the Supreme Court declared in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120 (1866), remains "a law for rulers and people, equally in war and in peace." And if so, whether it protects Plaintiffs' right to challenge an Executive Order that in text speaks with vague words of national security, but in context drips with religious intolerance, animus, and discrimination. Surely the Establishment Clause of the First Amendment yet stands as an untiring sentinel for the protection of one of our most cherished founding principles that government shall not establish any religious orthodoxy, or favor or disfavor one religion over another. Congress granted the President broad power to deny entry to aliens, but that power is not absolute. It cannot go unchecked when, as here, the President wields it through an executive edict that stands to cause irreparable harm to individuals across this nation. Therefore, for the reasons that follow, we affirm in substantial part the district court's issuance of a nationwide preliminary injunction as to Section 2(c) of the challenged Executive Order.

[1] Judges Motz, King, Wynn, Diaz, Floyd, and Harris join this opinion in full, Judge Traxler concurs in the judgment, and Judges Keenan and Thacker concur in substantial part and concur in the judgment.

I.

A.

In the early evening of January 27, 2017 seven days after taking the oath of office President Donald J. Trump signed Executive Order 13769, "Protecting the Nation From Foreign Terrorist Entry Into the United States" ("EO-1" or "First Executive Order"), 82 Fed. Reg. 8977 (Jan. 27, 2017). Referencing the past and present failings of the visa-issuance process, the First Executive Order had the stated purpose of "protect[ing] the American people from terrorist attacks by foreign nationals." EO-1, Preamble. To protect Americans, EO-1 explained, the United States must ensure that it does not admit foreign nationals who "bear hostile attitudes" toward our nation and our Constitution, who would "place violent ideologies over American law," or who "engage in acts of bigotry or hatred" (such as "'honor' killings"). *Id.* § 1.

To that end, the President invoked his authority under 8 U.S.C. § 1182(f) and immediately suspended for ninety days the immigrant and nonimmigrant entry of foreign aliens from seven predominantly Muslim countries: Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen.[2] *See* EO-1, § 3(c). During the ninety-day period, the Secretary of Homeland Security, Secretary of State, and Director of National Intelligence were to "immediately conduct a review to determine the information needed from any country" to assess whether individuals seeking entry from those countries posed a national security

[2] According to the Pew Research Center, Iraq's population is 99% Muslim, Iran's is 99.5%, Libya's is 96.6%, Sudan's is 90.7%, Somalia's is 99.8%, Syria's is 92.8%, and Yemen's is 99.1%. *See* Pew Res. Ctr., *The Global Religious Landscape* 45 50 (2012).

threat. Those cabinet officers were to deliver a series of reports updating the President as to that review and the implementation of EO-1. *See id.* § 3(a) (b), (h).

The First Executive Order also placed several constraints on the admission of refugees into the country. It reduced the number of refugees to be admitted in fiscal year 2017 from 110,000 to 50,000 and barred indefinitely the admission of Syrian refugees. *Id.* § 5(c) (d). It further ordered the Secretary of State to suspend for 120 days the United States Refugee Admissions Program ("USRAP"). *Id.* § 5(a). Upon resumption of USRAP, EO-1 directed the Secretary of State 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).

Individuals, organizations, and states across the nation challenged the First Executive Order in federal court. A judge in the Western District of Washington granted a Temporary Restraining Order ("TRO"), enjoining enforcement nationwide of Sections 3(c), 5(a) (c), and 5(e). *See Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040, at *2 (W.D. Wash. Feb. 3, 2017). The Ninth Circuit subsequently denied the Government's request to stay the TRO pending appeal and declined to "rewrite" EO-1 by narrowing the TRO's scope, noting that the "political branches are far better equipped" for that task. *Washington v. Trump*, 847 F.3d 1151, 1167 (9th Cir. 2017) (per curiam). At the Ninth Circuit's invitation, and in an effort to avoid further litigation concerning the First Executive Order, the President enacted a second order ("EO-2" or "Second Executive Order") on March 6, 2017. Exec. Order No. 13780, "Protecting the Nation

from Foreign Terrorist Entry Into the United States," 82 Fed. Reg. 13209 (Mar. 6, 2017). The Second Executive Order revoked and replaced the First Executive Order. *Id.* § 1(i).

Section 2(c) of EO-2 "Temporary Suspension of Entry for Nationals of Countries of Particular Concern During Review Period" is at the heart of the dispute in this case. This section reinstated the ninety-day suspension of entry for nationals from six countries, eliminating Iraq from the list, but retaining Iran, Libya, Somalia, Sudan, Syria, and Yemen (the "Designated Countries"). EO-2, § 2(c). The President, again invoking 8 U.S.C. § 1182(f) and also citing 8 U.S.C. § 1185(a), declared that the "unrestricted entry" of nationals from these countries "would be detrimental to the interests of the United States." *Id.*[3]

The Second Executive Order, unlike its predecessor, states that nationals from the Designated Countries warrant "additional scrutiny" because "the conditions in these

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[3] Section 2(c) reads in full:

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

countries present heightened threats." *Id.* § 1(d). In justifying the selection of the Designated Countries, EO-2 explains, "Each of these countries is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones."[4] *Id.* The Second Executive Order states that "until the assessment of current screening and vetting procedures required by section 2 of this order is completed, the risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harm the national security of the United States is unacceptably high." *Id.* § 1(f).

The Second Executive Order also provides brief descriptions of the conditions in each of the Designated Countries. It notes, for instance, that "Sudan has been designated as a state sponsor of terrorism since 1993 because of its support for international terrorist groups, including Hizballah and Hamas[, and] . . . elements of core al-Qa'ida and ISIS-linked terrorist groups remain active in the country." *Id.* § 1(e)(iv). The Second Executive Order further states that "[s]ince 2001, hundreds of persons born abroad have

[4] As the Government notes, nationals from these six countries are ineligible for the Visa Waiver Program, which currently allows nationals of thirty-eight countries seeking temporary admission to the United States for tourism or certain business purposes to enter without a visa. *See* 8 U.S.C. § 1187(a). The program excludes nationals of or aliens who have recently visited Iraq or Syria and nationals of or recent visitors to countries designated as state sponsors of terror (Iran, Sudan, and Syria). *See* 8 U.S.C. § 1187(a)(12); *see* U.S. Dep't of State, *U.S. Visa Waiver Program* (Apr. 6, 2016), https://www.dhs.gov/visa-waiver-program (saved as ECF opinion attachment). It also excludes recent visitors to Libya, Somalia, and Yemen. U.S. Dep't of Homeland Security, *DHS Announces Further Travel Restrictions for the Visa Waiver Program* (Feb. 18, 2016), https://www.dhs.gov/news/2016/02/18/dhs-announces-further-travel-restrictions-visa-waiver-program (saved as ECF opinion attachment). Thus, nationals from the six countries identified in Section 2(c), like nationals from the vast majority of countries, must undergo the individualized vetting of the regular visa process.

been convicted of terrorism-related crimes in the United States." *Id.* § 1(h). It provides the following examples: two Iraqi refugees who were convicted of terrorism-related offenses in January 2013, and a naturalized citizen who came to this country as a child refugee from Somalia and who was sentenced for terrorism-related offenses in October 2014. *Id.* The Second Executive Order does not include any examples of individuals from Iran, Libya, Sudan, Syria, or Yemen committing terrorism-related offenses in the United States.

The Second Executive Order clarifies that the suspension of entry applies to foreign nationals who (1) are outside the United States on its effective date of March 16, 2017, (2) do not have a valid visa on that date, and (3) did not have a valid visa on the effective date of EO-1 January 27, 2017. *Id.* § 3(a). Section 2(c) does not bar entry of lawful permanent residents, dual citizens traveling under a passport issued by a non-banned country, asylees, or refugees already admitted to the United States. *Id.* § 3(b). The Second Executive Order also includes a provision that permits consular officers, in their discretion, to issue waivers on a case-by-case basis to individuals barred from entering the United States. *Id.* § 3(c).

The Second Executive Order retains some but not all of the First Executive Order's refugee provisions. It again suspends USRAP for 120 days and decreases the number of refugee admissions for fiscal year 2017 by more than half, *id.* § 6(a), but it does not include the indefinite ban on Syrian refugees. The Second Executive Order also eliminates the provision contained in EO-1 that mandated preferential treatment of religious minorities seeking refugee status. It explains that this provision "applied to

refugees from every nation, including those in which Islam is a minority religion, and it applied to minority sects within a religion." *Id.* § 1(b)(iv). It further explains that EO-1 was "not motivated by animus toward any religion," but rather was designed to protect religious minorities. *Id.*

Shortly before the President signed EO-2, an unclassified, internal report from the Department of Homeland Security ("DHS") Office of Intelligence and Analysis dated March 2017 was released to the public. *See* J.A. 425 31. The report found that most foreign-born, U.S.-based violent extremists became radicalized many years after entering the United States, and concluded that increased screening and vetting was therefore unlikely to significantly reduce terrorism-related activity in the United States. J.A. 426. According to a news article, a separate DHS report indicated that citizenship in any country is likely an unreliable indicator of whether a particular individual poses a terrorist threat. J.A. 424. In a declaration considered by the district court, ten former national security, foreign policy, and intelligence officials who previously served in the White House, State Department, DHS, and Central Intelligence Agency four of whom were aware of intelligence related to terrorist threats as of January 20, 2017 advised that "[t]here is no national security purpose for a total ban on entry for aliens from the [Designated Countries]." J.A. 91.

B.

The First and Second Executive Orders were issued against a backdrop of public statements by the President and his advisors and representatives at different points in

time, both before and after the election and President Trump's assumption of office. We now recount certain of those statements.

On December 7, 2015, then-candidate Trump published a "Statement on Preventing Muslim Immigration" on his campaign website, which proposed "a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on." J.A. 346.[5] That same day, he

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[5] Trump's "Statement on Preventing Muslim Immigration" reads in full:

> (New York, NY) December 7th, 2015, -- Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on. According to Pew Research, among others, there is great hatred towards Americans by large segments of the Muslim population. Most recently, a poll from the Center for Security Policy released data showing "25% of those polled agreed that violence against Americans here in the United States is justified as a part of the global jihad" and 51% of those polled "agreed that Muslims in America should have the choice of being governed according to Shariah." Shariah authorizes such atrocities as murder against non-believers who won't convert, beheadings and more unthinkable acts that pose great harm to Americans, especially women.
>
> Mr. Trump stated, "Without looking at the various polling data, it is obvious to anybody the hatred is beyond comprehension. Where this hatred comes from and why we will have to determine. Until we are able to determine and understand this problem and the dangerous threat it poses, our country cannot be the victims of the horrendous attacks by people that believe only in Jihad, and have no sense of reason or respect of human life. If I win the election for President, we are going to Make America Great Again. *Donald J. Trump*

J.A. 346. The district court noted that, as of February 12, 2017, this statement remained on Trump's campaign website. *Int'l Refugee Assistance Project v. Trump*, No. TDC-17-0361, 2017 WL 1018235, at *4 (D. Md. Mar. 16, 2017). The statement was subsequently (Continued)

highlighted the statement on Twitter, "Just put out a very important policy statement on the extraordinary influx of hatred & danger coming into our country. We must be vigilant!" J.A. 470. And Trump read from the statement at a campaign rally in Mount Pleasant, South Carolina, that evening, where he remarked, "I have friends that are Muslims. They are great people but they know we have a problem." J.A. 472.

In an interview with CNN on March 9, 2016, Trump professed, "I think Islam hates us," J.A. 516, and "[W]e can't allow people coming into the country who have this hatred," J.A. 517. Katrina Pierson, a Trump spokeswoman, told CNN that "[w]e've allowed this propaganda to spread all through the country that [Islam] is a religion of peace." J.A. 518. In a March 22, 2016 interview with Fox Business television, Trump reiterated his call for a ban on Muslim immigration, claiming that this proposed ban had received "tremendous support" and stating, "we're having problems with the Muslims, and we're having problems with Muslims coming into the country." J.A. 522. "You need surveillance," Trump explained, and "you have to deal with the mosques whether you like it or not." J.A. 522.

Candidate Trump later recharacterized his call to ban Muslims as a ban on nationals from certain countries or territories. On July 17, 2016, when asked about a tweet that said, "Calls to ban Muslims from entering the U.S. are offensive and unconstitutional," then-candidate Trump responded, "So you call it territories. OK?

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removed from the campaign website shortly before the May 8, 2017 oral argument in this case.

We're gonna do territories." J.A. 798. He echoed this statement a week later in an interview with NBC's Meet the Press. When asked whether he had "pulled back" on his "Muslim ban," Trump replied, "We must immediately suspend immigration from any nation that has been compromised by terrorism until such time as proven vetting mechanisms have been put in place." J.A. 480. Trump added, "I actually don't think it's a rollback. In fact, you could say it's an expansion. I'm looking now at territories. People were so upset when I used the word Muslim. Oh, you can't use the word Muslim. Remember this. And I'm okay with that, because I'm talking territory instead of Muslim." J.A. 481. Trump continued, "Our Constitution is great. . . . Now, we have a religious, you know, everybody wants to be protected. And that's great. And that's the wonderful part of our Constitution. I view it differently." J.A. 481.

On December 19, 2016, following a terrorist attack in Germany, President-Elect Trump lamented the attack on people who were "prepared to celebrate the Christmas holiday" by "ISIS and other Islamic terrorists [who] continually slaughter Christians in their communities and places of worship as part of their global jihad." J.A. 506. Two days later, when asked whether recent violence in Europe had affected his plans to bar Muslims from immigrating to the United States, President-Elect Trump commented, "You know my plans. All along, I've been proven to be right. 100% correct. What's happening is disgraceful." J.A. 506.

The President gave an interview to the Christian Broadcasting News on January 27, 2017, the same day he issued the First Executive Order. In that interview, the President explained that EO-1 would give preference to Christian refugees: "They've

been horribly treated. Do you know if you were a Christian in Syria it was impossible, at least very tough to get into the United States? If you were a Muslim you could come in, but if you were a Christian, it was almost impossible . . . ." J.A. 461. He found that situation "very, very unfair." J.A. 461. Just before signing EO-1, President Trump stated, "This is the 'Protection of the Nation from Foreign Terrorist Entry into the United States.' We all know what that means." J.A. 403. The following day, former New York City Mayor and presidential advisor Rudolph Giuliani appeared on Fox News and was asked, "How did the President decide the seven countries?" J.A. 508. Giuliani answered, "I'll tell you the whole history of it. So when [the President] first announced it, he said 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'" J.A. 508. Giuliani said he assembled a group of "expert lawyers" that "focused on, instead of religion, danger the areas of the world that create danger for us. . . . It's based on places where there [is] substantial evidence that people are sending terrorists into our country." J.A. 508 09.

In response to the Ninth Circuit's decision not to stay enforcement of the nationwide injunction, the President stated at a news conference on February 16, 2017, that he intended to issue a new executive order tailored to that court's decision despite his belief that the First Executive Order was lawful. *See* J.A. 334. In discussing the Ninth Circuit's decision and his "[e]xtreme vetting" proposal, the President stated, "I got elected on defense of our country. I keep my campaign promises, and our citizens will be very happy when they see the result." J.A. 352. A few days later Stephen Miller, Senior Policy Advisor to the President, explained that the new order would reflect "mostly minor

technical differences," emphasizing that it would produce the "same basic policy outcome for the country." J.A. 339. White House Press Secretary Sean Spicer stated, "The principles of the executive order remain the same." J.A. 379. And President Trump, in a speech at a rally in Nashville, Tennessee, described EO-2 as "a watered down version of the first order." Appellees' Br. 7 (citing Katie Reilly, *Read President Trump's Response to the Travel Ban Ruling: It 'Makes Us Look Weak,'* Time (Mar. 16, 2017), http://time.com/4703622/president-trump-speech-transcript-travel-ban-ruling/ (saved as ECF opinion attachment)).

At the March 6, 2017 press conference announcing the Second Executive Order, Secretary of State Rex Tillerson said, "This executive order is a vital measure for strengthening our national security." J.A. 376. That same day, Attorney General Jefferson Sessions and Secretary of Homeland Security John Kelly submitted a letter to the President detailing how weaknesses in our immigration system compromise our nation's security and recommending a temporary pause on entry of nationals from the Designated Countries. Appellants' Br. 8 n.3 (citing Letter from Jefferson B. Sessions III, Attorney Gen., and John Francis Kelly, Sec'y of Homeland Sec., to President Donald J. Trump (Mar. 6, 2017)). In a CNN interview the next day, Secretary Kelly specified that there are probably "13 or 14 countries" that have "questionable vetting procedures," not all of which are Muslim countries or in the Middle East. J.A. 411. He noted that there are "51 overwhelmingly Muslim countries" and rejected the characterization of EO-2 as a "Muslim ban." J.A. 412.

C.

This action was brought by six individuals, all American citizens or lawful permanent residents who have at least one family member seeking entry into the United States from one of the Designated Countries, and three organizations that serve or represent Muslim clients or members.

Four of the individual Plaintiffs John Doe #1, Jane Doe #2, John Doe #3, and Paul Harrison allege that EO-2 would impact their immediate family members' ability to obtain visas. J.A. 213 14, 245 52, 305, 308 09, 318 19. Collectively, they claim that Section 2(c) of EO-2, the provision that suspends entry for certain foreign nationals for ninety days, will prolong their separation from their loved ones. *See, e.g.*, J.A. 306. John Doe #1 has applied for a spousal immigration visa so that his wife, an Iranian national, can join him in the United States; the application was approved, and she is currently awaiting her visa interview. J.A. 305. Jane Doe #2, a college student in the United States, has a pending I-130 visa application on behalf of her sister, a Syrian refugee living in Saudi Arabia. J.A. 316, 318 19. Since the filing of the operative Complaint on March 10, 2017, two of Plaintiffs' family members have obtained immigrant visas. The Government informed the district court that Paul Harrison's fiancé secured and collected a visa on March 15, 2017, the day before EO-2 was to take effect. Appellants' Br. 19 n.6 (citing J.A. 711 12, 715). Doe #3's wife secured an immigrant visa on May 1, 2017, and Plaintiffs anticipate that she will arrive in the United States within the next eight weeks. J.A. 819. The remaining two individual Plaintiffs Muhammed Meteab and Ibrahim

Ahmed Mohomed allege that EO-2 would delay or deny the admission of their family members as refugees. J.A. 214, 249 50, 252, 313 14, 321 22.

Beyond claiming injury to their family relationships, several of the individual Plaintiffs allege that the anti-Muslim message animating EO-2 has caused them feelings of disparagement and exclusion. Doe #1, a scientist who obtained permanent resident status through the National Interest Waiver program for people with extraordinary abilities, references these "anti-Muslim views," worries about his safety in this country, and contemplates whether he should return to Iran to be with his wife. J.A. 304, 306. Plaintiff Meteab relays that the "anti-Muslim sentiment" motivating EO-2 had led him to feel "isolated and disparaged in [his] community." J.A. 314. He explains that when he is in public with his wife, who wears a hijab, he "sense[s] a lot of hostility from people" and recounts that his nieces, who both wear a hijab, "say that people make mean comments and stare at them for being Muslim." J.A. 314. A classmate "pulled the hijab off" one of his nieces in class. J.A. 314.

Two of the organizational Plaintiffs, the International Refugee Assistance Project and the Hebrew Immigrant Aid Society, primarily assist refugees with the resettlement process. *See* J.A. 210 13, 235 43. These organizations claim that they have already diverted significant resources to dealing with EO-2's fallout, and that they will suffer direct financial injury from the anticipated reduction in refugee cases. J.A. 238, 243, 276 77. They further claim that their clients, who are located in the United States and the Middle East, will be injured by the delayed reunification with their loved ones. J.A. 268, 282 83. The final Plaintiff, the Middle East Studies Association, an umbrella

organization dedicated to fostering awareness of the Middle East, asserts that EO-2 will, among other injuries, reduce attendance at its annual conference and cause the organization to lose $18,000 in registration fees. J.A. 243 45, 300 03.

D.

Plaintiffs initiated this suit on February 7, 2017, seeking declaratory and injunctive relief against enforcement of the First Executive Order. Plaintiffs claimed that EO-1 violated the Establishment Clause of the First Amendment; the equal protection component of the Due Process Clause of the Fifth Amendment; the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101 1537 (2012); the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4 (2012); the Refugee Act, 8 U.S.C. §§ 1521 24 (2012); and the Administrative Procedure Act, 5 U.S.C. §§ 701 706 (2012). They named as Defendants the President, DHS, the Department of State, the Office of the Director of National Intelligence, the Secretary of Homeland Security, the Secretary of State, and the Director of National Intelligence.

On March 10, 2017, four days after the President issued EO-2, Plaintiffs filed the operative Complaint, along with a motion for a TRO and/or preliminary injunction. Plaintiffs sought to enjoin implementation of EO-2 in its entirety, prior to its effective date. In quick succession, the Government responded to the motion, Plaintiffs filed a reply, and the parties appeared for a hearing.

The district court construed the motion as a request for a preliminary injunction, and on March 16, 2017, it granted in part and denied in part that motion. *Int'l Refugee Assistance Project*, 2017 WL 1018235, at *1. In its Memorandum Opinion, the district

court first found that three individual Plaintiffs (Doe #1, Doe #2, and Doe #3) had standing to bring the claim that Section 2(c) violates the INA's provision prohibiting discrimination on the basis of nationality in the issuance of immigrant visas, 8 U.S.C. § 1152(a)(1)(A). *Id.* at *6. The court also determined that at least three individual Plaintiffs (Meteab, Doe #1, and Doe #3) had standing to pursue the claim that EO-2 violates the Establishment Clause. *Id.* at *7.

After finding Plaintiffs' claims justiciable, the district court turned to the merits of their claims. The court determined that Plaintiffs are likely to succeed only in part on the merits of their INA claim. *Id.* at *10. It found that Section 2(c) likely violates § 1152(a)(1)(A), but only as to its effective bar on the issuance of *immigrant* visas, because § 1152(a)(1)(A) explicitly applies solely to immigrant visas. To the extent that Section 2(c) prohibits the issuance of nonimmigrant visas and bars entry on the basis of nationality, the court found that it was not likely to violate § 1152(a)(1)(A). *Id.* The court did not discuss this claim in addressing the remaining preliminary injunction factors.

The district court next found that Plaintiffs are likely to succeed on the merits of their Establishment Clause claim. *Id.* at *16. It then considered the remaining preliminary injunction requirements, but only as to the Establishment Clause claim: it found that Plaintiffs would suffer irreparable injury if EO-2 were to take effect, that the balance of the equities weighed in Plaintiffs' favor, and that a preliminary injunction was in the public interest. *Id.* at *17. The district court concluded that a preliminary injunction was therefore proper as to Section 2(c) of EO-2 because Plaintiffs' claims

centered primarily on that provision's suspension of entry. The court accordingly issued a nationwide injunction barring enforcement of Section 2(c). *Id.* at *18.

Defendants timely noted this appeal, and we possess jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

II.

Because the district court enjoined Section 2(c) in its entirety based solely on Plaintiffs' Establishment Clause claim, we need not reach the merits of Plaintiffs' statutory claim under the INA.

In Section 2(c) of EO-2, the President suspended the entry of nationals from the six Designated Countries, pursuant to his power to exclude aliens under Section 212(f) of the INA, codified at 8 U.S.C. § 1182(f), and Section 215(a)(1) of the INA, codified at 8 U.S.C. § 1185(a)(1). The Government contends that Section 2(c)'s suspension of entry falls squarely within the "expansive authority" granted to the President by § 1182(f)[6] and

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[6] Section 1182(f), entitled "Suspension of entry or imposition of restrictions by President," provides in pertinent part that

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

8 U.S.C. § 1182(f).

§ 1185(a)(1).[7] Appellants' Br. 28. Plaintiffs, on the other hand, argue that Section 2(c) violates a separate provision of the INA, Section 202(a)(1)(A), codified at 8 U.S.C. § 1152(a)(1)(A), prohibiting discrimination on the basis of nationality "in the issuance of immigrant visas."[8]

The district court determined that Plaintiffs are likely to succeed on their claim under § 1152(a)(1)(A) only in limited part. Because Section 2(c) has the practical effect of halting the issuance of immigrant visas on the basis of nationality, the court reasoned, it is inconsistent with § 1152(a)(1)(A). To that extent and contrary to the Government's position the court found that Presidential authority under § 1182(f) and § 1185(a)(1) is cabined by the INA's prohibition on nationality-based discrimination in visa issuance. But the district court's ruling was limited in two important respects. First, because § 1152(a)(1)(A) applies only to the issuance of *immigrant* visas, the district court discerned no conflict between that provision and the application of Section 2(c) to persons seeking *non-immigrant* visas. And second, the district court found that because § 1152(a)(1)(A) governs the issuance of visas rather than actual entry into the United

[7] Section 1185(a)(1) provides that "[u]nless otherwise ordered by the President, it shall be unlawful [] for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe . . . ." 8 U.S.C. § 1185(a)(1).

[8] Section 1152(a)(1)(A) provides, with certain exceptions not relevant here, that "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a)(1)(A).

States, it poses no obstacle to enforcement of Section 2(c)'s nationality-based entry bar. The district court summarized as follows:

> Plaintiffs have shown a likelihood of success on the merits of their claim that the Second Executive Order violates § 1152(a), but only as to the issuance of immigrant visas . . . . They have not shown a likelihood of success on the merits of the claim that § 1152(a) prevents the President from barring entry to the United States pursuant to § 1182(f), or the issuance of non-immigrant visas, on the basis of nationality.

Int'l Refugee Assistance Project, 2017 WL 1018235, at *10.

This narrow statutory ruling is not the basis for the district court's broad preliminary injunction enjoining Section 2(c) of EO-2 in all of its applications. Rather, Plaintiffs' constitutional claim, the district court determined, was what justified a nationwide preliminary injunction against any enforcement of Section 2(c). If we were to disagree with the district court that § 1152(a)(1)(A) partially restrains the President's authority under § 1182(f) and § 1185(a)(1), then we would be obliged to consider Plaintiffs' alternative Establishment Clause claim. And, importantly, even if we were to *agree* with the district court's statutory analysis, we still would be faced with the question of whether the scope of the preliminary injunction, which goes beyond the issuance of immigrant visas governed by § 1152(a)(1)(A) to enjoin Section 2(c) in its entirety, can be sustained on the basis of Plaintiffs' Establishment Clause claim.

In light of this posture, we need not address the merits of the district court's statutory ruling. We recognize, of course, the doctrine of constitutional avoidance, which counsels against the issuance of "unnecessary constitutional rulings." *Am. Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153, 161 (1989) (per curiam). But as we have explained, the

district court's constitutional ruling was necessary to its decision, and review of that ruling is necessary to ours. Accordingly, we decline to reach the merits of Plaintiffs' claim under § 1152(a)(1)(A). The breadth of the preliminary injunction issued by the district court may be justified if and only if Plaintiffs can satisfy the requirements for a preliminary injunction based on their Establishment Clause claim. We therefore turn to consider that claim.

III.

The Government first asks us to reverse the preliminary injunction on the grounds that Plaintiffs' Establishment Clause claim is non-justiciable. In its view, Plaintiffs have not satisfied the foundational Article III requirements of standing and ripeness, and in any event, the doctrine of consular nonreviewability bars judicial review of their claim. We consider these threshold challenges in turn.

A.

The district court found that at least three individual Plaintiffs Muhammed Meteab, Doe #1, and Doe #3 have standing to assert the claim that EO-2 violates the Establishment Clause. We review this legal determination de novo. *Peterson v. Nat'l Telecomms. & Info. Admin.*, 478 F.3d 626, 631 n.2 (4th Cir. 2007).

The Constitution's gatekeeping requirement that federal courts may only adjudicate "Cases" or "Controversies," U.S. Const. art. III, § 2, obligates courts to determine whether litigants have standing to bring suit, *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013). To demonstrate standing and thus invoke federal

jurisdiction, a party must establish that "(1) it has suffered an injury in fact, (2) the injury is fairly traceable to the defendants' actions, and (3) it is likely, and not merely speculative, that the injury will be redressed by a favorable decision." *Long Term Care Partners, LLC v. United States*, 516 F.3d 225, 231 (4th Cir. 2008) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 61 (1992)). The parties' core dispute is whether Plaintiffs have suffered a cognizable injury. To establish a cognizable injury, "a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan*, 504 U.S. at 560); *see also Beck v. McDonald*, 848 F.3d 262, 270 71 (4th Cir. 2017).

In evaluating standing, "the court must be careful not to decide the question on the merits for or against the plaintiff, and must therefore assume that on the merits the plaintiffs would be successful in their claims." *Cooksey v. Futrell*, 721 F.3d 226, 239 (4th Cir. 2013) (quoting *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003)); *see also Parker v. District of Columbia*, 478 F.3d 370, 377 (D.C. Cir. 2007), *aff'd by District of Columbia v. Heller*, 554 U.S. 570 (2008) ("The Supreme Court has made clear that when considering whether a plaintiff has Article III standing, a federal court must assume *arguendo* the merits of his or her legal claim."). This means, for purposes of standing, we must assume that Section 2(c) violates the First Amendment's prohibition against governmental "establishment of religion."

"Standing in Establishment Clause cases may be shown in various ways," *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 129 (2011), though as oft-repeated,

"the concept of injury for standing purposes is particularly elusive" in this context, *Suhre v. Haywood County*, 131 F.3d 1083, 1085 (4th Cir. 1997) (quoting *Murray v. City of Austin*, 947 F.2d 147, 151 (5th Cir. 1991)). Nevertheless, the Supreme Court and this Circuit have developed a set of rules that guide our review.

To establish standing for an Establishment Clause claim, a plaintiff must have "*personal contact* with the *alleged* establishment of religion." *Id.* at 1086 (emphasis added). A "mere abstract objection to unconstitutional conduct is not sufficient to confer standing." *Id.* The Supreme Court has reinforced this principle in recent years: "plaintiffs may demonstrate standing based on the direct harm of what is claimed to be an establishment of religion." *Winn*, 563 U.S. at 129. This "direct harm" can resemble injuries in other contexts. Merchants who suffered economic injury, for instance, had standing to challenge Sunday closing laws as violative of the Establishment Clause. *McGowan v. Maryland*, 366 U.S. 420, 430 31 (1961); *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017) (noting that, in *McGowan*, appellants who were "fined $5 plus costs had standing"). But because Establishment Clause violations seldom lead to "physical injury or pecuniary loss," the standing inquiry has been adapted to also include "the kind of injuries Establishment Clause plaintiffs" are more "likely to suffer." *Suhre*, 131 F.3d at 1086. As such, "noneconomic or intangible injury may suffice to make an Establishment Clause claim justiciable." *Id.* "Feelings of marginalization and exclusion are cognizable forms of injury," we recently explained, "particularly in the Establishment Clause context, because one of the core objectives of modern Establishment Clause jurisprudence has been to prevent the State from sending a message to non-adherents of a

particular religion 'that they are *outsiders*, not full members of the political community.'" *Moss v. Spartanburg Cty. Sch. Dist. Seven*, 683 F.3d 599, 607 (4th Cir. 2012) (quoting *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 860 (2005)).

Doe #1 who is a lawful permanent resident of the United States, Muslim, and originally from Iran filed a visa application on behalf of his wife, an Iranian national. Her application has been approved, and she is currently awaiting her consular interview. J.A. 305. If it took effect, EO-2 would bar the entry of Doe #1's wife. Doe #1 explains that because EO-2 bars his wife's entry, it "forces [him] to choose between [his] career and being with [his] wife," and he is unsure "whether to keep working here" as a scientist or to return to Iran. J.A. 306. Doe #1 adds that EO-2 has "created significant fear, anxiety, and insecurity" for him and his wife. He highlights the "statements that have been made about banning Muslims from entering, and the broader context," and states, "I worry that I may not be safe in this country." J.A. 306; *see also* J.A. 314 (Plaintiff Meteab describing how the "anti-Muslim sentiment motivating" EO-2 has led him to feel "isolated and disparaged in [his] community").

Doe #1 has therefore asserted two distinct injuries stemming from his "personal contact" with the alleged establishment of religion EO-2. *Suhre*, 131 F.3d at 1086. First, EO-2 will bar his wife's entry into the United States and prolong their separation. And second, EO-2 sends a state-sanctioned message condemning his religion and causing him to feel excluded and marginalized in his community.

We begin with Doe #1's allegation that EO-2 will prolong his separation from his wife. This Court has found that standing can be premised on a "threatened rather than

actual injury," *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir. 2000) (en banc), as long as this "threat of injury [is] both real and immediate," *Beck*, 848 F.3d at 277 (quoting *Lebron v. Rumsfeld*, 670 F.3d 540, 560 (4th Cir. 2012)). The purpose of the longstanding "imminence" requirement, which is admittedly "a somewhat elastic concept," is "to ensure that the alleged injury is not too speculative for Article III purposes that the injury is '*certainly* impending.'" *Lujan*, 504 U.S. at 564 n.2 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)).

The Government does not contest that, in some circumstances, the prolonged separation of family members can constitute an injury-in-fact. The Government instead argues that Doe #1's claimed injury is speculative and non-imminent, Appellants' Br. 19, such that it is not "legally and judicially cognizable." *Id.* at 18 (quoting *Raines v. Byrd*, 521 U.S. 811, 819 (1997)). According to the Government, Doe #1 has failed to show that his threatened injury prolonged separation from his wife is imminent. It asserts that Doe #1 has offered no reason to believe that Section 2(c)'s "short pause" on entry "will delay the issuance of [his wife's] visa." Appellants' Br. 19.

But this ignores that Section 2(c) appears to operate by design to delay the issuance of visas to foreign nationals. Section 2(c)'s "short pause" on entry effectively halts the issuance of visas for ninety days as the Government acknowledges, it "would be pointless to issue a visa to an alien who the consular officer already knows is barred from entering the country." Appellants' Br. 32; *see also* Brief for Cato Institute as Amicus Curiae Supporting Appellees 25 28, ECF No. 185 (arguing that Section 2(c) operates as a ban on visa issuance). The Government also cites 8 U.S.C. § 1201(g),

which provides in relevant part that "[n]o visa or other documentation shall be issued to an alien if [] it appears to the consular officer . . . that such alien is ineligible to receive a visa or other documentation under section 1182 of this title." *See also* U.S. Dep't of State, 9 *Foreign Affairs Manual* 302.14 3(B) (2016). A ninety-day pause on issuing visas would seem to necessarily inject at least some delay into any pending application's timeline. And in fact, the Government suggests that pending visa applications might not be delayed, but *denied*. *See* Appellants' Br. 33 (explaining that "when an alien subject to the Order is denied an immigrant visa, . . . he is being denied a visa because he has been validly barred from entering the country"). A denial on such grounds would mean that once the entry suspension period concludes, an alien would have to restart *from the beginning* the lengthy visa application process. What is more, Section 2(c) is designed to "reduce investigative burdens on relevant agencies" to facilitate *worldwide* review of the current procedures for "screening and vetting of foreign nationals." Logically, dedicating time and resources to a global review process will further slow the adjudication of pending applications.

Here, Doe #1 has a pending visa application on behalf of his wife, seeking her admission to the United States from one of the Designated Countries. Prior to EO-2's issuance, Doe #1 and his wife were nearing the end of the lengthy immigrant visa process, as they were waiting for her consular interview to be scheduled. J.A. 305. They had already submitted a petition, received approval of that petition, begun National Visa Center ("NVC") Processing, submitted the visa application form, collected and submitted the requisite financial and supporting documentation to NVC, and paid the appropriate

fees. J.A. 305; *see* U.S. Dep't of State, *The Immigrant Visa Process*, https://travel.state.gov/content/visas/en/immigrate/immigrant-process.html (last visited May 14, 2017) (saved as ECF opinion attachment) (diagramming steps of the immigrant-visa application process). If Section 2(c) were in force restricting the issuance of visas to nationals in the Designated Countries for ninety days and initiating the worldwide review of existing visa standards we find a "real and immediate" threat that it would prolong Doe #1's separation from his wife, either by delaying the issuance of her visa or denying her visa and forcing her to restart the application process. *Beck*, 848 F.3d at 277 (quoting *Lebron*, 670 F.3d at 560).

This prolonged family separation is not, as the Government asserts, a remote or speculative possibility. Unlike threatened injuries that rest on hypothetical actions a plaintiff may take "some day," *Lujan*, 504 U.S. at 564, or on a "highly attenuated chain of possibilities," *Clapper*, 133 S. Ct. at 1148, the threatened injury here is imminent, sufficiently "real" and concrete, *Spokeo*, 136 S. Ct. at 1549, and would harm Doe #1 in a personal and "particularized" way, *id.* at 1548. The progression of Doe #3's wife's visa application illustrates this. Doe #3's wife received a visa on May 1, 2017, while Section 2(c) was enjoined. If Section 2(c) had been in effect, she would have been ineligible to receive a visa until after the expiration of the ninety-day period. *See* 8 U.S.C. § 1201(g). Put simply, Section 2(c) would have delayed the issuance of Doe #3's wife's visa. This cuts directly against the Government's assertion that it is uncertain whether or how Section 2(c) would affect visa applicants. Clearly Section 2(c) will delay and disrupt pending visa applications.

Even more, flowing from EO-2 is the alleged state-sanctioned message that foreign-born Muslims, a group to which Doe #1 belongs, are "outsiders, not full members of the political community." *Moss*, 683 F.3d at 607 (quoting *McCreary*, 545 U.S. at 860).[9] Doe #1 explains how the Second Executive Order has caused him to fear for his personal safety in this country and wonder whether he should give up his career in the United States and return to Iran to be with his wife. J.A. 306. This harm is consistent with the "[f]eelings of marginalization and exclusion" injury we recognized in *Moss*. 683 F.3d at 607.

In light of these two injuries, we find that Doe #1 has had "personal contact with the alleged establishment of religion." *Suhre*, 131 F.3d at 1086. Regardless of whether EO-2 actually violates the Establishment Clause's command not to disfavor a particular religion, a merits inquiry explored in Section IV.A, his injuries are on par with, if not greater than, injuries we previously deemed sufficient in this context. *See Moss*, 683 F.3d at 607 (finding Jewish daughter and father who received letter describing public school policy of awarding academic credit for private, Christian religious instruction suffered

[9] The Government would have us, in assessing standing, delve into whether EO-2 sends a sufficiently religious message such that it violates the Establishment Clause. But this "put[s] the merits cart before the standing horse." *Cooksey*, 721 F.3d at 239 (quoting *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1093 (10th Cir. 2006)). The question of whether EO-2 "conveys a message of endorsement or disapproval [of religion]" is a merits determination. *Mellen v. Bunting*, 327 F.3d 355, 374 (4th Cir. 2003) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 56 n.42 (1985)). And both parties address it as a merits question in their briefs. Appellants' Br. 48 ("The Order, in contrast, conveys no religious message . . . ."); *id.* at 52 ("Here, the Order does not convey a religious message . . . ."); Appellees' Br. 38 ("The Order's purpose to exclude Muslims conveys the exact same message . . . ."). Because we assume the merits of Plaintiffs' claim in assessing standing, we need not reach the Government's argument on this point.

injury in part because they were made to feel like "'outsiders' in their own community").[10]

The Government attempts to undercut these injuries in several ways. It first frames Plaintiffs' injuries as "stress." Appellants' Br. 23. That minimizes the psychological harm that flows from confronting official action preferring or disfavoring a particular religion and, in any event, does not account for the impact on families. The Government next argues that because the Second Executive Order "directly applies only to aliens abroad from the specified countries," it is "not directly targeted at plaintiffs," who are based in the United States, "in the way that local- or state-government messages are." Appellants' Reply Br. 3. An executive order is of course different than a local Sunday closing law or a Ten Commandments display in a state courthouse, but that does not mean its impact is any less direct. Indeed, because it emanates from the highest elected office in the nation, its impact is arguably felt even more directly by the individuals it affects. From Doe #1's perspective, the Second Executive Order does not apply to arbitrary or anonymous "aliens abroad." It applies to his wife.

More than abstractly disagreeing with the wisdom or legality of the President's policy decision, Plaintiffs show how EO-2 impacted (and continues to impact) them

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[10] Plaintiffs' injuries are also consistent with the injuries that other courts have recognized in Establishment Clause cases that do not involve religious displays or prayer. *See Awad v. Ziriax*, 670 F.3d 1111, 1122 (10th Cir. 2012) (recognizing injury stemming from amendment that "condemn[ed] [plaintiff's] religious faith and expose[d] him to disfavored treatment"); *Catholic League for Religious & Civil Rights v. City & County of San Francisco*, 624 F.3d 1043, 1052 (9th Cir. 2010) (en banc) (finding "exclusion or denigration on a religious basis within the political community" to be sufficiently concrete injury).

personally. Doe #1 is not simply "roam[ing] the country in search of governmental wrongdoing." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 487 (1982). Rather, he is feeling the direct, painful effects of the Second Executive Order both its alleged message of religious condemnation *and* the prolonged separation it causes between him and his wife in his everyday life.[11] This case thus bears little resemblance to *Valley Forge*.

We likewise reject the Government's suggestion that Plaintiffs are seeking to vindicate the legal rights of third parties. The prudential standing doctrine includes a "general prohibition on a litigant's raising another person's legal rights." *CGM, LLC v. BellSouth Telecomms., Inc.*, 664 F.3d 46, 52 (4th Cir. 2011) (quoting *Allen v. Wright*, 468

[11] For similar reasons, this case is not, as the Government claims, comparable to *In re Navy Chaplaincy*, 534 F.3d 756 (D.C. Cir. 2008). In that case, the court found that non-liturgical Protestant chaplains who were part of the Navy's Chaplain Corps lacked standing to bring a claim that the Navy preferred Catholic chaplains in violation of the Establishment Clause. *Id.* at 765. The court stated its holding as follows: "When plaintiffs are not themselves affected by a government *action* except through their abstract offense at the *message* allegedly conveyed by that action, they have not shown an injury-in-fact to bring an Establishment Clause claim." *Id.* at 764 65. The court repeatedly emphasized that plaintiffs were not themselves affected by the challenged action. *See id.* at 758 ("[T]he plaintiffs do not claim that the Navy actually discriminated against any of them."); *id.* at 760 ("But plaintiffs have conceded that they themselves did not suffer employment discrimination . . . . Rather, they suggest that *other* chaplains suffered discrimination."). In fact, plaintiffs' theory of standing was so expansive that their counsel conceded at oral argument that even the "judges on th[e] panel" would have standing to challenge the allegedly discriminatory conduct. *Id.* at 764. Here, by contrast, Doe #1 *is* directly affected by the government action both its message and its impact on his family. Thus, contrary to the Government's assertion, Appellants' Br. 24, all Muslims in the United States do not have standing to bring this suit. Only those persons who suffer direct, cognizable injuries as a result of EO-2 have standing to challenge it.

U.S. 737, 751 (1984)). This "general prohibition" is not implicated here, however, as Doe #1 has shown that he himself suffered injuries as a result of the challenged Order.[12]

For all of these reasons, we find that Doe #1 has met his burden to establish an Article III injury. We further find that Doe #1 has made the requisite showing that his claimed injuries are causally related to the challenged conduct the Second Executive Order as opposed to "the independent action of some third party not before the court." *Cooksey*, 721 F.3d at 238 (quoting *Frank Krasner Enters., Ltd. v. Montgomery County*, 401 F.3d 230, 234 (4th Cir. 2005)). Enjoining enforcement of Section 2(c) therefore will likely redress those injuries. Doe #1 has thus met the constitutional standing requirements with respect to the Establishment Clause claim. And because we find that at least one Plaintiff possesses standing, we need not decide whether the other individual Plaintiffs or the organizational Plaintiffs have standing with respect to this claim. *See Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014).

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[12] The district court here correctly recognized that the Supreme Court has on multiple occasions "reviewed the merits of cases brought by U.S. residents with a specific interest in the entry of a foreigner." *Int'l Refugee Assistance Project*, 2017 WL 1018235, at *5 (citing *Kerry v. Din*, 135 S. Ct. 2128, 2131, 2138 42 (2015) (reaching merits where American citizen challenged denial of husband's visa application); *Kleindienst v. Mandel*, 408 U.S. 753, 756, 762 65 (1972) (reaching merits where American scholars challenged denial of temporary nonimmigrant visa to Marxist Belgian journalist)); *see also Mandel*, 408 U.S. at 772 ("Even assuming, arguendo, that those on the outside seeking admission have no standing to complain, those who hope to benefit from the traveler's lectures do." (Douglas, J., dissenting)). The Supreme Court's consideration of the merits in these cases suggests, at least at a general level, that Americans have a cognizable interest in the application of immigration laws to their foreign relatives.

Lastly, the Government asserts that Plaintiffs' Establishment Clause claim is unripe. It argues that under EO-2, Plaintiffs' relatives can apply for a waiver, and unless and until those waiver requests are denied, Plaintiffs' claims are dependent on future uncertainties. When evaluating ripeness, we consider "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Id.* (quoting *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003)). An action is fit for resolution "when the issues are purely legal and when the action in controversy is final and not dependent on future uncertainties." *Miller v. Brown*, 462 F.3d 312, 319 (4th Cir. 2006). The "hardship prong is measured by the immediacy of the threat and the burden imposed on the [plaintiff]." *Lansdowne on the Potomac Homeowners Ass'n, Inc. v. OpenBand at Lansdowne, LLC*, 713 F.3d 187, 199 (4th Cir. 2013) (quoting *Charter Fed. Sav. Bank v. Office of Thrift Supervision*, 976 F.2d 203, 208 09 (4th Cir. 1992)).

Our ripeness doctrine is clearly not implicated here. Plaintiffs have brought a facial challenge, alleging that EO-2 violates the Establishment Clause regardless of whether their relatives secure waivers. This legal question is squarely presented for our review and is not dependent on the factual uncertainties of the waiver process. What is more, Plaintiffs will suffer undue hardship, as explained above, were we to require their family members to attempt to secure a waiver before permitting Plaintiffs to challenge Section 2(c). We accordingly find the claim ripe for judicial decision.

B.

In one final justiciability challenge, the Government asserts that consular nonreviewability bars *any* review of Plaintiffs' claim. This Court has scarcely discussed the doctrine, so the Government turns to the District of Columbia Circuit, which has stated that "a consular official's decision to issue or withhold a visa is not subject to judicial review, at least unless Congress says otherwise." *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999). But in the same opinion, the court explained that judicial review was proper in cases involving "claims by United States citizens rather than by aliens . . . and statutory claims that are accompanied by constitutional ones." *Id.* at 1163 (quoting *Abourezk v. Reagan*, 785 F.2d 1043, 1051 n.6 (D.C. Cir. 1986)). This is precisely such a case. More fundamentally, the doctrine of consular nonreviewability does not bar judicial review of constitutional claims. *See, e.g.*, *Din*, 135 S. Ct. at 2132 (reviewing visa denial where plaintiff asserted due process claim). The Government's reliance on the doctrine is therefore misplaced.

Behind the casual assertion of consular nonreviewability lies a dangerous idea that this Court lacks the authority to review high-level government policy of the sort here. Although the Supreme Court has certainly encouraged deference in our review of immigration matters that implicate national security interests, *see infra* Section IV.A, it has not countenanced judicial abdication, especially where constitutional rights, values, and principles are at stake. To the contrary, the Supreme Court has affirmed time and again that "it is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803). This "duty will sometimes

involve the 'resolution of litigation challenging the constitutional authority of one of the three branches,' but courts cannot avoid their responsibility." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012) (quoting *INS v. Chadha*, 462 U.S. 919, 943 (1983)). In light of this duty, and having determined that the present case is justiciable, we now proceed to consider whether the district court properly enjoined Section 2(c) of the Second Executive Order.

IV.

A preliminary injunction is an "extraordinary remed[y] involving the exercise of very far-reaching power" and is "to be granted only sparingly and in limited circumstances." *MicroStrategy Inc. v. Motorola, Inc.*, 245 F.3d 335, 339 (4th Cir. 2001) (quoting *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 816 (4th Cir. 1991)). For a district court to grant a preliminary injunction, "a plaintiff 'must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.'" *WV Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009) (quoting *Winter v. Nat. Res. Defense Council, Inc.*, 555 U.S. 7, 20 (2008)). The district court found that Plaintiffs satisfied all four requirements as to their Establishment Clause claim, and it enjoined Section 2(c) of EO-2. We evaluate the court's findings for abuse of discretion, *Aggarao v. MOL Ship Mgmt. Co., Ltd.*, 675 F.3d 355, 366 (4th Cir. 2012), reviewing its

factual findings for clear error and its legal conclusions de novo, *Dewhurst v. Century Aluminum Co.*, 649 F.3d 287, 290 (4th Cir. 2011).

A.

The district court determined that Plaintiffs are likely to succeed on the merits of their claim that EO-2 violates the Establishment Clause. *Int'l Refugee Assistance Project*, 2017 WL 1018235, at *16. It found that because EO-2 is "facially neutral in terms of religion," *id.* at *13, the test outlined in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), governs the constitutional inquiry. And applying the *Lemon* test, the court found that EO-2 likely violates the Establishment Clause. The Government argues that the court erroneously applied the *Lemon* test instead of the more deferential test set forth in *Kleindienst v. Mandel*, 408 U.S. 753 (1972). And under *Mandel*, the Government contends, Plaintiffs' claim fails.

1.

We begin by addressing the Government's argument that the district court applied the wrong test in evaluating Plaintiffs' constitutional claim. The Government contends that *Mandel* sets forth the appropriate test because it recognizes the limited scope of judicial review of executive action in the immigration context. Appellants' Br. 42. We agree that *Mandel* is the starting point for our analysis, but for the reasons that follow, we find that its test contemplates the application of settled Establishment Clause doctrine in this case.

In *Mandel*, American university professors had invited Mandel, a Belgian citizen and revolutionary Marxist and professional journalist, to speak at a number of

conferences in the United States. 408 U.S. at 756. But Mandel's application for a nonimmigrant visa was denied under a then-existing INA provision that barred the entry of aliens "who advocate the economic, international, and governmental doctrines of world communism." 8 U.S.C. § 1182(a)(28)(D) (1964). The Attorney General had discretion to waive § 1182(a)(28)(D)'s bar and grant Mandel an individual exception, but declined to do so on the grounds that Mandel had violated the terms of his visas during prior visits to the United States. 408 U.S. at 759. The American professors sued, alleging, among other things, that the denial of Mandel's visa violated their First Amendment rights to "hear his views and engage him in a free and open academic exchange." *Id.* at 760.

The Supreme Court, citing "Congress' 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden,'" *id.* at 766 (quoting *Boutilier v. INS*, 387 U.S. 118, 123 (1967)), found that the longstanding principle of deference to the political branches in the immigration context limited its review of plaintiffs' challenge, *id.* at 767. The Court held that "when the Executive exercises this power [to exclude an alien] on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the [plaintiffs'] First Amendment interests." *Id.* at 770. The Court concluded that the Attorney General's

stated reason for denying Mandel's visa that he had violated the terms of prior visas satisfied this test.[13] It therefore did not review plaintiffs' First Amendment claim.

Courts have continuously applied *Mandel*'s "facially legitimate and bona fide" test to challenges to individual visa denials. *See Din*, 135 S. Ct. at 2139 40 (Kennedy, J., concurring in the judgment) (applying *Mandel*'s test to challenge to visa denial); *Cardenas v. United States*, 826 F.3d 1164, 1172 73 (9th Cir. 2016) (same); *Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 125 (2d Cir. 2009) (same). Subsequently, in *Fiallo v. Bell*, 430 U.S. 787 (1977), the Supreme Court applied *Mandel*'s test to a facial challenge to an immigration law, finding "no reason to review the broad congressional policy choice at issue here under a more exacting standard than was applied in *Kleindienst v. Mandel*, a First Amendment case." *Id.* at 795. And in a case where plaintiffs brought a constitutional challenge to an immigration law, this Court has found that "we must apply the same standard as the *Fiallo* court and uphold the statute if a 'facially legitimate and bona fide reason' supports [it]." *Johnson*, 647 F.3d at 127.[14] *Mandel* is therefore the starting point for our review.

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[13] The Court specifically declined to decide "what First Amendment or other grounds may be available for attacking exercise of discretion for which no justification whatsoever is advanced." *Id.*

[14] In *Johnson*, this Court considered an equal protection challenge to an immigration law. *Id.* at 126 27. Relying on several of our sister circuits, we equated *Mandel*'s "facially legitimate and bona fide" test with rational basis review. *Id.* at 127 (citing *Barthelemy v. Ashcroft*, 329 F.3d 1062, 1065 66 (9th Cir. 2003), *as amended* (June 9, 2003); *Wedderburn v. INS*, 215 F.3d 795, 800 (7th Cir. 2000)). But the *Johnson* Court's interpretation is incomplete. Rational basis review does build in deference to the government's reasons for acting, like *Mandel*'s "facially legitimate" requirement, but it (Continued)

But in another more recent line of cases, the Supreme Court has made clear that despite the political branches' plenary power over immigration, that power is still "subject to important constitutional limitations," *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001), and that it is the judiciary's responsibility to uphold those limitations. *Chadha*, 462 U.S. at 941 (stating that Congress and the Executive must "cho[ose] a constitutionally permissible means of implementing" their authority over immigration). These cases instruct that the political branches' power over immigration is not tantamount to a constitutional blank check, and that vigorous judicial review is required when an immigration action's constitutionality is in question.

We are bound to give effect to both lines of cases, meaning that we must enforce constitutional limitations on immigration actions while also applying *Mandel*'s deferential test to those actions as the Supreme Court has instructed. For the reasons that follow, however, we find that these tasks are not mutually exclusive, and that *Mandel*'s

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does not call for an inquiry into an actor's "bad faith" and therefore does not properly account for *Mandel*'s "bona fide" requirement. Even more, *Johnson* and similar cases applying rational basis review did so in the context of equal protection challenges. *See, e.g.*, *Rajah v. Mukasey*, 544 F.3d 427, 438 (2d Cir. 2008); *Breyer v. Meissner*, 214 F.3d 416, 422 n.6 (3d Cir. 2000). But courts do not apply rational basis review to Establishment Clause challenges, because that would mean dispensing with the purpose inquiry that is so central to Establishment Clause review. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general."); *see also Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1255 n.2 (10th Cir. 2008) (suggesting that rational basis review cannot be used to evaluate an Establishment Clause claim) (citing *Heller*, 554 U.S. 570). We therefore decline to apply *Johnson*'s interpretation of *Mandel*'s "facially legitimate and bona fide" test to this case.

test still contemplates meaningful judicial review of constitutional challenges in certain, narrow circumstances, as we have here.

To begin, *Mandel*'s test undoubtedly imposes a heavy burden on plaintiffs, consistent with the significant deference we afford the political branches in the immigration context. *See Mathews v. Diaz*, 426 U.S. 67, 82 (1976) (describing the "narrow standard of [judicial] review of decisions made by the Congress or the President in the area of immigration and naturalization"). The government need only show that the challenged action is "facially legitimate and bona fide" to defeat a constitutional challenge. *Mandel*, 408 U.S. at 770. These are separate and quite distinct requirements. To be "facially legitimate," there must be a valid reason for the challenged action stated on the face of the action. *Din*, 135 S. Ct. at 2140 41 (Kennedy, J., concurring in the judgment) (finding visa denial "facially legitimate" where government cited a statutory provision in support of the denial).

And as the name suggests, the "bona fide" requirement concerns whether the government issued the challenged action in good faith. In *Kerry v. Din*, Justice Kennedy, joined by Justice Alito, elaborated on this requirement. *Id.* at 2141.[15] Here, the burden is

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[15] The Ninth Circuit has found that Justice Kennedy's concurrence is the controlling opinion in *Din*. It relied on the Supreme Court's holding in *Marks v. United States*, which stated that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Cardenas*, 826 F.3d at 1171 (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)). We agree that Justice Kennedy's opinion sets forth the narrowest grounds for the Court's holding in *Din* and likewise recognize it as the controlling opinion.

on the plaintiff. Justice Kennedy explained that where a plaintiff makes "an affirmative showing of bad faith" that is "plausibly alleged with sufficient particularity," courts may "look behind" the challenged action to assess its "facially legitimate" justification. *Id.* (suggesting that if plaintiff had sufficiently alleged that government denied visa in bad faith, court should inquire whether the government's stated statutory basis for denying the visa was the actual reason for the denial). In the typical case, it will be difficult for a plaintiff to make an affirmative showing of bad faith with plausibility and particularity. *See, e.g.*, *Cardenas*, 826 F.3d at 1173 (applying *Din* and finding that plaintiff who alleged that consular officer refused to consider relevant evidence and acted based on racial bias had failed to make an affirmative showing of bad faith). And absent this affirmative showing, courts must defer to the government's "facially legitimate" reason for the action.

Mandel therefore clearly sets a high bar for plaintiffs seeking judicial review of a constitutional challenge to an immigration action. But although *Mandel*'s "facially legitimate and bona fide" test affords significant deference to the political branches' decisions in this area, it does not completely insulate those decisions from *any* meaningful review. Where plaintiffs have seriously called into question whether the stated reason for the challenged action was provided in good faith, we understand *Mandel*, as construed by Justice Kennedy in his controlling concurrence in *Din*, to require that we step away from our deferential posture and look behind the stated reason for the challenged action. In other words, *Mandel*'s requirement that an immigration action be "bona fide" may in some instances compel more searching judicial review. Plaintiffs ask

this Court to engage in such searching review here under the traditional Establishment Clause test, and we therefore turn to consider whether such a test is warranted.

We start with *Mandel*'s requirement that the challenged government action be "facially legitimate." EO-2's stated purpose is "to protect the Nation from terrorist activities by foreign nationals admitted to the United States." EO-2, Preamble. We find that this stated national security interest is, on its face, a valid reason for Section 2(c)'s suspension of entry. EO-2 therefore satisfies *Mandel*'s first requirement. Absent allegations of bad faith, our analysis would end here in favor of the Government. But in this case, Plaintiffs have alleged that EO-2's stated purpose was given in bad faith. We therefore must consider whether they have made the requisite showing of bad faith.

As noted, Plaintiffs must "plausibly allege[] with sufficient particularity" that the reason for the government action was provided in bad faith. *Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring in the judgment). Plaintiffs here claim that EO-2 invokes national security in bad faith, as a pretext for what really is an anti-Muslim religious purpose. Plaintiffs point to ample evidence that national security is not the true reason for EO-2, including, among other things, then-candidate Trump's numerous campaign statements expressing animus towards the Islamic faith; his proposal to ban Muslims from entering the United States; his subsequent explanation that he would effectuate this ban by targeting "territories" instead of Muslims directly; the issuance of EO-1, which targeted certain majority-Muslim nations and included a preference for religious minorities; an advisor's statement that the President had asked him to find a way to ban Muslims in a legal way; and the issuance of EO-2, which resembles EO-1 and which

President Trump and his advisors described as having the same policy goals as EO-1. *See, e.g.*, J.A. 339, 346, 370, 379, 403, 470, 472, 480, 481, 506, 508, 516 18, 522, 798. Plaintiffs also point to the comparably weak evidence that EO-2 is meant to address national security interests, including the exclusion of national security agencies from the decisionmaking process, the post hoc nature of the national security rationale, and evidence from DHS that EO-2 would not operate to diminish the threat of potential terrorist activity.

Based on this evidence, we find that Plaintiffs have more than plausibly alleged that EO-2's stated national security interest was provided in bad faith, as a pretext for its religious purpose. And having concluded that the "facially legitimate" reason proffered by the government is not "bona fide," we no longer defer to that reason and instead may "look behind" EO-2. *Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring in the judgment).

Since Justice Kennedy's concurrence in *Din*, no court has confronted a scenario where, as here, plaintiffs have plausibly alleged with particularity that an immigration action was taken in bad faith. We therefore have minimal guidance on what "look[ing] behind" a challenged immigration action entails. *See id.* In addressing this issue of first impression, the Government does not propose a framework for this inquiry. Rather, the Government summarily asserts that because EO-2 states that it is motivated by national security interests, it therefore satisfies *Mandel*'s test. But this only responds to *Mandel*'s "facially legitimate" requirement it reads out *Mandel*'s "bona fide" test altogether. Plaintiffs, for their part, suggest that we review their claim using our normal

constitutional tools. And in the Establishment Clause context, our normal constitutional tool for reviewing facially neutral government actions is the test in *Lemon v. Kurtzman*.

We find for several reasons that because Plaintiffs have made an affirmative showing of bad faith, applying the *Lemon* test to analyze EO-2's constitutionality is appropriate. First, as detailed above, the Supreme Court has unequivocally stated that the political branches' immigration actions are still "subject to important constitutional limitations." *Zadvydas*, 533 U.S. at 695; *see also Chadha*, 462 U.S. at 941 42. The constitutional limitation in this case is the Establishment Clause, and this Court's duty to uphold the Constitution even in the context of a presidential immigration action counsels in favor of applying our standard constitutional tool. Second, that Plaintiffs have satisfied *Mandel*'s heavy burden to plausibly show that the reason for the challenged action was proffered in bad faith further supports the application of our established constitutional doctrine. The deferential framework set forth in *Mandel* is based in part on general respect for the political branches' power in the immigration realm. Once plaintiffs credibly call into question the political branches' motives for exercising that power, our reason for deferring is severely undermined. In the rare case where plaintiffs plausibly allege bad faith with particularity, more meaningful review in the form of constitutional scrutiny is proper. And third, in the context of this case, there is an obvious symmetry between *Mandel*'s "bona fide" prong and the constitutional inquiry established in *Lemon*. Both tests ask courts to evaluate the government's purpose for acting.

Because Plaintiffs have made a substantial and affirmative showing that the government's national security purpose was proffered in bad faith, we find it appropriate to apply our longstanding Establishment Clause doctrine. Applying this doctrine harmonizes our duty to engage in the substantial deference required by *Mandel* and its progeny with our responsibility to ensure that the political branches choose constitutionally permissible means of exercising their immigration power. We therefore proceed to "look behind" EO-2 using the framework developed in *Lemon* to determine if EO-2 was motivated by a primarily religious purpose, rather than its stated reason of promoting national security.

2.

To prevail under the *Lemon* test, the Government must show that the challenged action (1) "ha[s] a secular legislative purpose," (2) that "its principal or primary effect [is] one that neither advances nor inhibits religion," and (3) that it does "not foster 'an excessive government entanglement with religion.'" *Lemon*, 403 U.S. at 612 13 (quoting *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 674 (1970)) (citation omitted). The Government must satisfy all three prongs of *Lemon* to defeat an Establishment Clause challenge. *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987). The dispute here centers on *Lemon*'s first prong.

In the Establishment Clause context, "purpose matters." *McCreary*, 545 U.S. at 866 n.14. Under the *Lemon* test's first prong, the Government must show that the challenged action "ha[s] a secular legislative purpose." *Lemon*, 403 U.S. at 612. Accordingly, the Government must show that the challenged action has a secular purpose

that is "genuine, not a sham, and not merely secondary to a religious objective." *McCreary*, 545 U.S. at 864; *see also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) ("When a governmental entity professes a secular purpose for an arguably religious policy, the government's characterization is, of course, entitled to some deference. But it is nonetheless the duty of the courts to 'distinguis[h] a sham secular purpose from a sincere one.'" (quoting *Wallace*, 472 U.S. at 75 (O'Connor, J., concurring in the judgment)). The government cannot meet this requirement by identifying *any* secular purpose for the challenged action. *McCreary*, 545 U.S. at 865 n.13 (noting that if any secular purpose sufficed, "it would leave the purpose test with no real bite, given the ease of finding some secular purpose for almost any government action"). Rather, the government must show that the challenged action's *primary* purpose is secular. *Edwards*, 482 U.S. at 594 (finding an Establishment Clause violation where the challenged act's "primary purpose . . . is to endorse a particular religious doctrine," notwithstanding that the act's stated purpose was secular).

When a court considers whether a challenged government action's primary purpose is secular, it attempts to discern the "official objective . . . from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts." *McCreary*, 545 U.S. at 862. The court acts as a reasonable, "objective observer," taking into account "the traditional external signs that show up in the 'text, legislative history, and implementation of the statute,' or comparable official act." *Id.* (quoting *Santa Fe*, 530 U.S. at 308). It also considers the action's "historical context" and "the specific sequence of events leading to [its] passage." *Edwards*, 482 U.S. at 595. And as a

reasonable observer, a court has a "reasonable memor[y]," and it cannot "'turn a blind eye to the context in which [the action] arose.'" *McCreary*, 545 U.S. at 866 (quoting *Santa Fe*, 530 U.S. at 315).

The evidence in the record, viewed from the standpoint of the reasonable observer, creates a compelling case that EO-2's primary purpose is religious. Then-candidate Trump's campaign statements reveal that on numerous occasions, he expressed anti-Muslim sentiment, as well as his intent, if elected, to ban Muslims from the United States. For instance, on December 7, 2015, Trump posted on his campaign website a "Statement on Preventing Muslim Immigration," in which he "call[ed] for a total and complete shutdown of Muslims entering the United States until our representatives can figure out what is going on" and remarked, "[I]t is obvious to anybody that the hatred is beyond comprehension. . . . [O]ur country cannot be the victims of horrendous attacks by people that believe only in Jihad, and have no sense of reason or respect for human life." J.A. 346. In a March 9, 2016 interview, Trump stated that "Islam hates us," J.A. 516, and that "[w]e can't allow people coming into this country who have this hatred," J.A. 517. Less than two weeks later, in a March 22 interview, Trump again called for excluding Muslims, because "we're having problems with the Muslims, and we're having problems with Muslims coming into the country." J.A. 522. And on December 21, 2016, when asked whether recent attacks in Europe affected his proposed Muslim ban, President-Elect Trump replied, "You know my plans. All along, I've proven to be right. 100% correct." J.A. 506.

As a candidate, Trump also suggested that he would attempt to circumvent scrutiny of the Muslim ban by formulating it in terms of nationality, rather than religion. On July 17, 2016, in response to a tweet stating, "Calls to ban Muslims from entering the U.S. are offensive and unconstitutional," Trump said, "So you call it territories. OK? We're gonna do territories." J.A. 798. One week later, Trump asserted that entry should be "immediately suspended[ed] . . . from any nation that has been compromised by terrorism." J.A. 480. When asked whether this meant he was "roll[ing]back" his call for a Muslim ban, he said his plan was an "expansion" and explained that "[p]eople were so upset when I used the word Muslim," so he was instead "talking territory instead of Muslim." J.A. 481.

Significantly, the First Executive Order appeared to take this exact form, barring citizens of seven predominantly Muslim countries from entering the United States. And just before President Trump signed EO-1 on January 27, 2017, he stated, "This is the 'Protection of the Nation from Foreign Terrorist Entry into the United States.' We all know what that means." J.A. 403. The next day, presidential advisor and former New York City Mayor Giuliani appeared on Fox News and asserted that "when [Trump] first announced it, he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'" J.A. 508.

Shortly after courts enjoined the First Executive Order, President Trump issued EO-2, which the President and members of his team characterized as being substantially similar to EO-1. EO-2 has the same name and basic structure as EO-1, but it does not include a preference for religious-minority refugees and excludes Iraq from its list of

Designated Countries. EO-2, § 1(e). It also exempts certain categories of nationals from the Designated Countries and institutes a waiver process for qualifying individuals. EO-2, § 3(b), (c). Senior Policy Advisor Miller described the changes to EO-2 as "mostly minor technical differences," and said that there would be "the same basic policy outcomes for the country." J.A. 339. White House Press Secretary Spicer stated that "[t]he principles of the [second] executive order remain the same." J.A. 379. And President Trump, in a speech at a rally, described EO-2 as "a watered down version of the first order." Appellees' Br. 7 (citing Reilly, *supra*). These statements suggest that like EO-1, EO-2's purpose is to effectuate the promised Muslim ban, and that its changes from EO-1 reflect an effort to help it survive judicial scrutiny, rather than to avoid targeting Muslims for exclusion from the United States.

These statements, taken together, provide direct, specific evidence of what motivated both EO-1 and EO-2: President Trump's desire to exclude Muslims from the United States. The statements also reveal President Trump's intended means of effectuating the ban: by targeting majority-Muslim nations instead of Muslims explicitly. And after courts enjoined EO-1, the statements show how President Trump attempted to preserve its core mission: by issuing EO-2 a "watered down" version with "the same basic policy outcomes." J.A. 339. These statements are the exact type of "readily discoverable fact[s]" that we use in determining a government action's primary purpose. *McCreary*, 545 U.S. at 862. They are explicit statements of purpose and are attributable either to President Trump directly or to his advisors. We need not probe anyone's heart of hearts to discover the purpose of EO-2, for President Trump and his aides have

explained it on numerous occasions and in no uncertain terms. *See Glassroth v. Moore*, 335 F.3d 1282, 1296 (11th Cir. 2003) ("Besides, no psychoanalysis or dissection is required here, where there is abundant evidence, including his own words, of the [government actor's] purpose."). EO-2 cannot be read in isolation from the statements of planning and purpose that accompanied it, particularly in light of the sheer number of statements, their nearly singular source, and the close connection they draw between the proposed Muslim ban and EO-2 itself.[16] *See McCreary*, 545 U.S. at 866 (rejecting notion that court could consider only "the latest news about the last in a series of governmental actions, however close they may all be in time and subject"). The reasonable observer could easily connect these statements to EO-2 and understand that its primary purpose appears to be religious, rather than secular.

The Government argues, without meaningfully addressing Plaintiffs' proffered evidence, that EO-2's primary purpose is in fact secular because it is facially neutral and operates to address the risks of potential terrorism without targeting any particular religious group. Appellants' Br. 42 44. That EO-2's stated objective is religiously neutral is not dispositive; the entire premise of our review under *Lemon* is that even facially neutral government actions can violate the Establishment Clause. *See Lemon*, 403 U.S. at 612 (recognizing that "a law 'respecting' . . . the establishment of religion[] is

[16] We reject the government's contentions that none of these statements "in substance corresponds to [Section 2(c)]," Appellants' Br. 52, and that Section 2(c) "bears no resemblance to a 'Muslim ban,'" *id.* at 53. These statements show that President Trump intended to effectuate his proposed Muslim ban by targeting predominantly Muslim nations, rather than Muslims explicitly. Section 2(c) does precisely that.

not always easily identifiable as one," and creating a three-part test for discerning when a facially neutral law violates the Establishment Clause); *see also Santa Fe*, 530 U.S. at 315 ("Our examination [under *Lemon*'s purpose prong] . . . need not stop at an analysis of the text of the policy."). We therefore reject the Government's suggestion that EO-2's facial neutrality might somehow fully answer the question of EO-2's primary purpose.[17]

The Government's argument that EO-2's primary purpose is related to national security, Appellants' Br. 43 44, is belied by evidence in the record that President Trump issued the First Executive Order without consulting the relevant national security agencies, J.A. 397, and that those agencies only offered a national security rationale after EO-1 was enjoined. Furthermore, internal reports from DHS contradict this national security rationale, with one report stating that "most foreign-born, US-based violent

[17] Plaintiffs suggest that EO-2 is not facially neutral, because by directing the Secretary of Homeland Security to collect data on "honor killings" committed in the United States by foreign nationals, EO-2 incorporates "a stereotype about Muslims that the President had invoked in the months preceding the Order." Appellees' Br. 5, 7; *see* J.A. 598 (reproducing Trump's remarks in a September 2016 speech in Arizona in which he stated that applicants from countries like Iraq and Afghanistan would be "asked their views about honor killings," because "a majority of residents [in those countries] say that the barbaric practice of honor killings against women are often or sometimes justified"). Numerous amici explain that invoking the specter of "honor killings" is a well-worn tactic for stigmatizing and demeaning Islam and painting the religion, and its men, as violent and barbaric. *See, e.g.*, Brief for New York University as Amicus Curiae Supporting Appellees 21, ECF No. 82-1; Brief for Muslim Justice League, et al., as Amici Curiae Supporting Appellees 17-18, ECF No. 152-1; Brief for History Professors and Scholars as Amici Curiae Supporting Appellees 2 3, ECF No. 154-1; Brief for Constitutional Law Scholars as Amici Curiae Supporting Appellees 19 n.3, ECF No. 173-1; Brief for Members of the Clergy, et al., as Amici Curiae Supporting Appellees 13, ECF No. 179-1. The Amici Constitutional Law Scholars go so far as to call the reference to honor killings "anti-Islamic dog-whistling." Brief for Constitutional Law Scholars 19 n.3. We find this text in EO-2 to be yet another marker that its national security purpose is secondary to its religious purpose.

extremists likely radicalized several years after their entry to the United States, limiting the ability of screening and vetting officials to prevent their entry because of national security concerns." J.A. 426. According to former National Security Officials, Section 2(c) serves "no legitimate national security purpose," given that "not a single American has died in a terrorist attack on U.S. soil at the hands of citizens of these six nations in the last forty years" and that there is no evidence of any new security risks emanating from these countries. Corrected Brief for Former National Security Officials as Amici Curiae Supporting Appellees 5 8, ECF No. 126-1.[18] Like the district court, we think this strong evidence that any national security justification for EO-2 was secondary to its primary religious purpose and was offered as more of a "litigating position" than as the actual purpose of EO-2. *See McCreary*, 545 U.S. at 871 (describing the government's "new statements of purpose . . . as a litigating position" where they were offered to explain the third iteration of a previously enjoined religious display). And EO-2's text does little to bolster any national security rationale: the only examples it provides of immigrants born abroad and convicted of terrorism-related crimes in the United States include two Iraqis Iraq is not a designated country in EO-2 and a Somalian refugee who entered the United States as a child and was radicalized here as an adult. EO-2, § 1(h). The Government's asserted national security purpose is therefore no more convincing as applied to EO-2 than it was to EO-1.

[18] A number of amici were current on the relevant intelligence as of January 20, 2017. *Id.* at 9.

Relatedly, the Government argues that EO-2's operation "confirms its stated purpose." Appellants' Br. 43. "[I]t applies to six countries based on risk, not religion; and in those six countries, the suspension applies irrespective of any alien's religion." *Id.* In support of its argument that EO-2 does not single out Muslims, the Government notes that these six countries are either places where ISIS has a heavy presence (Syria), state sponsors of terrorism (Iran, Sudan, and Syria), or safe havens for terrorists (Libya, Somalia, and Yemen). Appellants' Br. 5 6. The Government also points out that the six Designated Countries represent only a small proportion of the world's majority-Muslim nations, and EO-2 applies to everyone in those countries, even non-Muslims. *Id.* at 44. This shows, the Government argues, that EO-2's primary purpose is secular. The trouble with this argument is that EO-2's practical operation is not severable from the myriad statements explaining its operation as intended to bar Muslims from the United States. And that EO-2 is underinclusive by targeting only a small percentage of the world's majority-Muslim nations and overinclusive for targeting all citizens, even non-Muslims, in the Designated Countries, is not responsive to the purpose inquiry. This evidence might be relevant to our analysis under *Lemon*'s second prong, which asks whether a government act has the primary *effect* of endorsing or disapproving of religion, *see Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring), but it does not answer whether the government acted with a primarily religious purpose to begin with. If we limited our purpose inquiry to review of the operation of a facially neutral order, we would be caught in an analytical loop, where the order would always survive scrutiny. It is for this precise reason that when we attempt to discern purpose, we look to more than

just the challenged action itself. And here, when we consider the full context of EO-2, it is evident that it is likely motivated primarily by religion. We do not discount that there may be a national security concern motivating EO-2; we merely find it likely that any such purpose is secondary to EO-2's religious purpose.

The Government separately contends that our purpose inquiry should not extend to "extrinsic evidence" that is beyond EO-2's relevant context. Appellants' Br. 45. The Government first argues that we should not look beyond EO-2's "text and operation." *Id.* at 45 46. But this is clearly incorrect, as the Supreme Court has explicitly stated that we review more than just the face of a challenged action. *See, e.g.*, *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 699 (1994) ("[O]ur [Establishment Clause] analysis does not end with the text of the statute at issue.") (citing *Church of the Lukumi Babalu Aye*, 508 U.S. at 534).[19]

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[19] The Government separately suggests that we should limit our review to EO-2's text and operation based on "the Constitution's structure and its separation of powers," and the "'presumption of regularity' that attaches to all federal officials' actions." Appellants' Br. 45 (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14 (1926)). In support of this point, the Government relies on pre-*McCreary* cases discussing, variously, judicial deference to an executive official's decision to deport an alien who had violated the terms of his admission to the United States, *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999), the President's absolute immunity from damages liability based on his or her official acts, *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982), and the presumptive privilege we afford a President's conversations and correspondence, *United States v. Nixon*, 418 U.S. 683, 708 (1974). These cases suggest that in certain circumstances, we insulate the President and other executive officials from judicial scrutiny in order to protect and promote the effective functioning of the executive branch. But these cases do not circumscribe our review of Establishment Clause challenges or hold that when a President's official acts violate the Constitution, the acts themselves are immune from judicial review. We find no support in this line of cases for the Government's argument that our review of EO-2's context is so limited. In fact, the (Continued)

The Government next argues that even if we do look beyond EO-2 itself, under *McCreary*, we are limited to considering only "the operative terms of governmental action and official pronouncements," Appellants' Br. 46, which we understand to mean only EO-2 itself and a letter signed by the Attorney General and the Secretary of State that largely echoes EO-2's text, *id.* at 8 n.3 (citing Letter, *supra*). We find no support for this view in *McCreary*. The *McCreary* Court considered "the traditional external signs that show up in the 'text, legislative history, and implementation of the [challenged action],'" 545 U.S. at 862 (quoting *Santa Fe*, 530 U.S. at 308), but it did not limit other courts' review to those particular terms. *Id.* Nor did it make such an artificial distinction between "official" and "unofficial" context. Rather, it relied on principles of "common sense" and the "reasonable observer[']s . . . reasonable memor[y]" to cull the relevant context surrounding the challenged action. *Id.* at 866. The Government would have us abandon this approach in favor of an unworkable standard that is contrary to the well-established framework for considering the context of a challenged government action.

And finally, the Government argues that even if we could consider unofficial acts and statements, we should not rely on campaign statements. Appellants' Br. 49. Those statements predate President Trump's constitutionally significant "transition from private life to the Nation's highest public office," and as such, they are less probative than

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Supreme Court has suggested quite the opposite. *See Zadvydas*, 533 U.S. at 695 ("Executive and Legislative Branch decisionmaking . . . power is subject to important constitutional limitations." (citing *Chadha*, 462 U.S. at 941 42)).

official statements, the Government contends. *Id.* at 51.[20] We recognize that in many cases, campaign statements may not reveal all that much about a government actor's purpose. But we decline to impose a bright-line rule against considering campaign statements, because as with any evidence, we must make an individualized determination as to a statement's relevancy and probative value in light of all the circumstances. The campaign statements here are probative of purpose because they are closely related in time, attributable to the primary decisionmaker, and specific and easily connected to the challenged action. *See Glassroth*, 335 F.3d at 1297 (reviewing an elected judge's campaign materials that proclaimed him the "Ten Commandment's Judge" as part of its inquiry into the constitutionality of a Ten Commandments display he installed); *see also Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 463 (1982) (considering facially

[20] The government also suggests that we can never rely on private communications to impute an improper purpose to a government actor. *See, e.g.*, *Modrovich v. Allegheny County*, 385 F.3d 397, 411 12 (3d Cir. 2004) (limiting its review to statements made by the elected officials who oversaw the government action). But this is incorrect. These cases merely establish that the motives of people not involved in the decisionmaking process cannot *alone* evince the government's motive. *See Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998) ("[R]emarks by non-decisionmakers or remarks unrelated to the decisionmaking process itself are not *direct* evidence of discrimination." (emphasis added)). But when those statements reveal something about the government's purpose, they are certainly part of the evidence we review for purpose. In *McCreary*, the Court noted that a pastor had delivered a religious message at the ceremony for the challenged religious display. 545 U.S. at 869. Based on this and other evidence of purpose, the Court concluded that "[t]he reasonable observer could only think that the [government] meant to emphasize and celebrate the [display's] religious message." *Id.* In any event, none of these cases contemplate the situation here, where the private speaker and the government actor are one and the same. We need not impute anyone's purpose to anyone else, for the same person has espoused these intentions all along. The distinction between candidate and elected official is thus an artificial one where the inquiry is only whether the reasonable observer would understand the candidate's statements to explain the purpose of his actions once elected.

neutral campaign statements related to bussing in an equal protection challenge); *California v. United States*, 438 U.S. 645, 663 64 (1978) (referring to candidates' political platforms when considering the Reclamation Act of 1902); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 68 (1977) (explaining that in the equal protection context, "[w]hen there is [] proof that a discriminatory purpose has been a motivating factor in the decision," a court may consider "contemporary statements by members of the decisionmaking body").

Just as the reasonable observer's "world is not made brand new every morning," *McCreary*, 545 U.S. at 866, nor are we able to awake without the vivid memory of these statements. We cannot shut our eyes to such evidence when it stares us in the face, for "there's none so blind as they that won't see." Jonathan Swift, *Polite Conversation* 174 (Chiswick Press ed., 1892). If and when future courts are confronted with campaign or other statements proffered as evidence of governmental purpose, those courts must similarly determine, on a case-by-case basis, whether such statements are probative evidence of governmental purpose. Our holding today neither limits nor expands their review.[21]

The Government argues that reviewing campaign statements here would encourage scrutiny of all religious statements ever made by elected officials, even remarks from before they assumed office. Appellants' Br. 49 50. But our review creates

[21] This finding comports with the *McCreary* Court's observation that "past actions [do not] forever taint" a government action, 545 U.S. at 873 74. Whether a statement continues to taint a government action is a fact-specific inquiry for the court evaluating the statement.

no such sweeping implications, because as the Supreme Court has counseled, our purpose analysis "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights*, 429 U.S. at 266; *see also Lee v. Weisman*, 505 U.S. 577, 597 (1992) ("Our Establishment Clause jurisprudence remains a delicate and fact-sensitive one . . . ."). Just as a reasonable observer would not understand general statements of religious conviction to inform later government action, nor would we look to such statements as evidence of purpose. A person's particular religious beliefs, her college essay on religious freedom, a speech she gave on the Free Exercise Clause rarely, if ever, will such evidence reveal anything about that person's actions once in office. For a past statement to be relevant to the government's purpose, there must be a substantial, specific connection between it and the challenged government action. And here, in this highly unique set of circumstances, there is a direct link between the President's numerous campaign statements promising a Muslim ban that targets territories, the discrete action he took only one week into office executing that exact plan, and EO-2, the "watered down" version of that plan that "get[s] just about everything," and "in some ways, more." J.A. 370.

For similar reasons, we reject the Government's argument that our review of these campaign statements will "inevitably 'chill political debate during campaigns.'" Appellants' Br. 50 (quoting *Phelps v. Hamilton*, 59 F.3d 1058, 1068 (10th Cir. 1995)). Not all not even most political debate will have any relevance to a challenged government action. Indeed, this case is unique not because we are considering campaign statements, but because we have such directly relevant and probative statements of

government purpose at all. *See Smith v. Town of Clarkton*, 682 F.2d 1055, 1064 (4th Cir. 1982) (observing that government actors "seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate"). To the extent that our review chills campaign promises to condemn and exclude entire religious groups, we think that a welcome restraint.

Lastly, the Government contends that we are ill-equipped to "attempt[] to assess what campaign statements reveal about the motivation for later action." Appellants' Br. 50. The Government argues that to do so would "mire [us] in a swamp of unworkable litigation," *id.* (quoting Amended Order, *Washington v. Trump*, No. 17-35105, slip op. at 13 (9th Cir. Mar. 17, 2017) (Kozinski, J., dissenting from denial of reconsideration en banc)), and "forc[e us] to wrestle with intractable questions," such as "the level of generality at which a statement must be made, by whom, and how long after its utterance the statement remains probative." *Id.* But discerning the motives behind a challenged government action is a well-established part of our purpose inquiry. *McCreary*, 545 U.S. at 861 ("Examination of purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country, and governmental purpose is a key element of a good deal of constitutional doctrine." (citations omitted)). As part of this inquiry, courts regularly evaluate decisionmakers' statements that show their purpose for acting. *See, e.g.*, *Green v. Haskell Cty. Bd. of Comm'rs*, 568 F.3d 784, 801 (10th Cir. 2009) (considering news reports quoting county commissioners who described both their determination to keep challenged religious display at issue and the strength of their religious beliefs); *Glassroth*, 355 F.3d at 1297 (reviewing elected judge's campaign

materials for evidence of his purpose in installing religious display); *Brown v. Gilmore*, 258 F.3d 265, 277 (4th Cir. 2001) (reviewing state legislators' statements in discerning purpose of statute challenged under the Establishment Clause); *see also Edwards*, 482 U.S. at 586 87 (looking to statute's text together with its sponsor's public comments to discern its purpose). And the purpose inquiry is not limited to Establishment Clause challenges; we conduct this analysis in a variety of contexts. *See, e.g.*, *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (striking down federal statute based in part on "strong evidence" that "the congressional purpose [was] to influence or interfere with state sovereign choices about who may be married"); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 80 (1979) (upholding public hiring preferences based in part on finding that government had not created preferences with purpose of discriminating on the basis of sex); *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 219 (4th Cir. 2016), *cert. denied sub nom. North Carolina v. N.C. State Conference of NAACP*, No. 16-833, 2017 WL 2039439 (U.S. May 15, 2017) (concluding that challenged voting restrictions were unconstitutional because they were motivated by racially discriminatory intent). We therefore see nothing "intractable" about evaluating a statement's probative value based on the identity of the speaker and how specifically the statement relates to the challenged government action, for this is surely a routine part of constitutional analysis. And this analysis is even more straightforward here, because we are not attempting to discern motive from many legislators' statements, as in *Brown*, but rather are looking primarily to one person's statements to discern that person's motive for taking a particular action once in office.

The Government has repeatedly asked this Court to ignore evidence, circumscribe our own review, and blindly defer to executive action, all in the name of the Constitution's separation of powers. We decline to do so, not only because it is the particular province of the judicial branch to say what the law is, but also because we would do a disservice to our constitutional structure were we to let its mere invocation silence the call for meaningful judicial review. The deference we give the coordinate branches is surely powerful, but even it must yield in certain circumstances, lest we abdicate our own duties to uphold the Constitution.

EO-2 cannot be divorced from the cohesive narrative linking it to the animus that inspired it. In light of this, we find that the reasonable observer would likely conclude that EO-2's primary purpose is to exclude persons from the United States on the basis of their religious beliefs. We therefore find that EO-2 likely fails *Lemon*'s purpose prong in violation of the Establishment Clause.[22] Accordingly, we hold that the district court did not err in concluding that Plaintiffs are likely to succeed on the merits of their Establishment Clause claim.

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[22] What is more, we think EO-2 would likely fail any purpose test, for whether religious animus motivates a government action is a fundamental part of our Establishment Clause inquiry no matter the degree of scrutiny that applies. *See, e.g.*, *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1826 (2014) (upholding town's legislative prayer policy in part because "[i]n no instance did town leaders signal disfavor toward nonparticipants or suggest that their stature in the community was in any way diminished"); *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 696 (1989) (finding that the challenged statute satisfied *Lemon*'s purpose prong in part because "there is no allegation that [it] was born of animus"); *Lynch*, 465 U.S. at 673 (stating that the Establishment Clause "forbids hostility toward any [religion]"); *see also* Brief for Constitutional Law Scholars 6 11. There is simply too much evidence that EO-2 was motivated by religious animus for it to survive any measure of constitutional review.

B.

Because we uphold the district court's conclusion that Plaintiffs are likely to succeed on the merits of their Establishment Clause claim, we next consider whether Plaintiffs have demonstrated that they are likely to suffer irreparable harm in the absence of a preliminary injunction. *Winter*, 555 U.S. at 22; *Musgrave*, 553 F.3d at 298. As we have previously recognized, "in the context of an alleged violation of First Amendment rights, a plaintiff's claimed irreparable harm is inseparably linked to the likelihood of success on the merits." *Centro Tepeyac v. Montgomery County*, 722 F.3d 184, 190 (4th Cir. 2013) (en banc) (quoting *Centro Tepeyac v. Montgomery County*, 779 F. Supp. 2d 456, 471 (D. Md. 2011)). Accordingly, our finding that Plaintiffs are likely to succeed on the merits of their constitutional claim counsels in favor of finding that in the absence of an injunction, they will suffer irreparable harm.

Indeed, the Supreme Court has stated in no uncertain terms that "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion); *see also Johnson v. Bergland*, 586 F.2d 993, 995 (4th Cir. 1978) ("Violations of first amendment rights constitute per se irreparable injury."). Though the *Elrod* Court was addressing freedom of speech and association, our sister circuits have interpreted it to apply equally to Establishment Clause violations. *See, e.g.*, *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 302 (D.C. Cir. 2006); *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996); *Parents' Ass'n of P.S. 16 v. Quinones*, 803 F.2d 1235, 1242 (2d Cir. 1986); *ACLU of Ill. v. City of St. Charles*, 794 F.2d 265, 274

(7th Cir. 1986). We agree with these courts that because of "the inchoate, one-way nature of Establishment Clause violations," they create the same type of immediate, irreparable injury as do other types of First Amendment violations. *Chaplaincy of Full Gospel Churches*, 454 F.3d at 303; *see also id.* ("[W]hen an Establishment Clause violation is alleged, infringement occurs the moment the government action takes place . . . ."). We therefore find that Plaintiffs are likely to suffer irreparable harm if Section 2(c) of EO-2 takes effect.

C.

Even if Plaintiffs are likely to suffer irreparable harm in the absence of a preliminary injunction, we still must determine that the balance of the equities tips in their favor, "pay[ing] particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). This is because "courts of equity may go to greater lengths to give 'relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.'" *E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 826 (4th Cir. 2004) (quoting *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 552 (1937)). As the district court did, we consider the balance of the equities and the public interest factors together.

The Government first contends that "the injunction causes [it] direct, irreparable injury" that outweighs the irreparable harm to Plaintiffs because "'no governmental interest is more compelling than the security of the Nation.'" Appellants' Br. 54 (quoting *Haig v. Agee*, 453 U.S. 280, 307 (1981)). When it comes to national security, the

Government argues, the judicial branch "should not second-guess" the President's "'[p]redictive judgment[s].'" Appellants' Br. 55 (quoting *Dep't of the Navy v. Egan*, 484 U.S. 518, 529 (1988)). The Government further argues that the injunction causes institutional injury, because according to two single-Justice opinions, "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). The Government contends that this principle applies here because the President "represents the people of all 50 states." Appellants' Reply Br. 25.

At the outset, we reject the notion that the President, because he or she represents the entire nation, suffers irreparable harm whenever an executive action is enjoined. This Court has held that the Government is "in no way harmed by issuance of a preliminary injunction which prevents [it] from enforcing restrictions likely to be found unconstitutional." *Centro Tepeyac*, 722 F.3d at 191 (quoting *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002)). "If anything," we said, "the system is improved by such an injunction." *Id.* (quoting *Giovani Carandola*, 303 F.3d at 521). Because Section 2(c) of EO-2 is likely unconstitutional, allowing it to take effect would therefore inflict the greater institutional injury. And we are not persuaded that the general deference we afford the political branches ought to nevertheless tip the equities in the Government's favor, for even the President's actions are not above judicial scrutiny,

and especially not where those actions are likely unconstitutional. *See Zadvydas*, 533 U.S. at 695; *Chadha*, 462 U.S. at 941 42.

We are likewise unmoved by the Government's rote invocation of harm to "national security interests" as the silver bullet that defeats all other asserted injuries. *See United States v. Robel*, 389 U.S. 258, 264 (1967) ("Th[e] concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart. . . . [O]ur country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile."). National security may be the most compelling of government interests, but this does not mean it will always tip the balance of the equities in favor of the government. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010) (agreeing with the dissent that the government's "authority and expertise in [national security and foreign relations] matters do not automatically trump the Court's own obligation to secure the protection that the Constitution grants to individuals" (quoting *id.* at 61 (Breyer, J., dissenting))). A claim of harm to national security must still outweigh the competing claim of injury. Here and elsewhere, the Government would have us end our inquiry without scrutinizing either Section 2(c)'s stated purpose or the Government's asserted interests, but "unconditional deference to a government agent's invocation of 'emergency' . . . has a lamentable place in our history,"

Patrolmen's Benevolent Ass'n of New York v. City of New York, 310 F.3d 43, 53 54 (2d. Cir. 2002) (citing *Korematsu v. United States*, 323 U.S. 214, 223 (1944)), and is incompatible with our duty to evaluate the evidence before us.

As we previously determined, the Government's asserted national security interest in enforcing Section 2(c) appears to be a post hoc, secondary justification for an executive action rooted in religious animus and intended to bar Muslims from this country. We remain unconvinced that Section 2(c) has more to do with national security than it does with effectuating the President's promised Muslim ban. We do not discount that EO-2 may have some national security purpose, nor do we disclaim that the injunction may have some impact on the Government. But our inquiry, whether for determining Section 2(c)'s primary purpose or for weighing the harm to the parties, is one of balance, and on balance, we cannot say that the Government's asserted national security interest outweighs the competing harm to Plaintiffs of the likely Establishment Clause violation.

For similar reasons, we find that the public interest counsels in favor of upholding the preliminary injunction. As this and other courts have recognized, upholding the Constitution undeniably promotes the public interest. *Giovani Carandola*, 303 F.3d at 521 ("[U]pholding constitutional rights surely serves the public interest."); *see also Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights." (quoting *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 974 (9th Cir. 2002))); *Dayton Area Visually Impaired Pers., Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) ("[T]he public as a

whole has a significant interest in ensuring . . . protection of First Amendment liberties."). These cases recognize that when we protect the constitutional rights of the few, it inures to the benefit of all. And even more so here, where the constitutional violation injures Plaintiffs and in the process permeates and ripples across entire religious groups, communities, and society at large.

When the government chooses sides on religious issues, the "inevitable result" is "hatred, disrespect and even contempt" towards those who fall on the wrong side of the line. *Engel v. Vitale*, 370 U.S. 421, 431 (1962). Improper government involvement with religion "tends to destroy government and to degrade religion," *id.*, encourage persecution of religious minorities and nonbelievers, and foster hostility and division in our pluralistic society. The risk of these harms is particularly acute here, where from the highest elected office in the nation has come an Executive Order steeped in animus and directed at a single religious group. "The fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J. concurring). We therefore conclude that enjoining Section 2(c) promotes the public interest of the highest order. And because Plaintiffs have satisfied all the requirements for securing a preliminary injunction, we find that the district court did not abuse its discretion in enjoining Section 2(c) of EO-2.

V.

Lastly, having concluded that Plaintiffs are entitled to a preliminary injunction, we address the scope of that injunction. The Government first argues that the district court erred by enjoining Section 2(c) nationwide, and that any injunctive relief should be limited solely to Plaintiffs.

It is well-established that "district courts have broad discretion when fashioning injunctive relief." *Ostergren v. Cuccinelli*, 615 F.3d 263, 288 (4th Cir. 2010). Nevertheless, "their powers are not boundless." *Id.* The district court's choice of relief "should be carefully addressed to the circumstances of the case," *Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001), *overruled on other grounds by Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544 (4th Cir. 2012), and "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs," *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). Courts may issue nationwide injunctions consistent with these principles. *See Richmond Tenants Org., Inc. v. Kemp*, 956 F.2d 1300, 1308 09 (4th Cir. 1992).

The district court here found that a number of factors weighed in favor of a nationwide injunction, and we see no error. First, Plaintiffs are dispersed throughout the United States. *See* J.A. 263, 273; *see also Richmond Tenants Org.*, 956 F.2d at 1308 09 (upholding nationwide injunction where challenged conduct caused irreparable harm in myriad jurisdictions across the country). Second, nationwide injunctions are especially appropriate in the immigration context, as Congress has made clear that "the immigration laws of the United States should be enforced vigorously and *uniformly*." *Texas v. United*

States, 809 F.3d 134, 187 88 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (quoting Immigration Reform and Control Act of 1996, Pub. L. No. 99-603, § 115(1), 100 Stat. 3359, 3384); *see also Arizona v. United States*, 132 S. Ct. 2492, 2502 (2015) (describing the "comprehensive and unified system" of "track[ing] aliens within the Nation's borders"). And third, because Section 2(c) likely violates the Establishment Clause, enjoining it only as to Plaintiffs would not cure the constitutional deficiency, which would endure in all Section 2(c)'s applications. Its continued enforcement against similarly situated individuals would only serve to reinforce the "message" that Plaintiffs "are outsiders, not full members of the political community." *Santa Fe*, 530 U.S. at 309 (quoting *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)). For these reasons, we find that the district court did not abuse its discretion in concluding that a nationwide injunction was "necessary to provide complete relief." *Madsen*, 512 U.S. at 778.

Finally, the Government argues that the district court erred by issuing the injunction against the President himself. Appellants' Br. 55 (citing *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1866) (finding that a court could not enjoin the President from carrying out an act of Congress)). We recognize that "in general, 'this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties,'" *Franklin v. Massachusetts*, 505 U.S. 788, 802 03 (1992) (opinion of O'Connor, J.) (quoting *Johnson*, 71 U.S. at 501), and that a "grant of injunctive relief against the President himself is extraordinary, and should . . . raise[] judicial eyebrows," *id.* at 802. In light of the Supreme Court's clear warning that such relief should be ordered only in the rarest of circumstances we find that the district court erred in issuing an injunction

against the President himself. We therefore lift the injunction as to the President only. The court's preliminary injunction shall otherwise remain fully intact.

To be clear, our conclusion does not "in any way suggest[] that Presidential action is *unreviewable*. Review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive." *Franklin*, 505 U.S. at 828 (Scalia, J., concurring in part and concurring in the judgment). Even though the President is not "directly bound" by the injunction, we "assume it is substantially likely that the President . . . would abide by an authoritative interpretation" of Section 2(c) of the Second Executive Order. *Id.* at 803 (opinion of O'Connor, J.).

VI.

For all of these reasons, we affirm in part and vacate in part the preliminary injunction awarded by the district court. We also deny as moot Defendants' motion for a stay pending appeal.

AFFIRMED IN PART, VACATED IN PART

TRAXLER, Circuit Judge, concurring in the judgment:

I concur in the judgment of the majority insofar as it affirms the district court's issuance of a nationwide preliminary injunction as to Section 2(c) of the Executive Order against the officers, agents, and employees of the Executive Branch of the United States, and anyone acting under their authorization or direction, who would attempt to enforce it, because it likely violates the Establishment Clause of the United States Constitution. I also concur in the judgment of the majority to lift the injunction as to President Trump himself.

BARBARA MILANO KEENAN, Circuit Judge, with whom JUDGE THACKER joins except as to Part II.A.i., concurring in part and concurring in the judgment:

I concur in the majority opinion's analysis with respect to its conclusions: (1) that the stated "national security purpose" of the Second Executive Order[1] likely fails *Mandel*'s "bona fide" test and violates the Establishment Clause, *see Kleindienst v. Mandel*, 408 U.S. 753 (1972); and (2) that the record before us supports the award of a nationwide injunction.[2] I write separately to express my view that although the plaintiffs are unlikely to succeed on the merits of their claim under Section 1152(a)(1)(A), their request for injunctive relief under the INA nevertheless is supported by the failure of Section 2(c) to satisfy the threshold requirement of Section 1182(f) for the President's lawful exercise of authority.[3]

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[1] Exec. Order No. 13,780, *Protecting the Nation from Foreign Terrorist Entry Into the United States*, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

[2] Based on my view that the Second Executive Order does not satisfy the threshold requirement of 8 U.S.C. § 1182(f) for exercise of a president's authority under that statute, I would conclude that the Second Executive Order is not "facially legitimate" within the meaning of *Mandel*, 408 U.S. at 770. Nevertheless, I join in the majority opinion's holding that the plaintiffs are likely to succeed on the merits of their Establishment Clause claim, based on my further conclusion that the Second Executive Order likely fails *Mandel*'s "bona fide" test. In reaching this conclusion, I additionally note that I do not read the majority opinion as holding that a plausible allegation of bad faith alone would justify a court's decision to look behind the government's proffered justification for its action. Rather, in accordance with Justice Kennedy's concurrence in *Din*, a plaintiff must make an affirmative showing of bad faith to satisfy the "bona fide" requirement of *Mandel*. *See Kerry v. Din*, 135 S. Ct. 2128, 2140 41 (2015) (Kennedy, J., concurring in the judgment).

[3] We may consider this facial deficiency not raised by the plaintiffs because this defect is apparent from the record. *See Drager v. PLIVA USA, Inc.*, 741 F.3d 470, 474 (Continued)

I.

As an initial matter, I conclude that John Doe #1 has standing to raise a claim that the Second Executive Order violates the INA.[4] To establish standing under Article III, a plaintiff must show that he has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). A plaintiff seeking "to enjoin a future action must demonstrate that he is immediately in danger of sustaining some direct injury as the result" of the challenged conduct, which threat of injury is "both real and immediate." *Beck v. McDonald*, 848 F.3d 262, 277 (4th Cir. 2017) (internal quotation marks omitted) (quoting *Lebron v. Rumsfeld*, 670 F.3d 540, 560 (4th Cir. 2012)).

Prolonged separation from one's family members constitutes a cognizable injury-in-fact. *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) (per curiam). As the government concedes, by barring entry of nationals from the six identified countries, Section 2(c) of the Second Executive Order operates to delay, or ultimately to prevent, the issuance of visas to nationals from those countries.

(4th Cir. 2014) (explaining that the Court may affirm on any grounds apparent from the record).

[4] Because only one plaintiff must have standing for the Court to consider a particular claim, I do not address whether the other plaintiffs also have standing to challenge the Second Executive Order under the INA. *See Bostic v. Schaefer*, 760 F.3d 352, 370 71 (4th Cir. 2014).

Before the President issued the Second Executive Order, John Doe #1 filed a visa application on behalf of his Iranian national wife, and took substantial steps toward the completion of the visa issuance process. However, his wife's request for a visa is still pending. It is self-evident from the language and operation of the Order that the 90-day "pause" on entry, which the government may extend, is likely to delay the issuance of a visa to John Doe #1's wife and her entry into the United States, a likelihood that is not remote or speculative.[5] Accordingly, I conclude that John Doe #1 has established the existence of an injury-in-fact that is fairly traceable to the Second Executive Order, and which is likely to be redressed by a favorable decision in this case.

II.

I turn to consider whether the plaintiffs are entitled to a preliminary injunction based on the likelihood that the Second Executive Order violates the INA. This Court evaluates a district court's decision to grant a preliminary injunction based on an abuse-of-discretion standard. *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 366 (4th Cir. 2012). Under this standard, we review the district court's factual findings for clear error and review its legal conclusions de novo. *Dewhurst v. Century Aluminum Co.*, 649 F.3d 287, 290 (4th Cir. 2011).

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[5] For the same reasons, I reject the government's contention that the plaintiffs' claims are not ripe for review. The harm to the plaintiffs caused by separation from their family members is imminent and concrete, and is not ameliorated by the hypothetical possibility that the plaintiffs might receive a discretionary waiver under Section 3(c) of the Second Executive Order at some point in the future.

A preliminary injunction is an "extraordinary remedy," which may be awarded only upon a "clear showing" that a plaintiff is entitled to such relief. *The Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 345 46 (4th Cir. 2009) (citing *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22 (2008)), *vacated on other grounds*, 559 U.S. 1089 (2010). Preliminary relief affords a party before trial the type of relief ordinarily available only after trial. *Id.* at 345. A preliminary injunction must be supported by four elements: (1) a likelihood of success on the merits; (2) that the plaintiff likely will suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities weighs in the plaintiff's favor; and (4) that a preliminary injunction is in the public interest. *Id.* at 346.

A.

I begin by considering whether the plaintiffs are likely to succeed on the merits of a claim that the Second Executive Order fails to comply with the requirements of the INA. In interpreting a statute, courts first must consider the plain meaning of the statutory language. *United States v. Ide*, 624 F.3d 666, 668 (4th Cir. 2010). A statute's plain meaning derives from consideration of all the words employed, rather than from reliance on isolated statutory phrases. *Id.* (citing *United States v. Mitchell*, 518 F.3d 230, 233 34 (4th Cir. 2008)).

i.

Initially, I would reject the plaintiffs' contention that 8 U.S.C. § 1152(a)(1)(A), which prohibits discrimination on the basis of nationality in the issuance of immigrant visas, operates as a limitation on the President's authority under 8 U.S.C. § 1182(f) to

"suspend the entry of all aliens or any class of aliens" if he finds that the entry of such aliens "would be detrimental to the interests of the United States." Section 1152(a)(1)(A) provides that:

> [N]o person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence.

Thus, the plain language of Section 1152(a)(1)(A) addresses an alien's ability to obtain an immigrant visa. Section 1182(f), on the other hand, explicitly addresses an alien's ability to *enter* the United States, and makes no reference to the issuance of visas. *See* 8 U.S.C. § 1182(f). I am unpersuaded by the plaintiffs' attempt to read into Section 1152(a)(1)(A) terms that do not appear in the statute's plain language.

Sections 1152(a)(1)(A) and 1182(f) address two distinct actions in the context of immigration, namely, the issuance of a visa and the denial of an alien's ability to enter the United States. Indeed, the fact that an alien possesses a visa does not guarantee that person's ability to enter the United States. For example, an alien who possesses a visa may nonetheless be denied admission into the United States for a variety of reasons set forth elsewhere in the INA. *See* 8 U.S.C. § 1201(h) ("Nothing in this chapter shall be construed to entitle any alien, to whom a visa or other documentation has been issued, to be admitted [sic] the United States, if, upon arrival at a port of entry in the United States, he is found to be inadmissible under this chapter, or any other provision of law."). For these reasons, I would reject the plaintiffs' assertion that Section 1152(a)(1)(A) provides a basis for affirming the preliminary injunction issued by the district court.

ii.

Nevertheless, I would conclude that the plaintiffs' request for injunctive relief is supported by the President's failure to comply with Section 1182(f). In issuing his proclamation under Section 2(c), the President relied exclusively on two provisions of the INA. The President stated in material part:

> I hereby proclaim, pursuant to sections 212(f) and 215(a) of the INA, 8 U.S.C. 1182(f) and 1185(a), that the unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen would be detrimental to the interests of the United States. I therefore direct that the entry into the United States of nationals of those six countries be suspended for 90 days from the effective date of this order, subject to the limitations, waivers, and exceptions set forth in sections 3 and 12 of this order.

82 Fed. Reg. at 13,213.

Section 1185(a), however, does not confer any authority on a president. Instead, that statute imposes certain requirements on persons traveling to and from the United States, and renders unlawful their failure to comply with the requirements of the statute.

In contrast, Section 1182(f) addresses a president's authority to impose restrictions on the entry of aliens into the United States. Section 1182(f) states, in relevant part: "Whenever the [p]resident finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States," the president may "suspend the entry [into the United States] of all aliens or any class of aliens." Although this language provides broad discretion to a president to suspend the entry of certain aliens and classes of aliens, that discretion is not unlimited.

The plain language of Section 1182(f) permits a president to act only if he "finds" that entry of the aliens in question "*would be* detrimental to the interests of the United States" (emphasis added). In my view, an unsupported conclusion will not satisfy this "finding" requirement. Otherwise, a president could act in total disregard of other material provisions of the INA, thereby effectively nullifying that complex body of law enacted by Congress.

Here, the President's "finding" in Section 2(c) is, in essence, a non sequitur because the "finding" does not follow from the four corners of the Order's text. In particular, the text fails to articulate a basis for the President's conclusion that entry by any of the approximately 180 million[6] individuals subject to the ban "would be detrimental to the interests of the United States."

I reach this conclusion by examining the Order's relevant text. In Section 1(a) of the Order, the President declares that the policy of the United States is "to protect its citizens from terrorist attacks, including those committed by foreign nationals," and "to improve the screening and vetting protocols and procedures" involved in issuing visas and in the administration of the United States Refugee Admissions Program. 82 Fed.

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[6] *See* Cent. Intelligence Agency, *The World Factbook*, *Country Comparison: Population*, https://www.cia.gov/library/publications/the-world-factbook/rankorder/2119rank.html (last visited May 19, 2017) (saved as ECF opinion attachment) (listing populations of the six identified countries, in the total amount of more than 180 million). Notably, the class of banned "nationals" potentially includes citizens of one of the six identified countries whether or not those citizens have ever been physically present in one of these countries. *See* Cent. Intelligence Agency, *The World Factbook*, *Field Listing: Citizenship*, https://www.cia.gov/library/publications/the-world-factbook/fields/2263.html (last visited May 19, 2017) (saved as ECF opinion attachment).

Reg. at 13,209. The Order explains that such screening and vetting procedures are instrumental "in detecting foreign nationals who may commit, aid, or support acts of terrorism and in preventing those individuals from entering the United States." *Id.*

The Order further states that the governments of Iran, Libya, Somalia, Sudan, Syria, and Yemen are unlikely to be willing or able "to share or validate important information about individuals seeking to travel to the United States," because these countries: (1) have porous borders facilitating "the illicit flow of weapons, migrants, and foreign terrorist fighters"; (2) have been compromised by terrorist organizations; (3) contain "active conflict zones"; or (4) are state sponsors of terrorism. *Id.* at 13,210 11. In light of these conditions, the Second Executive Order proclaims that "the risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harm the national security of the United States is unacceptably high." *Id.* at 13,211.

Significantly, however, the Second Executive Order does not state that any *nationals* of the six identified countries, *by virtue of their nationality*, intend to commit terrorist acts in the United States or otherwise pose a detriment to the interests of the United States. Nor does the Order articulate a relationship between the unstable conditions in these countries and any supposed propensity of the nationals of those countries to commit terrorist acts or otherwise to endanger the national security of the United States. For example, although the Order states that several of the six countries permit foreigners to establish terrorist safe havens within the countries' borders, the Order does not assert that any *nationals* of the six countries are likely to have joined

terrorist organizations operating within those countries, or that members of terrorist organizations are likely to pose as *nationals* of these six countries in order to enter the United States to "commit, aid, or support acts of terrorism." *See id.* at 13,210 12 (noting, among other things, that the Syrian government "has allowed or encouraged extremists to pass through its territory to enter Iraq," and that "ISIS continues to attract foreign fighters to Syria and to use its base in Syria to plot or encourage attacks around the globe, including in the United States").

The text of the Second Executive Order therefore does not identify a basis for concluding that entry of any member of the particular class of aliens, namely, the more than 180 million nationals of the six identified countries, would be detrimental to the interests of the United States. In the absence of any such rationale articulating the risks posed by this class of foreign nationals, the President's proclamation under Section 2(c) does not comply with the "finding" requirement of the very statute he primarily invokes to issue the ban imposed by Section 2(c).

The government asserted at oral argument in this case that the Second Executive Order nevertheless can stand on the rationale that the President is "not sure" whether any of the 180 million nationals from the six identified countries present a risk to the United States. Oral Arg. 38:04 40:11. I disagree that this rationale is sufficient to comply with the specific terms of Section 1182(f). Although this statute does not require the President to find that the entry of any alien or class of aliens would present a danger to the United States, the statutory text plainly requires more than vague uncertainty regarding whether their entry might be detrimental to our nation's interests. Indeed, given the scope of

Section 2(c), the President was required under Section 1182(f) to find that entry of any members of the identified class *would be* detrimental to the interests of the United States.

Instead of articulating a basis why entry of these foreign nationals "would be detrimental" to our national interests, the Order merely proposes a process under which the executive branch will study the question. *See* 82 Fed. Reg. at 13,212 13. This "study" proposal is an implicit acknowledgement that, presently, there is no affirmative basis for concluding that entry of nationals from these six countries "*would be* detrimental to the interests of the United States." 8 U.S.C. § 1182(f) (emphasis added).

The government likewise fails in its attempt to justify the Second Executive Order by relying on the prior exclusion of individuals from the Visa Waiver Program who had certain connections to the six countries identified in the Order. *See* 82 Fed. Reg. at 13,209. Generally, the Visa Waiver Program allows nationals of specific countries to travel to the United States without a visa for purposes of tourism or business for up to 90 days. *See generally* 8 U.S.C. § 1187. Based on modifications to the Program made by Congress in 2015 and by the Secretary of Homeland Security in 2016, people with certain connections to the six named countries no longer were permitted to participate in the Program.[7] As a result, those newly ineligible aliens became subject to the *standard*

[7] *See* Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015, Pub. L. No. 114-113, § 203, 129 Stat. 2242, 2989 91; Department of Homeland Security, U.S. Customs and Border Protection-009 Electronic System for Travel Authorization System of Records, 81 Fed. Reg. 39,680, 39,682 (June 17, 2016).

procedures required for the issuance of visas.[8] Thus, exclusion from the Visa Waiver Program merely reimposed for such aliens the customary requirements for obtaining a visa, and did not impose any additional conditions reflecting a concern that their entry "would be detrimental to the interests of the United States." Further, the above-described limitations of the Visa Waiver Program underscore the fact that, currently, the relevant class of aliens does not enjoy "*unrestricted* entry" into the United States as incorrectly stated in Section 2(c) of the Second Executive Order. *See* 82 Fed. Reg. at 13,213 (emphasis added).

Accordingly, I would hold that the text of Section 2(c) fails to meet the statutory precondition for the lawful exercise of a president's authority under Section 1182(f). I thus conclude that the plaintiffs likely would succeed on the merits of this particular statutory issue. *See Winter*, 555 U.S. at 20.

B.

I also would conclude with respect to Section 1182(f) that the plaintiffs would satisfy the remaining *Winter* factors, because they are "likely to suffer irreparable harm in the absence of preliminary relief," the balance of the equities would resolve in their favor, and an injunction would be in the public interest. *Id.* First, at a minimum, plaintiff John Doe #1 has shown that absent an injunction, he likely will be subject to imminent and

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[8] *See* U.S. Customs & Border Prot., *Visa Waiver Program Improvement and Terrorist Travel Prevention Act Frequently Asked Questions*, https://www.cbp.gov/travel/international-visitors/visa-waiver-program/visa-waiver-program-improvement-and-terrorist-travel-prevention-act-faq (last visited May 19, 2017) (saved as ECF opinion attachment).

irreparable harm based on the prolonged separation from his wife that will result from enforcement of the Second Executive Order. *See Andreiu v. Ashcroft*, 253 F.3d 477, 484 (9th Cir. 2001) (en banc). And, based on my conclusion that Section 2(c) is invalid on its face, I would hold that an injunction should be issued on a nationwide basis.

Next, the balance of harms weighs in favor of granting a preliminary injunction. *See Winter*, 555 U.S. at 24. The government's interest in enforcing laws related to national security as a general matter would be a strong factor in its favor. *See Haig v. Agee*, 453 U.S. 280, 307 (1981). However, because the Second Executive Order does not comply with the threshold requirement for a president's lawful exercise of authority under Section 1182(f), the government's interest cannot outweigh the real harms to the affected parties. *See Washington v. Trump*, 847 F.3d 1151, 1168 (9th Cir. 2017) (reviewing the First Executive Order, dismissing the government's claim of irreparable injury, and noting that "the Government has done little more than reiterate" its general interest in combating terrorism).

Finally, the public interest also strongly favors a preliminary injunction, because the public has an interest "in free flow of travel" and "in avoiding separation of families." *Id.* at 1169. And, most importantly, the public interest is served by ensuring that any actions taken by the President under Section 1182(f) are lawful and do not violate the only restraint on his authority contained in that statute.

III.

Accordingly, in addition to affirming the district court's judgment with respect to the plaintiffs' Establishment Clause claim and the issuance of a nationwide injunction, I would affirm the court's judgment and award of injunctive relief on the separate basis that the Second Executive Order is invalid on its face because it fails to comply with the "finding" requirement of Section 1182(f).

WYNN, Circuit Judge, concurring:

Invidious discrimination that is shrouded in layers of legality is no less an insult to our Constitution than naked invidious discrimination. We have matured from the lessons learned by past experiences documented, for example, in *Dred Scott* and *Korematsu*. But we again encounter the affront of invidious discrimination this time layered under the guise of a President's claim of unfettered congressionally delegated authority to control immigration and his proclamation that national security requires his exercise of that authority to deny entry to a class of aliens defined solely by their nation of origin. Laid bare, this Executive Order is no more than what the President promised before and after his election: naked invidious discrimination against Muslims. Such discrimination contravenes the authority Congress delegated to the President in the Immigration and Nationality Act (the "Immigration Act"), 8 U.S.C. § 1101 *et seq.*, and it is unconstitutional under the Establishment Clause.

To that end, I concur fully in the majority opinion, including its analysis and conclusion that Section 2(c) of the Executive Order, which suspends entry of nationals from six predominantly Muslim countries, likely violates the Establishment Clause. In particular, I agree that even when the President invokes national security as a justification for a policy that encroaches on fundamental rights, our courts must not turn a blind eye to statements by the President and his advisors bearing on the policy's purpose and constitutionality. Those statements characterized Section 2(c) as the realization of the

President's repeated promise, made before and after he took office, to ban Muslims.[1] And I agree that "the Government's asserted national security interest in enforcing Section 2(c) appears to be a post hoc, secondary justification for an executive action rooted in religious animus and intended to bar Muslims from this country."[2] *Ante* at 75.

I write separately because I believe Plaintiffs' claim that Section 2(c) exceeds the President's authority under the Immigration Act also is likely to succeed on the merits. That statute authorizes the President to suspend the "entry of any aliens or of any class of aliens" that he finds "would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f). Because the Executive Order here relies on national origin as a proxy for discrimination based on religious animus, the Government's argument that Section 2(c)'s suspension on entry "falls squarely within the President's broad authority"

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[1] The answer to the rhetorical question of whether the President will be able to "free himself from the stigma" of his own self-inflicted statements, *post* at 189, lies in determining whether the Executive Order complies with the rule of law. That requires us to consider, in each instance, how the character, temporality, and nature of the President's repeated, public embrace of an invidiously discriminatory policy offensive to the Constitution bear on a challenged policy.

[2] It strains credulity to state that "the security of our nation is indisputably *lessened* as a result of the injunction." *Post* at 188 (emphasis added). Rather, the district court's order only enjoined implementation of Section 2(c) of the Executive Order a provision that the President maintained would *increase* national security. Indeed, two reports released by the Department of Homeland Security in February 2017 and March 2017 found that citizenship is an "unlikely indicator" of whether an individual poses a terrorist threat to the United States and that most of the individuals who have become U.S.-based violent extremists have been radicalized after living in the United States for a period of years. J.A. 233. The Government has not provided any information suggesting, much less establishing, that the security risks facing our country are any different today than they were when the President first sought to impose this temporary ban only seven days into his presidency.

under Section 1182(f) essentially contends that Congress delegated to the President virtually unfettered discretion to deny entry to any class of aliens, including to deny entry solely on the basis of nationality and religion. Appellants' Br. at 28. Not so.

To the contrary, the Immigration Act provides no indication that Congress intended the "broad generalized" delegation of authority in Section 1182(f) to allow the President "to trench . . . heavily on [fundamental] rights."[3] And even if the plain language of Section 1182(f) suggested Congress had given the President such unfettered discretion to invidiously discriminate based on nationality and religion which it does not a statute delegating to the President the authority to engage in such invidious discrimination would raise grave constitutional concerns. Indeed, imposing burdens on individuals solely on the basis of their race, national origin, or religion "a classification of persons undertaken for its own sake . . . inexplicable by anything but animus towards the class it affects"[4] is "odious to a free people whose institutions are founded upon the doctrine of equality."[5] That is why even when faced with a congressional delegation of seemingly unbridled power to the President or his appointees the Supreme Court repeatedly "ha[s] read significant limitations into . . . immigration statutes in order to avoid their constitutional invalidation" when the delegation provides no explicit

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[3] *Kent v. Dulles*, 357 U.S. 116, 129 30 (1958).

[4] *Romer v. Evans*, 517 U.S. 620, 636, 632 (1996).

[5] *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

statement that Congress intended for the executive to use the delegated authority in a manner in conflict with constitutional protections.[6]

Accordingly, I conclude that Section 2(c)'s suspension on entry likely exceeds the President's authority under the Immigration Act to deny entry to classes of aliens.

I.

The majority opinion does not reach the merits of Plaintiffs' claim that Section 2(c)'s suspension on entry violates the Immigration Act, and Section 1182(f), in particular. *Ante* at 28 31. The district court, however, concluded that the Executive Order likely violates the Immigration Act insofar as Section 2(c) effectively prohibits the issuance of immigrant visas to aliens from the six countries based on their nationalities. *Int'l Refugee Assistance Project v. Trump*, -- F. Supp. 3d --, 2017 WL 1018235, at *10 (D. Md. Mar. 16, 2017). And the Government has argued, both on appeal and before the district court, that the suspension on entry falls within the President's delegated power under Section 1182(f). Appellants' Br. at 28 30. Accordingly, the question of whether Section 2(c) complies with Section 1182(f) is squarely before this Court.[7]

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[6] *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001).

[7] The Government also asserts that Section 2(c)'s suspension on entry is authorized by Section 1185(a) of the Immigration Act, which "authorizes the President to prescribe 'reasonable rules, regulations, and orders,' as well as 'limitations and exceptions,' governing the entry of aliens." Appellants' Brief at 29 (quoting 8 U.S.C. § 1185(a)). The Government does not argue that Sections 1182(f) and 1185(a) confer meaningfully different powers on the President. Because Section 1182(f) is specifically tailored to the suspension on entry, and because there is no reason to believe that the (Continued)

Section 1182(f) provides, in relevant part, that "[w]henever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate." 8 U.S.C. § 1182(f). Like the district court, the majority opinion finds, and I agree, that Plaintiffs are likely to establish based on statements by the President and his advisors that in promulgating Section 2(c), the President relied on one suspect classification (national origin) as a proxy to purposely discriminate against members of another suspect class (adherents to a particular religion) solely on the basis of their membership in that class. *Ante* at 58. Thus, in considering Plaintiffs' statutory claim, we confront the following question: Did Congress, in enacting Section 1182(f),

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analysis would be different under Section 1185(a), my analysis will proceed under Section 1182(f).

Additionally, because the Executive Order cites the Immigration Act as the sole statutory basis for the President's authority to proclaim Section 2(c)'s suspension on entry, I need not, and thus do not, take any position on the scope of the President's delegated power to deny entry to classes of aliens under other statutes. Likewise, because the claim at issue relates only to Section 2(c)'s compliance with the Immigration Act, I do not address whether, and in what circumstances, the President may deny entry to classes of aliens under his inherent powers as commander-in-chief, even absent express congressional authorization. *See The Prize Cases*, 67 U.S. 635 (1862).

Finally, I agree with Judge Keenan's analysis and conclusion that, at a minimum, John Doe #1 has standing to pursue Plaintiffs' Immigration Act claim. *Ante* at 82 83.

authorize the President to deny entry to a class of aliens on the basis of invidious discrimination?

A.

Two related canons of statutory construction bear directly on this question. First, under the "constitutional avoidance canon," "when an Act of Congress raises 'a serious doubt' as to its constitutionality, '[courts must] first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). "[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible' [courts] are obligated to construe the statute to avoid such problems." *I.N.S. v. St. Cyr*, 533 U.S. 289, 299 300 (2001) (citation omitted) (quoting *Crowell*, 285 U.S. at 62). This canon "rest[s] on the reasonable presumption that Congress did not intend [an interpretation] which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). Put differently, "[t]he courts will . . . not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

The Supreme Court has applied the constitutional avoidance canon on several occasions to narrow facially broad statutes relating to immigration and national security. For example, in *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court assessed whether Section 1231(a)(6) of the Immigration Act which provides that certain

categories of aliens who have been ordered removed "may be detained beyond the removal period" authorized the detention of such categories of aliens indefinitely. 533 U.S. at 689. Notwithstanding that Section 1231(a)(6) placed no express limitation on the duration of such detentions, the Supreme Court "read an implicit limitation into the statute . . . limit[ing] an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States." *Id.* Explaining that "permitting indefinite detention of an alien would raise a serious constitutional problem" and noting the absence of "any clear indication of congressional intent to grant the Attorney General the power to hold indefinitely in confinement an alien ordered removed," the Supreme Court concluded that the constitutional avoidance canon required adoption of the "implicit limitation." *Id.* at 690, 697.

The Supreme Court also relied on the constitutional avoidance canon in *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001). In that case, the Supreme Court rejected the Government's arguments that two statutes amending the Immigration Act (1) deprived the judiciary of jurisdiction to review habeas petitions filed by certain aliens subject to removal orders and (2) retroactively deprived certain aliens who had pled guilty to criminal offenses which convictions rendered such aliens removable the opportunity to pursue a discretionary waiver of removal, notwithstanding that such aliens had been entitled to pursue such a waiver at the time of their plea. *Id.* at 292 93, 297. In reaching these conclusions, the Supreme Court acknowledged that Congress, at least in certain circumstances, has the constitutional authority to repeal habeas jurisdiction and to make legislation retroactive. *Id.* at 298 99, 315 16. Nonetheless, because (1) the

Government's proposed constructions would require the Supreme Court to hold that Congress intended to exercise "the outer limits of [its] power" under the Constitution and (2) the legislation included no "clear, unambiguous, and express statement of congressional intent" indicating that Congress intended to exercise the "outer limits" of its power, the Supreme Court rejected the Government's positions. *Id.* at 299, 313 26.

The second applicable canon of construction which is a corollary to the constitutional avoidance canon requires an even clearer indication of congressional intent regarding the infringement on constitutional rights due to the absence of direct action by Congress. That canon forbids courts from construing a "broad generalized" delegation of authority by Congress to the executive as allowing the executive to exercise that delegated authority in a matter that "trench[es]" upon fundamental rights, *Kent v. Dulles*, 357 U.S. 116, 129 (1958), absent an "explicit" statutory statement providing the executive with such authority, *Greene v. McElroy*, 360 U.S. 474, 507 (1959). Under this canon, which I will refer to as the "delegation of authority canon," courts must "construe narrowly all delegated powers that curtail or dilute" fundamental rights. *Kent*, 357 U.S. at 129; *see also United States v. Robel*, 389 U.S. 258, 275 (1967) (Brennan, J., concurring) ("The area of permissible indefiniteness [in a delegation] narrows, however, when the regulation . . . potentially affects fundamental rights . . . . This is because the numerous deficiencies connected with vague legislative directives . . . are far more serious when liberty and the exercise of fundamental rights are at stake."). The Supreme Court requires that delegations that potentially authorize the executive to encroach on fundamental rights "be made explicitly not only to assure that individuals are not

deprived of cherished rights under procedures not actually authorized, but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting *and* implementing our laws." *Greene*, 360 U.S. at 507 (emphasis added) (citation omitted).

As with the constitutional avoidance canon, the Supreme Court has applied the delegation of authority canon to statutes involving immigration and national security. For example, in *United States v. Witkovich*, 353 U.S. 194 (1957), the Supreme Court interpreted Section 242(d)(3) of the Immigration and Nationality Act of 1952, which provided that the Attorney General could require any alien subject to a final order of deportation that had been outstanding for more than six months "to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper." 353 U.S. at 195 (quoting 8 U.S.C. § 1252(d)(3) (1952)). The Government asserted that the plain language of the provision afforded the Attorney General near unfettered discretion to demand information from such aliens. *Id.* at 198. Although the Supreme Court acknowledged that "[t]he language of [Section] 242(d)(3), if read in isolation and literally, appears to confer upon the Attorney General unbounded authority to require whatever information he deems desirable of [such] aliens," the Supreme Court limited the Attorney General's authority under Section 242(d)(3) to "questions reasonably calculated to keep the Attorney General advised regarding the continued availability for departure of aliens whose deportation is overdue." *Id.* at 199, 202. In rendering this narrowing construction, the Supreme Court emphasized, first, that

the broad reading proposed by the Government would call into question the statute's constitutional validity and, second, that the context and legislative history did not provide unambiguous evidence that Congress intended to give the Attorney General the unbridled authority the Government claimed. *Id.* at 199 200.

The Supreme Court also applied the delegation of authority canon in *Kent v. Dulles*, 357 U.S. 116 (1958). There, the Supreme Court was asked to construe a statute providing that "[t]he Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States." 357 U.S. at 123 (internal quotation marks omitted) (quoting 22 U.S.C. § 211a (1952)). Pursuant to that authority, the executive branch promulgated a regulation authorizing the Secretary of State to demand an affidavit from any passport applicant averring whether the applicant had ever been a Communist and barring issuance of passports to Communists. *Id.* at 118 & n.2. Under that regulation, the Department of State denied a passport to an applicant on grounds he refused to submit such an affidavit. *Id.* at 118 19. Thereafter, the applicant sought a declaratory judgment that the regulation was unconstitutional. *Id.* at 119. Despite the breadth of the plain language of the delegating statute, the Supreme Court "hesitate[d] to impute to Congress . . . a purpose to give [the Secretary of State] unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose." *Id.* at 128. Emphasizing (1) that the authority to deny a passport necessarily involved the power to infringe on the fundamental right to travel and (2) that the statutory delegation provision's "broad generalized" terms were devoid of any "explicit" indication Congress had intended to

"give[] the Secretary authority to withhold passports to citizens because of their beliefs or associations," the Supreme Court refused "to find in this broad generalized power an authority to trench so heavily on the rights of the citizen." *Id.* at 129 30.

Taken together, the two canons reflect the basic principle that "when a particular interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *St. Cyr*, 533 U.S. at 299; *see also United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 548 (1950) (Frankfurter, J., dissenting) (explaining that legislation potentially encroaching on fundamental rights "should not be read in such a decimating spirit unless the letter of Congress is inexorable"). Although closely related, the two canons are analytically distinct. In particular, the constitutional avoidance canon involves *direct actions* by Congress that potentially encroach upon fundamental rights. By contrast, the delegation of authority canon governs *delegations* by Congress that potentially allow a delegatee to exercise congressional power to encroach on fundamental rights. Because Congress does not itself decide when or how its delegated authority will be exercised, any encroachment on individual rights by Congress's delegatee must be supported by an "explicit" statement that Congress intended to permit such encroachment, *Greene*, 360 U.S. at 507 a more stringent requirement than the "clear indication" necessary when Congress acts directly, *Zadvydas*, 533 U.S. 696 97.

B.

The constitutional avoidance canon and the delegation of authority canon bear directly on the scope of authority conferred on the President by Congress under Section

1182(f) because, if construed broadly, Section 1182(f) could authorize the President to infringe on fundamental constitutional rights. In particular, the Supreme Court has "consistently repudiated '(d)istinctions between citizens solely because of their ancestry' [or race] as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'" *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). "[T]he imposition of special disabilities" upon a group of individuals based on "immutable characteristic[s] determined solely by the accident of birth," like race and national origin, runs contrary to fundamental constitutional values enshrined in the Fifth and Fourteenth Amendments because it "violate[s] 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility.'" *See Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion) (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)). Accordingly, the Constitution forbids "[p]referring members of any one group for no reason other than race or ethnic origin." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (Powell, J., concurring in judgment). Or, more simply, the Constitution prohibits "discrimination for its own sake." *Id.*

Although religion, unlike race and national origin, is not an immutable characteristic, the Constitution treats classifications drawn on religious grounds as equally offensive. The First Amendment "mandates governmental neutrality between religion and religion, and between religion and nonreligion." *McCreary County v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). To that end, the Constitution forbids both discriminating

against "those who embrace[] one religious faith rather than another" and "preferring some religions over others an invidious discrimination that would run afoul of the [Constitution]." *United States v. Seeger*, 380 U.S. 163, 188 (1965) (Douglas, J., concurring).

If, as the Government's argument implies, Congress delegated to the President the authority to deny entry to an alien or group of aliens based on invidious discrimination against a race, nationality, or religion, then Section 1182(f) would encroach on the core constitutional values set forth in the First, Fifth, and Fourteenth Amendments: The President could deny entry to aliens of a particular race solely based on the color of their skin. The President could deny entry to citizens of a particular nation solely on the basis of their place of birth. The President could deny entry to adherents of a particular religion solely because of their subscription to that faith. Or, as this Court concludes the President likely did here, the President could rely on one form of invidious discrimination discrimination based on national origin to serve as pretext for implementing another form of invidious discrimination discrimination based on religion.

The President justified his use of this layered invidious discrimination on grounds that citizens of the six predominantly Muslim countries subject to the suspension on entry pose a special risk to United States security. Revised Order § 1(e). In particular, the Executive Order generally points to "the significant presence in each of these countries of terrorist organizations, their members, and others exposed to those organizations." *Id.* § 1(d). The order also cites, as the sole example of an act of terrorism by a native of one

of the six countries, a native of Somalia who was brought to the United States as a refugee at the age of two and was convicted, as an adult, of "attempting to use a weapon of mass destruction as part of a plot to detonate a bomb at a crowded Christmas-tree-lighting ceremony in Portland, Oregon." *Id.* § 1(h).

Accordingly, the President relies on the acts of *specific* individuals and groups of individuals (*i.e.*, "terrorist organizations" and "their members") within the six countries to establish that *all* citizens of those countries pose a danger to the United States. Dissenting from the Supreme Court's sanctioning of the forced internment of Japanese Americans during World War II, Justice Murphy explained the danger such rationales pose to the core constitutional value of equality:

> [T]o infer that examples of individual [misconduct] prove group [misconduct] and justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for deprivation of rights. Moreover, this inference . . . has been used in support of the abhorrent and despicable treatment of minority groups by the dictatorial tyrannies which this nation is now pledged to destroy. To give constitutional sanction to that inference . . . is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow.

Korematsu v. United States, 323 U.S. 214, 240 (1944) (Murphy, J., dissenting).

To be sure, the Supreme Court has recognized that, particularly in times of war,[8] Congress has broad authority to control immigration, including the power to authorize the

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[8] Congress's constitutional power to control immigration and authority to delegate that control fundamentally differs in a time of war. *Korematsu v. United States*, 323 U.S. 214, 224 (1944) (Frankfurter, J., concurring) ("[T]he validity of action under the war power must be judged wholly in the context of war. That action is not to (Continued)

President to establish policies restricting the entry of aliens. *See Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (stating that "the power to admit or exclude aliens is a sovereign prerogative" entrusted almost exclusively to Congress). And "in the exercise of its broad power over immigration and naturalization, 'Congress regularly makes rules that would be unacceptable if applied to citizens.'" *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Mathews v. Diaz*, 426 U.S. 67, 80 (1976)).

But the Supreme Court also has long, and repeatedly, held that Congress's power to create immigration laws remains "subject to important constitutional limitations." *Zadvydas*, 533 U.S. at 695; *see also, e.g.*, *I.N.S. v. Chadha*, 462 U.S. 919, 940 41 (1983) ("The plenary authority of Congress over aliens under Art. I, § 8, cl. 4 is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power."); *Chae Chan Ping v. United States*, 130 U.S. 581, 604 (1889) (holding that Congress's constitutionally devised powers to control immigration, among other powers, are "restricted in their exercise only by the

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be stigmatized as lawless because like action in times of peace would be lawless."). The Supreme Court's broadest statements regarding the scope of the President's delegated powers over immigration which are relied upon by the Government are in cases in which Congress expressly declared war and authorized the President to deny entry to aliens as part of his prosecution of the conflict. *See, e.g.*, *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 & n.7 (1953) ("Congress expressly authorized the President to impose additional restrictions on aliens entering or leaving the United States during periods of international tension and strife [including] *the present emergency* [the Korean War]." (emphasis added)); *Knauff*, 338 U.S. at 543 ("[B]ecause the power of exclusion of aliens is also inherent in the executive department of the sovereign, Congress may in broad terms authorize the executive to exercise the power, e.g., as was done here, for the best interests of the country *during a time of national emergency* [World War II]." (emphasis added)).

constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations"). That is particularly true when the discriminatory burdens of an immigration policy fall not just on aliens who have no claim to constitutional rights, but also on citizens and other individuals entitled to constitutional protections. *Cf. Zadvydas*, 533 U.S. at 693 94 (surveying the Supreme Court's immigration jurisprudence and finding that whether a plaintiff alien could lay claim to constitutional protections "made all the difference").

Here, aliens who are denied entry by virtue of the President's exercise of his authority under Section 1182(f) can claim few, if any, rights under the Constitution. But when the President exercises that authority based solely on animus against a particular race, nationality, or religion, there is a grave risk indeed, likelihood that the constitutional harm will redound to *citizens*. For example, we hold today that the denial of entry to a class of aliens solely based on their adherence to a particular religion likely violates the Establishment Clause by sending "a state-sanctioned message that foreign-born Muslims . . . are 'outsiders, not full members of the political community.'" *Ante* at 38 (quoting *Moss v. Spartanburg Cty. Sch. Dist. Seven*, 683 F.3d 599, 607 (4th Cir. 2012)). Likewise, were the President to deny entry to a class of aliens solely based on their race, *citizens* of that race would be subjected to a constitutionally cognizable "feeling of inferiority as to their status in the community." *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 494 (1954). And denying entry to classes of aliens based on invidious discrimination has the potential to burden the fundamental right of *citizens* to marry the partner of their choice based on nothing more than the partner's race,

nationality, or religion.[9] *Loving*, 388 U.S. at 12 ("There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause."). Put simply, when the Government engages in invidious discrimination be it against aliens or citizens individuals whose rights the Constitution protects face substantial harm.

Because construing Section 1182(f) as authorizing the President to engage in invidious discrimination is plainly inconsistent with basic constitutional values and because the violation of those values implicates the rights of citizens and lawful permanent residents, not just aliens, the Government's proposed construction "raise[s] serious constitutional problems." *St. Cyr*, 533 U.S. at 299 300.

C.

Having concluded that the Government's broad reading of Section 1182(f) raises serious constitutional concerns, we must reject that construction absent a "clear indication of congressional intent" to allow the President to deny the entry of classes of aliens on invidiously discriminatory bases. *Zadvydas*, 533 U.S. at 696 97. And because Section 1182(f) involves a delegation of congressional authority, not a direct action by Congress, the indication of congressional intent to authorize the President, as delegatee, to encroach on fundamental rights must be "explicit." *Greene*, 360 U.S. at 507.

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[9] *See Kerry v. Din*, 135 S. Ct. 2128, 2142 (2015) (Breyer, J., dissenting) (stating that a United States citizen and resident has a procedural due process interest in knowing the Government's grounds for denying a visa application by her husband, an Afghan citizen with no claim to rights under the Constitution); *id.* at 2139 (Kennedy, J., concurring in judgment) (recognizing that a United States citizen may have "a protected liberty interest in the visa application of her alien spouse").

To ascertain congressional intent, we look to the "plain meaning" of Section 1182(f). *Ross v. R.A. North Dev., Inc. (In re Total Realty Mgmt.)*, 706 F.3d 245, 251 (4th Cir. 2013). "To determine a statute's plain meaning, we not only look to the language itself but also the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* (internal quotation marks omitted); *see also U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (holding that in ascertaining congressional intent, courts "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy" (internal quotation marks omitted)). Here, neither the language of Section 1182(f), nor the context in which the language is used, nor the "object and policy" underlying the Immigration Act "explicitly" state, much less "clear[ly] indicat[e]," that Congress intended to authorize the President to deny entry to aliens based on invidious discrimination.

1.

Beginning with the plain language, Section 1182(f) permits the President to suspend the entry of "any aliens or of any class of aliens" *only* when he "finds that the entry of [such aliens] would be detrimental to the interests of the United States." Accordingly, the plain language of Section 1182(f) does not explicitly authorize the President to deny entry to a class of aliens solely defined by religion or by race, national origin, or other immutable characteristic.

Nonetheless, in arguing that Section 1182(f) authorizes the Executive Order's suspension on entry, the Government focuses on that statute's use of the (concededly

broad) term "any class of aliens." Appellants' Br. at 28 29. But the Government's argument omits the crucial limitation Congress imposed by requiring that the President may bar entry *only* upon a finding that entry of a class of aliens "would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f). That restriction requires a substantive connection between an alien's membership in a particular class and the likelihood that her entry would be detrimental to the interests of the United States.

Detrimental is defined as "harmful" or "damaging." Webster's Third New International Dictionary (2002). Accordingly, Section 1182(f) authorizes the President to deny entry to an alien if the President has reason to believe that, by virtue of the alien being a member of a particular class, her entry is more likely to damage or harm the interests of the United States. But the Constitution forbids imposing legal burdens on a class of individuals solely based on race or national origin precisely because those immutable characteristics bear no "relationship to individual responsibility." *Weber*, 406 U.S. at 175. Because an alien's race or national origin bears no "relationship to individual responsibility," those characteristics, by themselves, cannot render it more likely that the alien's entry will damage or harm the interests of the United States. *Cf. Romer*, 517 U.S. at 632, 636 (holding that "a classification of persons undertaken for its own sake" is "inexplicable by anything but animus towards the class it affects[, has no] relationship to legitimate state interests," and therefore violates the Fourteenth Amendment). Likewise, the Constitution's prohibition on discriminating against "those who embrace[] one religious faith rather than another," *Seeger*, 380 U.S. at 188 (Douglas, J., concurring), means that an alien's adherence to a particular religion alone also

provides no constitutionally cognizable basis for concluding that her entry is disproportionately likely to harm or damage the interests of the United States.

Because race, national origin, and religion bear no factual or constitutionally cognizable relationship to individual responsibility, courts have long interpreted delegation provisions in the Immigration Act as barring executive officials from engaging in invidious discrimination. For example, in *United States ex rel. Kaloudis v. Shaughnessy*, 180 F.2d 489 (2d Cir. 1950) (Hand, J.), the Second Circuit recognized "implied limitations" on Congress's facially broad delegation of authority to the Attorney General to suspend the deportation of any alien unlawfully present in the country. 180 F.2d at 490. Writing for the court, Judge Hand suggested that denying suspension of deportation based on "irrelevant" reasons having no bearing on whether the "alien's continued residence [was] prejudicial to the public weal" such as "becom[ing] too addicted to attending baseball games, or ha[ving] bad table manners" would exceed the Attorney General's congressionally delegated authority. *Id.* Factors like these, Judge Hand explained, are "considerations that Congress *could not have intended to make relevant*" to a determination of whether an alien could permissibly remain in the United States.[10] *Id.* at 491 (emphasis added). Under the dictates of equality established by the Constitution, an alien's race, nationality, or religion is as irrelevant to the potential for his

[10] Notably, *Kaloudis* found a basis for this clear outer limit on congressional delegations of discretionary authority to the executive branch in the Immigration Act well before Congress made explicit, in comprehensively amending the Immigration Act, that discrimination on the basis of race, sex, ethnicity, and nationality has no place in controlling immigration. *See infra* Part I.C.3.

entry to harm the interests of the United States as is the alien's addiction to baseball or his poor table manners.

Judge Friendly made this point clear in *Wong Wing Hang v. I.N.S.*, 360 F.2d 715 (2d Cir. 1966) (Friendly, J.). There, the Second Circuit again confronted a question regarding the scope of the Attorney General's authority delegated by Congress to suspend an alien's deportation. 360 F.2d at 716 17. Judge Friendly concluded that "the denial of suspension to an eligible alien would be an abuse of discretion if it were made without a rational explanation, inexplicably departed from established policies, or *rested on an impermissible basis such as an invidious discrimination against a particular race or group*." *Id.* at 719 (emphasis added). Like addiction to baseball and poor table manners, invidious discrimination is a "consideration[] that Congress could not have intended to make relevant" to decisions regarding whether to allow an alien residence in the United States, Judge Friendly held. *Id.* (internal quotation marks omitted) (quoting *Kaloudis*, 180 F.2d at 491).

Just as Congress "could not have intended to make" considerations like "invidious discrimination against a particular race or group" relevant to the Attorney General's discretionary decision to suspend an alien's deportation from the United States, *id.*, Congress "could not have intended to make" invidious discrimination relevant to the President's discretionary determination regarding whether the entry of a particular alien or class of aliens is "detrimental to the interests of the United States," 8 U.S.C. § 1182(f). That is because invidious discrimination has no connection to whether an alien's residence in the United States would be harmful or damaging to the nation or its interests.

Accordingly, not only does the plain language of Section 1182(f) fail to "explicitly" authorize the President to use invidious discrimination in determining whether to deny entry to a class of aliens, *see Greene*, 360 U.S. at 507, it does not even provide a "clear indication" that Congress intended to delegate to the President the power to invidiously discriminate, *see Zadvydas*, 533 U.S. at 696 97.

2.

Nor does the broader context of the Immigration Act, and Section 1182(f)'s place within it, suggest that Congress intended Section 1182(f) to allow the President to suspend the entry of a class of aliens based on invidious discrimination. In Section 1182(a), Congress enumerates numerous specific classes of aliens who are ineligible for visas or admission. These categories encompass, for example, classes of individuals who pose a variety of health, safety, and security risks, or are likely to become public charges. *See generally* 8 U.S.C. § 1182(a). Many of the categories are quite specific, providing particularized reasons why individual aliens may be deemed inadmissible. For example, aliens who have been convicted of certain crimes, served as foreign government officials and committed "particularly severe violations of religious freedom," or participated in the commission of torture are inadmissible. 8 U.S.C. § 1182(a)(2)(A), (G); *id.* § 1182(a)(3)(E)(iii). Likewise, Section 1182(a) deems inadmissible aliens who have been members of a totalitarian or Communist party, abused their status as student visa holders, or "engaged in the recruitment or use of child soldiers." *Id.* § 1182(a)(3)(D); *id.* § 1182(a)(6)(G); *id.* § 1182(a)(3)(G).

Importantly, most of the categories of inadmissible classes of aliens Congress sets forth in Section 1182(a) relate to past *conduct* by an alien that renders the alien particularly dangerous to the interests of the United States. *E.g.*, § 1182(a)(2); § 1182(a)(3); § 1182(a)(6)(E); § 1182(a)(8)(B); § 1182(a)(9)(A). And, in accordance with Congress's decision to define categories of inadmissible aliens largely based on individual conduct and responsibility rather than considerations over which aliens have no control, none of the Section 1182(a) categories render a class of aliens inadmissible solely on the basis of religion or of race, national origin, or other immutable characteristic.

Notwithstanding Congress's enumeration of the many general and specific categories and classes of aliens that the executive branch may or must deem inadmissible and its failure to include any category defined by race, national origin, or religion alone the Government argues that, in enacting Section 1182(f), Congress delegated to the President the authority to deny entry to any class of aliens for any reason whatsoever, necessarily including for invidiously discriminatory reasons. Appellants' Br. at 28 29. But in construing a statutory provision, we must, if at all possible, avoid a construction "that would render another provision [in the same statute] superfluous." *Bilski v. Kappos*, 561 U.S. 593, 607 08 (2010). And reading Section 1182(f) as conferring on the President the unbridled authority to deny entry to any class of aliens would impermissibly render superfluous the numerous specific classes of inadmissible aliens that Congress has enumerated in Section 1182(a).

The District of Columbia Circuit reached an identical conclusion in *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986) (Ginsburg, J.). There, the court considered 8 U.S.C. § 1182(a)(27) ("Subsection (27)"), which required the Attorney General to exclude an alien if the Attorney General had reason to believe that the alien sought "to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest or endanger the welfare, safety, or security of the United States." 785 F.2d at 1047 (internal quotation marks omitted) (quoting 8 U.S.C. § 1182(a)(27) (1982)). The question at issue was whether Subsection (27) allowed the Attorney General to "exclude aliens whose entry might threaten [United States'] foreign policy objectives simply because of their membership in Communist organizations," *id.* at 1057, when an adjacent provision in the statute, 8 U.S.C. § 1182(a)(28) ("Subsection (28)"), specifically dealt with exclusion of aliens who were or previously had been members of any Communist party, *Abourezk*, 785 F.2d at 1048. Then-Judge (now Justice) Ginsburg concluded that reading the Attorney General's vague and generalized delegated authority under Subsection (27) to allow exclusion on such a basis would impermissibly render Subsection (28) "superfluous." *Id.* at 1057.

"To preserve the significance of both sections, and the congressional intent that guided their adoption," the court held that the Attorney General could not rely on Subsection (27) to exclude aliens who were or had been members of a Communist party unless "the reason for the threat to the 'public interest[,] . . . welfare, safety, or security'" that the Attorney General put forward as a basis for barring entry under Subsection (27) was "*independent of* the fact of membership in or affiliation with the proscribed

organization." *Id.* at 1058 (alterations in original) (quoting 8 U.S.C. § 1182(a)(27)). Put differently, the court prohibited the executive branch from using the general exclusionary authority conferred by Congress in Subsection (27) to circumvent the more specific provision in Subsection (28) dealing with exclusion of aliens affiliated with the Communist party. *Id.* at 1057 58.

For the same reason, the President's reliance on Section 1182(f) as a basis for Section 2(c)'s suspension on entry also is inconsistent with Section 1182(a)(3)(B), which includes "specific criteria for determining terrorism-related inadmissibility." *See Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring). Recall that the Executive Order justified the President's suspension on entry, in part, on grounds that certain nationals of the six countries were members of terrorist organizations or previously had engaged in acts of terrorism and, therefore, that admitting aliens from those countries would be detrimental to the interests of the United States. *See supra* Part I.B.

Section 1182(a)(3)(B) renders inadmissible aliens who have been, are, or may in the future be connected to or engaged in terrorist activity, including aliens who have "engaged in a terrorist activity"; those whom government officials know or have reasonable cause to believe are "likely to engage after entry in any terrorist activity"; those who have "incited terrorist activity"; and those who "endorse[] or espouse[] terrorist activity or persuade[] others to" do so or who "support a terrorist organization." 8 U.S.C. § 1182(a)(3)(B)(i). That subsection also provides detailed definitions of "terrorist activity," "terrorist organization," the act of "engag[ing] in terrorist activity," and "representative" of a terrorist organization. *Id.* § 1182(a)(3)(B)(iii) (vi).

Congress established these "specific criteria for determining terrorism-related inadmissibility," *Din*, 135 S. Ct. at 2140, against the backdrop of the executive branch's exclusion of aliens based on "mere membership in an organization, some members of which have engaged in terrorist activity" even when there was no indication that *the alien seeking admission* was himself engaged in such activity. H.R. Rep. No. 100-882, at 19 (1988). By enacting specific provisions regarding the inadmissibility of aliens who are or have been engaged in terrorist activity, Congress sought to make clear that "the definitions of 'terrorist activity' and 'engages in terrorist activity' must be applied on a case by case basis" and that "simple membership in any organization . . . is not *per se* an absolute bar to admission to the United States" whether under the President's general authority to bar entry or otherwise. *Id.* at 30.

If Congress has deemed it unlawful for the President to absolutely bar the entry of aliens who *are members of an organization* that includes some members who engage in terrorism, it defies logic that Congress delegated to the President in Section 1182(f) the far broader power to absolutely bar the entry of aliens who *happen to have been born in a particular country*, within the borders of which some individuals have engaged in terrorism. Indeed, this is precisely why courts apply the canon of statutory construction "that the specific governs the general." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) (internal quotation marks omitted). When, as here, a statute includes "a general authorization [Section 1182(f)] and a more limited, specific authorization [Section 1182(a)(3)(B)] . . . side-by-side" that canon requires that "[t]he terms of the specific authorization must be complied with" in order to avoid "the

superfluity of a specific provision that is swallowed by the general one." *Id.* Accordingly, Section 1182(a)(3)(B), not Section 1182(f), is the congressionally authorized mechanism for the President to deny entry to aliens whom he concludes are detrimental to the United States because they pose a threat of engaging in terrorist activities. *See Abourezk*, 785 F.2d at 1049 n.2 ("The President's sweeping proclamation power [under Section 1182(f)] thus provides a safeguard against the danger posed by any particular case or class of cases *that is not covered by one of the categories in section 1182(a)*." (emphasis added)).

Interpreting Section 1182(f) to allow the President to suspend the entry of aliens based solely on their race, nationality, or other immutable characteristics also would conflict with 8 U.S.C. § 1152(a), which provides that "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." Congress passed Section 1152(a) in 1965, more than a decade after it enacted Section 1182(f), as part of a comprehensive revision to the Immigration Act intended to eliminate nationality-based discrimination in the immigration system. *See infra* Part I.C.3.

Section 1152(a) deals with issuance of *immigrant visas*, rather than entry, which is governed by Section 1182. Nonetheless, reading Section 1182(f) as authorizing the President to deny entry based on invidious discrimination would place Section 1182(f) in conflict with Section 1152(a), which prohibits invidious discrimination in the issuance of visas. In particular, the Immigration Act authorizes the executive branch to refuse to issue a visa to any alien who "is ineligible to receive a visa or such other documentation

under section 1182." 8 U.S.C. § 1201(g). As the Government concedes, the President's exercise of his authority under Section 1182(f) to deny entry to aliens from the six predominantly Muslim countries, were it lawful, also would bar, by virtue of Section 1201(g), such aliens from obtaining visas, including *immigrant* visas. This would be the very result Congress sought to avoid in ending nationality-based discrimination in the issuance of immigrant visas through its passage of Section 1152(a).

Accordingly, Section 1182(f)'s function within the Immigration Act does not clearly indicate that Congress intended to delegate to the President the authority to suspend the entry of aliens based on invidious discrimination. On the contrary, construing Section 1182(f) as broadly authorizing the President to engage in invidious discrimination in denying entry would render superfluous the numerous categories of inadmissible aliens Congress took pains to identify in Section 1182(a), including the provisions directly addressing aliens who pose a risk of engaging in terrorist activities, and conflict with Section 1152(a)'s prohibition on discrimination based on race, nationality, and other immutable characteristics.

3.

Reading Section 1182(f) as allowing the President to deny entry to classes of aliens based on invidious discrimination also would contradict the "object and policy" underlying the Immigration Act. *See U.S. Nat'l Bank of Or.*, 508 U.S. at 455. Although the specific language of Section 1182(f) dates to 1952, Congress "comprehensive[ly] revis[ed]" the Immigration Act in 1965 (the "1965 Revisions"). *S. 1932 & Other Legislation Relating to the Immigration Quota System Before the S. Subcomm. on*

Immigration & Naturalization Vol. 2, 88th Cong. 78 (1964) (statement of Sen. Fong). Those revisions were drafted concurrently with the Civil Rights Act of 1964 and the Voting Rights Act of 1965 and enacted at the height of the civil rights movement with the express purpose of "eliminat[ing] the national origins system as the basis for the selection of immigrants to the United States." H.R. Rep. No. 89-745, at 8 (1965); *see also S. 1932 & Other Legislation Relating to the Immigration Quota System Before the S. Subcomm. on Immigration & Naturalization Vol. 3*, 88th Cong. 107 (1964) (statement of Sen. Hart) ("A law that says that one man is somewhat less than another simply because of accident of his place of birth is not tolerable in the year 1964. A formula based on equality and fair play must be enacted. Selection should be based primarily on questions of our own national interest.").

Prior to the 1965 Revisions, the Immigration Act employed nationality-based quotas, limiting the number of immigrants admissible to the nation each year based on nation of birth. President Kennedy called on Congress to repeal the nationality-based quota system, condemning it as a system "without basis in either logic or reason" that "neither satisfie[d] a national need nor accomplishe[d] an international purpose" but instead "discriminate[d] among applicants for admission into the United States on the basis of accident of birth." Letter to the President of the Senate and to the Speaker of the House on Revision of the Immigration Laws, 1963 PUB. PAPERS 594, 595 (July 23, 1963). After President Kennedy's assassination, President Johnson renewed Kennedy's request for "the elimination of the national origins quota system," which he described as "incompatible with our basic American tradition" and "our fundamental belief that a man

is to be judged and judged exclusively on his worth as a human being." Special Message to the Congress on Immigration, 1965 PUB. PAPERS 37, 37, 39 (Jan. 13, 1965).

The 1965 Revisions answered President Kennedy's and President Johnson's calls. Congress explained that the 1965 Revisions abolished nationality-based discrimination in the immigration system in order to "firmly express in our immigration policy the dedication which our nation has to the principles of equality, of human dignity, and of the individual worth of each man and woman." *S. 1932 & Other Legislation Relating to the Immigration Quota System Before the S. Subcomm. on Immigration & Naturalization Vol. 1*, 88th Cong. 4 (1964) (statement of Sen. Kennedy). Time and again Congress connected the need to eliminate the nationality-based quota system to American "tenets of equality irrespective of race, creed, or color" and emphasized that abolishing nationality-based quotas "demonstrat[ed] to the whole world that we practice what we preach, and that all men are equal under law." *S. 1932 & Other Legislation Relating to the Immigration Quota System Before the S. Subcomm. on Immigration & Naturalization Vol. 2*, 88th Cong. 100 01 (1964) (statement of Sen. Fong); *see also id. Vol. 1*, at 9 (statement of Sen. Hart) (explaining that the 1965 Revisions abolished the "irrational . . . national origins concept, which said in clear and echoing words that the people of some nations [we]re more welcome to America than others" based on "[a]rbitrary ethnic and racial barriers").

Upon signing the bill into law at Liberty Island, New York, President Johnson lauded the end of the nationality-based discrimination that previously defined the American system of immigration, describing the 1965 Revisions as abolishing "the harsh

injustice of the national origins quota system," which "violated the basic principle of American democracy the principle that values and rewards each man on the basis of his merit as a man." 1965 PUB. PAPERS 1037, 1038 39 (Oct. 3, 1965). As a result of the 1965 Revisions, immigrants would be permitted to come to America "because of what they are, and *not because of the land from which they sprung*." *Id.* at 1039 (emphasis added).

To effect its purpose of eliminating discrimination in the immigration system, Congress stripped the Immigration Act of all provisions expressly authorizing national origin-based invidious discrimination and added Section 1152(a)(1)'s prohibition on discrimination in the issuance of visas based on nationality and other immutable characteristics, such as race. As evidenced by Section 1152(a)(1), disregarding national origin in selecting which immigrants to admit to the United States remains a core principle of United States immigration policy. Far from evidencing "any clear indication" that Congress intended the President to have the authority to exercise his Section 1182(f) powers based on invidious discrimination, the "object and policy" of the Immigration Act suggest that Congress *did not* intend to grant the President unbridled authority to engage in invidious discrimination when deciding whether and to what extent to suspend alien entry.[11]

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[11] The Government points to a number of orders promulgated by Presidents pursuant to their authority under Section 1182(f) as evidence that that statutory provision authorizes the President to engage in national origin-based discrimination. But the previous orders the Government cites materially differ from Section 2(c), in that they did not suspend the entry of classes of aliens based on national origin alone, let alone use (Continued)

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In sum, the language of Section 1182(f), related provisions in the Immigration Act, and the "object and policy" of the statute do not "explicitly" state, much less provide

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national origin as a proxy to suspend the entry of a class of aliens based on another invidiously discriminatory basis, such as religion. *See* Proclamation 8693 (July 24, 2011) (suspending the entry of aliens subject to travel bans issued by the United Nations Security Council's resolution barring member nations from permitting the entry of individuals who threaten peace in various nations); Proclamation 8342 (Jan. 22, 2009) (suspending the entry of senior government officials "who have impeded their governments' antitrafficking efforts, have failed to implement their governments' antitrafficking laws and policies, or who otherwise bear responsibility for their governments' failures to take steps recognized internationally as appropriate to combat trafficking in persons"); Proclamation 6958 (Nov. 22, 1996) (suspending the entry of "members of the Government of Sudan, officials of that Government, and members of the Sudanese armed forces" based on the Sudanese government's harboring of individuals who attempted to assassinate the Egyptian President in Ethiopia, in violation of Ethiopian sovereignty); Executive Order No. 12,807 (May 24, 1992) (suspending the entry of "undocumented aliens [entering the United States] by sea" during the mass exodus of Haitian nationals fleeing a military coup, often in dangerous and overcrowded sea vessels); Proclamation 5887 (Oct. 22, 1988) (suspending the entry of "officers and employees" of the Nicaraguan government as nonimmigrants to the United States based on the Nicaraguan government's "unjustified expulsion" of American diplomats and "long-standing . . . suppression of free expression and press and support of subversive activities throughout Central America"); Proclamation 5829 (June 10, 1988) (suspending the entry of "Panamanian nationals . . . who formulate or implement the policies of Manuel Antonio Noriega and Manuel Solis Palma" due to those officials' act of "preventing the legitimate government . . . from restoring order and democracy" to Panama).

Of the executive orders cited by the government, President Reagan's suspension on the entry of Cuban nationals *as immigrants* comes closest to a nationality-based suspension on alien entry. Proclamation 5517 (Aug. 22, 1986). But that executive action was not challenged as a violation of either Section 1182(f) or Section 1152(a)(1), and therefore the judiciary never had the opportunity to address whether the order complied with those provisions or the Constitution. Nor does a single, unchallenged executive action "demonstrate the kind of consistent administrative interpretation necessary to give rise to a presumption of congressional acquiescence." *Abourezk*, 785 F.2d at 1056.

a "clear indication," that Congress intended to delegate to the President wholly unconstrained authority to deny entry to any class of aliens, including based on invidiously discriminatory reasons. *See Zadvydas*, 533 U.S. at 697. Accordingly, Section 2(c) which this Court finds was likely borne of the President's animus against Muslims and his intent to rely on national origin as a proxy to give effect to that animus exceeds the authority Congress conferred on the President in Section 1182(f). As Judge Friendly put it, "Congress could not have intended to make relevant" to the President's exercise of his delegated authority to suspend the entry of aliens "invidious discrimination against a particular race or group." *Wong Wing Hang*, 360 F.2d at 719 (internal quotation marks omitted).

II.

Invidious "discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States." *Korematsu*, 323 U.S. at 242 (Murphy, J., dissenting). Yet the Government asks this Court to hold that, in enacting Section 1182(f), Congress intended to delegate to the President the power to deny entry to a class of aliens based on nothing more than such aliens' race, national origin, or religion.

One might argue, as President Trump seemed to suggest during the campaign, *ante* at 18 21, that *as a matter of statistical fact*, Muslims, and therefore nationals of the six predominantly Muslim countries covered by the Executive Order, disproportionately

engage in acts of terrorism, giving rise to a *factual* inference that admitting such individuals would be detrimental to the interests of the United States. Indeed, viewing the Executive Order in its most favorable light, that is the precisely the rationale underlying Section 2(c). Setting aside the question of whether that *factual finding* is true, or even reasonable which is, at best, highly debatable given the 180 million people in the countries subject to the suspension on entry and the 1.6 million Muslims worldwide that is precisely the inference that the Framers of the Constitution and the Reconstruction Amendments concluded was impermissible as a matter of *constitutional law*.[12] *Korematsu*, 323 U.S. at 240 (Murphy, J., dissenting). In particular, classifying individuals based solely on their race, nationality, or religion and then relying on those classifications to discriminate against certain races, nationalities, or religions necessarily results in placing special burdens on individuals who lack any moral responsibility, a result the Framers deemed antithetical to core democratic principles and destabilizing to our Republic. *Id.*

Even though the Constitution affords greater latitude to the political branches to draw otherwise impermissible distinctions among classes of aliens, the harm to core

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[12] Our country adheres to the rule of law in preserving core constitutional protections. Thus, when the President can identify no change in circumstances justifying an invidious encroachment on constitutional rights, a simple claim of potential harm to national security does not provide the President with unfettered authority to override core constitutional protections. *See New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (holding that a claim of potential harm to national security does not provide the executive branch with unconstrained authority to override the freedom of the press). Indeed, even the invocation of Congressional war powers to protect national defense do "not remove constitutional limitations safeguarding essential liberties." *Robel*, 389 U.S. at 264 67 (internal quotation marks omitted).

constitutional values associated with governmental sanctioning of invidious discrimination and the harm to citizens stemming from the abridgement of those values demands evidence of "careful and purposeful consideration by those responsible for *enacting* ***and*** *implementing* our laws" before such discrimination should be sanctioned by the judiciary. *Greene*, 360 U.S. at 507 (emphasis added). Because Congress did not provide any indication let alone the requisite "explicit" statement that it intended to delegate to the President the authority to violate fundamental constitutional values of equality in exercising his authority to deny entry to classes of aliens, I reject the Government's proposed construction of Section 1182(f).

In emphasizing the larger constitutional problems raised by construing Section 1182(f) as a delegation of authority to engage in invidious discrimination, we must not forget that the Constitution embraces equality in order to forestall highly personal harms. Plaintiff John Doe #1, a lawful permanent resident, seeks to be reunited with his wife, an Iranian national, whom Section 2(c) bars from entering the United States. As Justice Jackson explained when confronted with another broad delegation of congressional authority over immigration, "Congress will have to use more explicit language than any yet cited before I will agree that it has authorized [the President] to break up the family of [a lawful permanent resident] or force him to keep his wife by becoming an exile." *Knauff*, 338 U.S. at 551 52 (Jackson, J., dissenting).

THACKER, Circuit Judge, concurring:

I concur in the majority's opinion but write separately for three reasons: (1) I would not consider remarks made by candidate Trump before he took his presidential oath of office; (2) I would nonetheless find that Appellees have demonstrated a likelihood of success on the merits of their argument that Section 2(c) of the Second Executive Order ("EO-2") violates the Establishment Clause, based solely on remarks made or sentiments expressed after January 20, 2017; and (3) I would conclude Appellees have demonstrated a likelihood of success on the merits of their argument that Section 2(c), as it applies to immigrant visas, violates 8 U.S.C. § 1152(a)(1)(A) of the Immigration and Nationality Act ("INA").

I.

I agree with the majority's conclusion that Appellees have standing to challenge the constitutionality of § 2(c) of EO-2 and that EO-2 likely violates the Establishment Clause. However, in my view, we need not -- and should not -- reach this conclusion by relying on statements made by the President and his associates before inauguration.

While on the campaign trail, a non-incumbent presidential candidate has not yet taken the oath to "preserve, protect and defend the Constitution," U.S. Const. art. II, § 1, and may speak to a host of promises merely to curry favor with the electorate. Once a candidate becomes President, however, the Constitution vests that individual with the awesome power of the executive office while simultaneously imposing constraints on that power. Thus, in undertaking the Establishment Clause analysis, I believe we should

focus our attention on conduct occurring on President Trump's inauguration date, January 20, 2017, and thereafter. Indeed, for the reasons below, looking to pre-inauguration conduct is neither advisable nor necessary.

A.

In confining my analysis to post-inauguration statements and actions, I do not draw on a blank slate. To begin, "the Establishment Clause protects religious expression from *governmental interference*." *Mellen v. Bunting*, 327 F.3d 355, 376 (4th Cir. 2003) (emphasis supplied). To this end, Establishment Clause jurisprudence has focused on government action rather than "a[] judicial psychoanalysis" of individuals. *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 862 (2005). We have neither the right nor the ability to peer inside an official's "heart of hearts"; indeed, we will "not look to the veiled psyche of government officers" -- much less that of *candidates* for public office -- to divine the purpose of a law. *Id.* at 862 63.

The Government relies on the doctrines of executive privilege and presidential immunity to contend that EO-2 is essentially unreviewable, arguing that courts "should not second-guess the President's stated purpose by looking beyond the policy's text and operation," and that we should instead apply a "presumption of regularity" to his actions. Appellants' Br. 45 (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14 15 (1926)). While I do not agree with this proposition for the reasons ably set forth by Chief Judge Gregory, I do believe the Supreme Court's decisions in the executive privilege and immunity context support confining our review to statements by the President and his administration made after the inauguration, once the President began operating pursuant

to Article II. Those decisions explain that the judiciary's ability to probe official, presidential conduct is related to his discharge of *official* power. *See Clinton v. Jones*, 520 U.S. 681, 703 (1997) ("[W]e have long held that when the President takes *official action*, the Court has the authority to determine whether he has acted within the law." (emphasis supplied)); *cf. Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 381 (2004) ("It is well established that 'a President's communications and activities encompass a vastly wider range of sensitive material than would be true of any *ordinary individual*.'" (quoting *United States v. Nixon*, 418 U.S. 683, 715 (1974)) (emphasis supplied)). Indeed, the executive privilege -- and, by that token, the separation of powers -- applies where the President operates within the executive's core constitutional powers. *See Nixon*, 418 U.S. at 708 09. It follows that a president's conduct after he takes office, but not before, carries the imprimatur of official "government" action, and can only then be considered "government interference" under the Establishment Clause. *Mellen*, 327 F.3d at 376.

B.

For more practical reasons, we should also hesitate to attach constitutional significance to words a candidate utters on the campaign trail. Campaign speeches are inevitably scattered with bold promises, but once the dust settles after an election -- when faced with the reality of the office and with benefit of wise counsel -- a newly inducted public official may act with a different philosophy. Presidents throughout history have

dialed back or even reversed campaign promises.[1] To be sure, the President's statements regarding Islam before assuming office reveal religious animus that is deeply troubling. *See, e.g.*, J.A. 346 ("Donald J. Trump Statement on Preventing Muslim Immigration," dated December 7, 2015).[2] Nonetheless, I do not adhere to the view that we should magnify our analytical lens simply because doing so would support our conclusion, particularly when we need not do so.

II.

Even without focusing on any campaign rhetoric, the record in this case amply demonstrates the primary purpose of EO-2 was to ban Muslims from entering the United States in violation of the Establishment Clause. I would thus base our Establishment Clause analysis on the morphing of the First Executive Order ("EO-1") into EO-2, the statements of presidential representatives and advisors, the lack of evidence supporting a

[1] Indeed, many might argue that this President has repeatedly and regularly dialed back or reversed course on his campaign promises. *See, e.g.*, Priya Krishnakumar et al., *Tracking President Trump's Campaign Promises*, L.A. Times (Apr. 26, 2017), http://www.latimes.com/projects/la-na-pol-trump-100-days-promises/(reporting President Trump has "scaled back" or "abandoned" 9 out of 31 campaign promises) (saved as ECF opinion attachment).

[2] Given that they were made on the campaign trail, I do not consider as part of my analysis the President's campaign website's archived statements about the plan to ban all Muslims from entering the United States. However, I must note it is peculiar that those statements were removed shortly before we began hearing arguments in this case. *See* Dan Merica, *Trump campaign removes controversial Muslim ban language from website*, CNN (May 8, 2017, 3:37 PM), http://www.cnn.com/2017/05/08/politics/trump-muslim-ban-campaign-website/ (saved as ECF opinion attachment).

purported national security purpose, and the text of and logical inconsistencies within EO-2.

The Government argues that we should simply defer to the executive and presume that the President's actions are lawful so long as he utters the magic words "national security." But our system of checks and balances established by the Framers makes clear that such unquestioning deference is not the way our democracy is to operate. Although the executive branch may have authority over national security affairs, *see Munaf v. Geren*, 553 U.S. 674, 689 (2008) (citing *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988)), it may only exercise that authority within the confines of the law, *see Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 645 46, 654 55 (1952) (Jackson, J., concurring); and, of equal importance, it has always been the duty of the judiciary to declare "what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

A.

The President issued EO-1 on January 27, 2017. *See* Exec. Order 13,769, Protecting the Nation From Foreign Terrorist Entry Into the United States, 82 Fed. Reg. 8977 (Jan. 27, 2017). EO-1 banned citizens of seven majority Muslim nations -- Libya, Iran, Iraq, Somalia, Syria, Sudan, and Yemen -- from entering the United States. The ban applied to over 180 million Muslims, or just over 10% of the world Muslim population, and was executed without input from relevant cabinet officials. Indeed, the President actively shielded certain officials from learning the contents of EO-1: per then-acting Attorney General Sally Yates, the administration advised "the Office of Legal Counsel

. . . not to tell the attorney general about [EO-1] until after it was over." *Full Transcript: Sally Yates and James Clapper testify on Russian election interference*, Wash. Post (May 8, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/05/08/full-transcript-sally-yates-and-james-clapper-testify-on-russian-election-interference (saved as ECF opinion attachment).

As Rudy Giuliani, an advisor to the President, explained on January 28, 2017, EO-1 did all this with the *purpose* of discriminating against Muslims. Giuliani was quite clear that the President wanted to enact a "Muslim ban" and had assembled a commission to study how to create a "Muslim ban" legally. J.A. 508. Per Giuliani, EO-1 was the President's attempt at a legal "Muslim ban." *Id.*[3]

To further this goal, EO-1 suspended the entry of refugees for 120 days but directed the Secretary of State "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." EO-1, § 5(b). The President explained that this exception was designed to give Christians priority in entering the United States as refugees. He said that in Syria,

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[3] Giuliani is purportedly a member, and claims to be chairman, of an expert legal commission assembled to study how to create a lawful way to ban Muslims from entering the country and an acknowledged advisor to the President. *See* J.A. 508 09. Courts routinely analyze statements and reports from presidential commissions such as the one of which Giuliani is a member. *See, e.g.*, *Bartnicki v. Vopper*, 532 U.S. 514, 533 (2001) (citing and quoting President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 202 (1967) to demonstrate importance of privacy in communications); *Osborne v. Ohio*, 495 U.S. 103, 111 (1990) (citing Attorney General's Commission on Pornography to establish state's interest in punishing child pornography possession).

> If you were a Muslim you could come in, but if you were a Christian, it was almost impossible and the reason that was so unfair, everybody was persecuted in all fairness, but they were chopping off the heads of everybody but more so the *Christians*. And I thought it was very, very unfair. So we are going to help *them*.

J.A. 462 (emphases supplied).[4] The statements of the President, his advisor, and the text of EO-1 made crystal clear a primary purpose of disfavoring Islam and promoting Christianity.

After the Ninth Circuit upheld the stay of EO-1, the President set about to issue a new executive order. But significantly, in revising the order, the executive branch did not attempt to walk away from its previous discriminatory order. Instead, it simply attempted to effectuate the same discrimination through a slightly different vehicle -- the proverbial wolf in sheep's clothing. Indeed, Press Secretary Sean Spicer confirmed that "[t]he principles of the executive order remain the same," J.A. 379,[5] and the President's Senior Policy Advisor, Stephen Miller, described the changes in the new order as "mostly minor technical differences," *id.* at 339.

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[4] Presidential statements necessarily shed light on executive policy. *See, e.g.*, *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2081 (2015) (using presidential statement to show United States' position on status of Jerusalem); *Clinton v. City of New York*, 524 U.S. 417, 495 96 (1998) (Breyer, J., dissenting) (relying on presidential statements to demonstrate effect of Line Item Veto Act).

[5] When relevant, the press secretary and other White House Official's statements can represent official government position. *See, e.g.*, *Reynolds v. United States*, 123 S. Ct. 975, 984 (2012) (citing to the Office of the Press Secretary to show President's position on registration of sex offenders who committed offenses before enactment of the Adam Walsh Child Protection and Safety Act of 2006); *Hamdi v. Rumsfeld*, 542 U.S. 507, 549 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (relying on Office of the White House Press Secretary's statement to identify official executive policy).

B.

The President issued EO-2 on March 6, 2017. *See* Exec. Order 13,780, Protecting the Nation From Foreign Terrorist Entry Into the United States, 82 Fed. Reg. 13209 (Mar. 6, 2017). Like its predecessor, EO-2 lacks evidentiary support, is logically inconstant, and evinces an intent to discriminate against Muslims.

1.

First, the Government offers very little evidence in an attempt to support the President's ban of approximately 180 million people. EO-2 claims, "hundreds of persons born abroad have been convicted of terrorism-related crimes in the United States" but cites only two such examples, each of which is weakly related, if at all, to the purported purpose of EO-2. EO-2, § 1(h). One example is from Iraq, but, as Iraq is not part of EO-2, it does not support *this* ban at all. The other example involves a child brought to the United States as a two-year-old. As this two-year-old was ultimately radicalized in the United States and not abroad, this case is unrelated to better screening and vetting -- the purported purpose of EO-2. *See* Br. for Cato Institute as Amicus Curiae Supporting Appellees at 12 13, *Int'l Refugee Assistance Project v. Trump*, No. 17-1351 (4th Cir. argued May 8, 2017; filed Apr. 19, 2017), ECF No. 185; EO-2, § 1(a), (h).

In sharp contrast to the dearth of evidence to support the purported purpose of EO-2, 42 bipartisan former national security officials concluded EO-2 "bear[s] no rational relation to the President's stated aim of protecting the nation from foreign terrorism." Corrected Br. for Former National Security Officials as Amici Curiae Supporting Appellees at 4, *Int'l Refugee Assistance Project v. Trump*, No. 17-1351 (4th Cir. argued

May 8, 2017; filed Apr. 13, 2017), ECF No. 126. In addition, since the issuance of EO-1, a report by the Department of Homeland Security has found that "country of citizenship is unlikely to be a reliable indicator of potential terrorist activity," likewise undermining any purported security justification for the Order. J.A. 419.

2.

The Government's untenable position is made even worse by the fact that the Government's purported justification for EO-2 does not logically support the ban it created. EO-2 reasoned that people coming from the six banned countries posed an increased risk of committing terrorist acts because, according to the Department of State's Country Reports on Terrorism 2015 (the "Country Reports"), "each of these countries is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones," and were unwilling or unable "to share or validate important information about individuals seeking to travel to the United States." EO-2, § 1(d); *see* § 1(e) (citing Country Reports). However, given these conditions as the reason for the ban, and based on the Country Reports, two other majority Christian countries -- Venezuela and the Philippines -- should have logically been included. *See* U.S. Dep't of State, Bureau of Counterterrorism and Countering Violent Extremism, Country Reports on Terrorism 2015 78 85, 297 98, 308 09, 314 15, 352, 380 (June 2016), https://www.state.gov/documents/organization/258249.pdf (excerpts saved as ECF opinion attachment). Neither country is willing and able to help the Government verify information about people attempting to travel to the United States, and both countries have terrorist organizations operating within their boundaries.

Therefore, applying the Government's logic, the potential of a terrorist act from a national of Venezuela or the Philippines would also justify a blanket ban on all nationals from these countries. Interestingly, however, the CIA World Factbook reports that Venezuelan population is, at most, 2% Muslim, and the Philippine population is 5% Muslim. *See* Cent. Intelligence Agency, *Field Listings: Religions*, World Factbook, https://www.cia.gov/library/publications/the-world-factbook/fields/2122.html (last visited May 23, 2017) (saved as ECF opinion attachment). Thus, the Government has not consistently applied the criteria it claims it used, and the reason seems obvious -- and inappropriate.

Moreover, if the conditions in the six countries subject to EO-2 truly motivated the Government's travel ban, the Government would have based its ban on *contact* with the listed countries, not *nationality*. Under EO-2, a person who is a citizen of Syria would not be allowed to enter the United States even if they had never set foot in Syria. However, a person who lived his or her whole life in Syria but never obtained Syrian citizenship, and had even recently lived near terrorist-controlled regions of Syria, would be unaffected and freely allowed to enter the United States.[6] As a result, EO-2 is at once both overinclusive and underinclusive and bears no logical relationship to its stated objective.

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[6] Syrian citizenship is not based on country of birth. *See* Legislative Decree 276 - Nationality Law [Syrian Arab Republic], Legislative Decree 276, 24 November 1969. Therefore, a person can have Syrian citizenship without ever setting foot in the country and a person who lives in Syria for their entire lifetime may not have Syrian citizenship.

Last, but by no means least, EO-2 identifies and discriminates against Muslims on its face. It identifies only Muslim majority nations, thus banning approximately 10% of the world's Muslim population from entering the United States. It discusses only Islamic terrorism. And, it seeks information on honor killings -- a stereotype affiliated with Muslims[7] -- even though honor killings have no connection whatsoever to the stated purpose of the Order.[8]

C.

All of this evidence -- arising after January 20, 2017 -- leads to only one conclusion: the principal motivation for the travel ban was a desire to keep Muslims from entering this country. EO-2 does not pass constitutional muster. Our constitutional system creates a strong presumption of legitimacy for presidential action; however, this deference does not require us to cover our eyes and ears and stand mute simply because a president incants the words "national security." The Constitution and our system of democracy requires that we ensure that any and every action of the President complies with the protections it enshrines.

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[7] Honor killings, in which family members kill one of their own (usually a woman) under the belief that the murder is necessary to vindicate the family's honor, occur within societies of many faiths and, notably, in countries that were not subject to either Executive Order. *See* Kimberly Winston, *Activists: Trump Call for Honor Killings Report Targets Muslims*, USA Today (March 7, 2017, 3:06 PM), https://www.usatoday.com/story/news/2017/03/07/activists-trump-call-honor-killings-report-targets-muslims/98861230/ (saved as ECF opinion attachment).

[8] EO-1 also sought information on honor killings. *See* EO-1 § 10(a)(iii).

III.

Finally, I would conclude Appellees have demonstrated a likelihood of success on the merits of their argument that Section 2(c) of EO-2, as it applies to immigrant visas, violates 8 U.S.C. § 1152(a)(1)(A) of the INA.[9]

Section 1182(f) of Title 8 states that the President may "suspend the entry of all aliens or any class of aliens" "for such period as he shall deem necessary" when the President finds that such entry "would be detrimental to the interests of the United States." However, § 1152(a)(1)(A), which was promulgated after § 1182(f), states that no person seeking an immigrant visa[10] "shall . . . be discriminated against" on the basis of "nationality." To be sure, EO-2 discriminates on the basis of nationality, suspending entry of "nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen" (the "Designated Countries"). EO-2, § 2(c). The crux of the Government's argument, however, is that § 1152(a)(1)(A) does not prevent the President, acting pursuant to his § 1182(f) authority, from suspending *entry* based on nationality, even if that suspension necessarily mandates the denial of immigrant visas based on nationality. This is nonsensical. I find this

[9] I join in Part I of Judge Keenan's opinion, concluding that the plaintiffs possess standing to bring a claim under the INA.

[10] Immigrant visas are issued to persons seeking admission to the United States with the goal of obtaining lawful permanent residence status. *See* 8 U.S.C. §§ 1101(a)(15), (20), 1201(a)(1)(A). Those seeking admission for other purposes, such as business, study, or tourism, typically receive nonimmigrant visas. *See id.* §§ 1101(a)(15), 1201(a)(1)(B). I would decline Appellees' invitation to extend § 1152(a)(1)(A) to nonimmigrant visas.

argument to contravene longstanding canons of statutory construction as well as the text and effect of EO-2 itself.

A.

Our jurisprudence gives ample guidance for a situation in which two statutes conflict with one another. But the Government believes § 1182(f) and § 1152(a)(1)(A) do not conflict at all. Instead, the Government posits that the two statutes "address different activities handled by different government officials." Appellants' Br. 31 (internal quotation marks omitted). The Government thus believes the specific visa denial warranted by EO-2 falls squarely within the broad ambit of § 1182(f).

I will first address whether we are faced with any real conflict between these provisions. "When two acts touch upon the same subject, both should be given effect if possible." *United States v. Mitchell*, 39 F.3d 465, 472 (4th Cir. 1994) (citation omitted). And "[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal quotation marks omitted). We must "fit, if possible, all parts into an harmonious whole." *Id.* (quoting *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 389 (1959)). In this vein, 8 U.S.C. § 1201(g) provides, "No visa . . . shall be issued to an alien . . . ineligible to receive a visa . . . under section 1182 . . . ." Thus, when a President suspends entry to a national from a Designated Country and renders him inadmissible under § 1182(f), there is a strong argument that the alien *must be* denied a visa. *See generally* 8 U.S.C. § 1182

(titled "Inadmissible aliens"). To conclude that the two statutes operate independently and deal with totally separate executive functions would be to ignore this link.

Furthermore, although the Government contends the provisions at issue do not touch upon the same subject -- asserting that the visa issuance process is a "different activity" than suspension of entry -- its own arguments and the text and operation of EO-2 belie this notion.

EO-2 directs that the entry of nationals of the Designated Countries be suspended, but the Government admits the Department of State will "implement th[e] suspension [of entry] by *declining to issue visas* to aliens who are covered by the Order and who are not found eligible for a waiver." Appellants' Br. 34 n.12 (emphasis supplied); *see also* J.A. 729 (Government counsel admitting immigrant visa applicants "will be denied a visa if they are a national from the listed country"). EO-2 also delineates who is entitled to or restricted from entry *based on* one's visa status. *See* EO-2, § 3(a) (defining the scope of entry suspension to those outside the United States on the effective date of the order who "did not have a valid visa" on the date of the now-revoked first executive order; and "do not have a valid visa" as of the effective date of EO-2). Further, the Government offers the precarious justification that "when an alien subject to [EO-2] is denied an immigrant visa, he is not suffering discrimination on the basis of nationality of the sort prohibited by Section 1152(a)(1)(A); instead, he is being denied a visa because he has been validly barred from entering the country." Appellants' Br. 33. Following this circular logic, an alien is barred from entry because he does not have and cannot attain a visa, but he is

denied a visa because he is barred from entry. It is clear that in EO-2, the visa issuance and entry concepts are intertwined to the point of indistinguishability.[11]

The Government also contends it would be a "fruitless exercise" and would "make no sense" to enable issuances of immigrant visas pursuant to § 1152(a)(1)(A), when those aliens receiving the visas would nonetheless be barred from entering the United States once they reach our borders. Appellants' Br. 31, 35. I fail to see how permitting a national of one of the Designated Countries to continue with her immigrant visa process would be fruitless, unless, of course, the Government intends to use the ban as a gateway to a much more permanent ban, ultimately sweeping in those nationals whose processes were halted by the order. *See* Section 1(a) (stating that a "Policy and Purpose" of the EO-2 is to improve the protocols and procedures "associated with the visa-issuance process"). Moreover, being a visa holder, even if one may be temporarily inadmissible, carries with it a certain status with regard to EO-2. *See, e.g.*, EO-2, § 3(c) (suggesting that one receiving a visa from U.S. Customs and Border Protection during the protocol review period could gain entry to the United States).

I likewise fail to see how allowing one to continue with her incipient visa process would "make no sense," when that national could be one step closer to ultimately reuniting with her loved ones. For example, in the case of John Doe #1, his wife could conceivably proceed with her visa application interview, obtain her visa, and once the

[11] Indeed, Section 3 of EO-1, the predecessor to EO-2's Section 2, was entitled "Suspension of *Issuance of Visas* and Other Immigration Benefits to Nationals of Countries of Particular Concern."

protocol review period has ended, join her husband in the United States as soon as possible thereafter, quickly redressing John Doe #1's constitutionally cognizable injury of being separated from an immediate family member.

For all of these reasons, I would reject the Government's argument that § 1152(a)(1)(A) and § 1182(f) operate in separate statutory spheres. I believe § 1152(a)(1)(A)'s prohibition limits the President's § 1182(f) authority in the issuance of EO-2. As the Government itself mentioned in its opening brief, "courts judge the legitimacy of a law by what it says and does." Appellants' Br. 2. Here, the ultimate effect of what EO-2 actually *does* is require executive agencies to deny visas based on nationality.

Therefore, I next turn to the traditional canons of statutory construction to determine how to resolve this tension between § 1182(f) and § 1152(a)(1)(A). I approach this analysis mindful that the executive branch's authority over immigration affairs is conferred and cabined by Congress. *See Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986) (The Executive's "broad discretion over the admission and exclusion of aliens . . . extends only as far as the statutory authority conferred by Congress.").

B.

When faced with provisions that apparently conflict, we must give effect to each provision, with a later enacted, more specific statute trumping an earlier, more general one. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976); *Morton v. Mancari*, 417 U.S. 535, 550 51 (1974) ("[A] specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment."); *Weinberger v.*

Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 633 (1973) ("[A]ll parts of a statute, if at all possible, are to be given effect.").

First, § 1152(a)(1)(A) must be given effect. Reading § 1182(f) as bestowing upon the President blanket authority to carry out a suspension of entry, which involves rejecting a particular country's immigrant visa applications as a matter of course, would effectively nullify the protections in § 1152(a)(1)(A) and create an end-run around its prohibitions against discrimination. It would collapse the statutory distinction between entry and visa issuance, *see* 8 U.S.C. § 1201(h) ("Nothing in this chapter shall be construed to entitle any alien, to whom a visa or other documentation has been issued, to be admitted [to] the United States, if, upon arrival at a port of entry in the United States, he is found to be inadmissible under this chapter, or any other provision of law."), and ultimately allow the chief executive to override any of Congress's carefully crafted visa criterion or grounds for inadmissibility.

Second, § 1182(f) was enacted in 1952, but § 1152(a)(1) was enacted in 1965 as part of a sweeping amendment of the INA. We assume that "when Congress enacts statutes, it is aware of relevant judicial precedent." *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 648 (2010). Thus, we must accept that Congress knew about the President's broad authority in § 1182(f) when it enacted § 1152(a)(1)(A), and the latter lists several exceptions, none of which include the former. *See* § 1152(a)(1)(A) (exempting §§ 1101(a)(27), 1151(b)(2)(A)(i), and 1153). Section 1152(a)(1)(A) is also more specific, applying to demarcated types of discrimination and a certain type of visa. *See*

Radzanower, 426 U.S. at 153 (preference should be given to statute involving a "narrow [and] precise . . . subject").

Finally, the Government's suggestions of potential statutory discord are unconvincing. For example, the Government relies on 8 U.S.C. § 1185(a)(1), which makes it unlawful for any alien to enter the United States "except under such reasonable rules, regulations, and orders, and subject to such limitations" prescribed by the President. But this provision merely acts as an implementation provision flowing from § 1182(f), which, as stated above, is limited by § 1152(a)(1)(A). In addition, § 1152(a)(1)(B) is of no concern to this analysis given that it applies to the Secretary of State, and § 2(c) of EO-2 bars visa issuance to nationals of the Designated Countries, rather than regulating visa processing locations.

C.

For these reasons, I find Appellees' statutory argument that EO-2 violates § 1152(a)(1)(A) because it requires the denial of immigrant visas on the basis of nationality the more compelling argument. Therefore, I would conclude that Appellees have shown a likelihood of success on the merits on this point. I otherwise join Judge Keenan's opinion, with the exception of Part II.A.i.

IV.

In conclusion, I believe the district court's injunction should be affirmed based on the majority's Establishment Clause conclusion, although I would do so based only on consideration of post-inauguration conduct. I also believe that the plaintiffs will likely

succeed on the merits of their argument that EO-2 violates the INA for the reasons stated by Judge Keenan and set forth in Part III of this opinion.

NIEMEYER, CIRCUIT JUDGE, with whom JUDGE SHEDD and JUDGE AGEE join, dissenting:

The district court issued a nationwide preliminary injunction against Executive Order No. 13,780 issued by President Donald Trump on March 6, 2017, to suspend temporarily, while vetting procedures could be reviewed, the entry of aliens from six countries, reciting terrorism-related concerns. While the court acknowledged the President's authority under 8 U.S.C. §§ 1182(f) and 1185(a) to enter the Order and also acknowledged that the national security reasons given on the face of the Order were legitimate, the court refused to apply *Kleindienst v. Mandel*, 408 U.S. 753 (1972), which held that courts are precluded from "look[ing] behind" "facially legitimate and bona fide" exercises of executive discretion in the immigration context to discern other possible purposes, *id.* at 770. Relying on statements made by candidate Trump during the presidential campaign, the district court construed the Executive Order to be directed against Muslims because of their religion and held therefore that it likely violated the Establishment Clause of the First Amendment.

I conclude that the district court seriously erred (1) by refusing to apply the Supreme Court's decision in *Mandel*; (2) by fabricating a new proposition of law indeed, a new rule that provides for the consideration of campaign statements to recast a later-issued executive order; and (3) by radically extending Supreme Court Establishment Clause precedents. The district court's approach is not only unprecedented, it is totally unworkable and inappropriate under any standard of analysis.

The majority reworks the district court's analysis by applying *Mandel*, albeit contrary to its holding, to defer only to the facial *legitimacy* of the Order but not to its facial *bona fides*, despite the *Mandel* Court's holding that "when the Executive exercises this power negatively on the basis of a *facially legitimate and bona fide reason*, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests" of the plaintiffs. *Mandel*, 408 U.S. at 770 (emphasis added). In addition, the majority, after violating *Mandel*, then adopts the same new rule of law adopted by the district court to consider candidate Trump's campaign statements to find the Executive Order's stated reasons "pretext[ual]," *ante* at 51, and then to rewrite the Order to find it in violation of the Establishment Clause. This too is unprecedented and unworkable.

Accordingly, I respectfully dissent. I would vacate the district court's injunction.

I

A

The Immigration and Nationality Act, 8 U.S.C. §§ 1101 *et seq.*, requires that an alien, to obtain admission into the United States, must normally both possess a visa and be admissible upon his or her arrival at a port of entry, *id.* §§ 1181, 1182(a)(7), 1201(h).

Exceptions exist which allow for entry without a visa. For instance, Congress has established a Visa Waiver Program, which allows nationals of certain countries to seek temporary admission into the United States for 90 days or less. 8 U.S.C. § 1187. In December 2015, however, Congress excluded aliens from admission under this program

who are dual nationals of or have recently visited Iraq, Syria, any country designated by the Secretary of State to be a state sponsor of international terrorism, or any country that the Secretary of Homeland Security has deemed to be a country or area of concern. Pub. L. No. 114-113, div. O, tit. II, § 203, 129 Stat. 2988, 2989 91 (2015) (codified at 8 U.S.C. § 1187(a)(12)). At all times relevant to this litigation, the countries designated by the Secretary of State to be state sponsors of international terrorism have been Iran, Sudan, and Syria. U.S. Dep't of State, *Country Reports on Terrorism 2015*, at 4, 299 302 (June 2016), https://perma.cc/KJ4B-E4QZ. Also, in February 2016, the Department of Homeland Security ("DHS") excluded recent visitors to and nationals of Libya, Somalia, and Yemen from the Program. DHS, *DHS Announces Further Travel Restrictions for the Visa Waiver Program* (Feb. 18, 2016), https://perma.cc/87CZ-L4FU.

Even when an alien possesses a visa, the alien must also be *admissible* to the United States when arriving at a port of entry. Congress has accorded the President broad discretion over the admission of aliens, providing in 8 U.S.C. § 1182(f):

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

In addition, Congress has specified that the entry of aliens is governed by "such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe." *Id.* § 1185(a)(1).

B

On January 27, 2017, the President issued Executive Order 13,769, 89 Fed. Reg. 8977, which was challenged in several courts. A district court in Washington enjoined nationally the enforcement of several provisions of that order, *see Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017), and the Ninth Circuit declined to stay the district court's injunction pending appeal, *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (per curiam).

Rather than challenge that decision further, the President issued a revised order Executive Order 13,780 on March 6, 2017, entitled, "Protecting the Nation From Foreign Terrorist Entry Into the United States," 82 Fed. Reg. 13,209, which is the Order before us. This Order revoked the earlier order and rendered moot the challenge to the earlier order.

The first Section of the revised Executive Order announces the policy goals of "protect[ing] the Nation from terrorist activities by foreign nationals" by "improv[ing] the screening and vetting protocols and procedures associated with the visa-issuance process and the [United States Refugee Admissions Program]" that "play a crucial role in detecting foreign nationals who may commit, aid, or support acts of terrorism and in preventing those individuals from entering the United States." Order Preamble, § 1(a).

The Order then recites the previous Administration's response to terrorist activities in the countries covered by the current Order:

> Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen . . . had [during the prior Administration] already been identified as presenting heightened concerns about terrorism and travel to the United States. . . . [And] [i]n

> 2016, the Secretary of Homeland Security designated Libya, Somalia, and Yemen as additional countries of concern for travel purposes, based on consideration of . . . statutory factors related to terrorism and national security . . . . Additionally, Members of Congress have expressed concerns about screening and vetting procedures following recent terrorist attacks in this country and in Europe.

Order § 1(b)(i). Describing further the threats posed generally by these nations, the Order states:

> Nationals from the countries previously identified . . . warrant additional scrutiny in connection with our immigration policies because the conditions in these countries present heightened threats. Each of these countries is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones. Any of these circumstances diminishes the foreign government's willingness or ability to share or validate important information about individuals seeking to travel to the United States. Moreover, the significant presence in each of these countries of terrorist organizations, their members, and others exposed to those organizations increases the chance that conditions will be exploited to enable terrorist operatives or sympathizers to travel to the United States.

Order § 1(d). Finally, the Order describes as follows "the conditions in six of the previously designated countries that demonstrate why their nationals continue to present heightened risks to the security of the United States," relying on the Department of State's *Country Reports of Terrorism 2015*:

> (i) Iran. Iran has been designated as a state sponsor of terrorism since 1984 and continues to support various terrorist groups, including Hizballah, Hamas, and . . . al Qa'ida . . . . Iran does not cooperate with the United States in counterterrorism efforts.
>
> (ii) Libya. Libya is an active combat zone . . . . In many parts of the country, security and law enforcement functions are provided by armed militias rather than state institutions. Violent extremist groups, including the Islamic State of Iraq and Syria (ISIS), have exploited these conditions to expand their presence in the country. . . . The United States Embassy in Libya suspended its operations in 2014.

> (iii) Somalia. Portions of Somalia have been terrorist safe havens. Al-Shabaab, an al-Qa'ida-affiliated terrorist group, has operated in the country for years and continues to plan and mount operations within Somalia and in neighboring countries. Somalia has porous borders, and most countries do not recognize Somali identity documents. . . .
>
> (iv) Sudan. Sudan has been designated as a state sponsor of terrorism since 1993 because of its support for international terrorist groups, including Hizballah and Hamas . . . [and it] provided safe havens for al-Qa'ida and other terrorist groups to meet and train. . . . [E]lements of core al-Qa'ida and ISIS-linked terrorist groups remain active in the country.
>
> (v) Syria. Syria has been designated as a state sponsor of terrorism since 1979. [Although] [t]he Syrian government is engaged in an ongoing military conflict against ISIS[,] . . . ISIS continues to attract foreign fighters to Syria and to use its base in Syria to plot or encourage attacks around the globe, including in the United States. The United States Embassy in Syria suspended its operations in 2012. Syria does not cooperate with the United States' counterterrorism efforts.
>
> (vi) Yemen. . . . Both ISIS and a second group, al-Qa'ida in the Arabian Peninsula (AQAP), have exploited [internal] conflict to expand their presence in Yemen and to carry out hundreds of attacks. Weapons and other materials smuggled across Yemen's porous borders are used to finance AQAP and other terrorist activities. In 2015, the United States Embassy in Yemen suspended its operations . . . .

Order § 1(e). Based on this collection of information, the Order concludes that, "[i]n light of the conditions in these six countries, until [an] assessment of current screening and vetting procedures . . . is completed, the risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harm the national security of the United States is unacceptably high." Order § 1(f).

The operative provisions, as relevant here, are stated in Section 2 of the Order, which directs the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, to "conduct a worldwide review to identify whether, and if so what, additional information will be needed from each foreign

country to adjudicate an application by a national of that country for a visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual is not a security or public-safety threat." Order § 2(a). The Secretary of Homeland Security is then directed to present a report with his findings to the President. Order § 2(b). And finally, pending the review, the Order prohibits the entry of certain nationals from the six countries, as follows:

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

Order § 2(c).

The referenced limitations in Section 3 specify that the suspension does not apply to nationals of the designated countries who are inside the United States on the effective date of the Order (March 16, 2017) or who had a valid visa at 5:00 p.m. on January 27, 2017 or on the effective date of the Order. Order § 3(a). The Section goes on to create exceptions that allow the entry of lawful permanent residents of the United States, foreign nationals with valid travel documents that are not visas, dual nationals traveling on passports issued by a non-designated country, foreign nationals traveling on diplomatic visas, foreign nationals granted asylum, refugees already admitted to the United States,

and any individual who has been granted withholding of removal, advance parole, or protection under the Convention Against Torture. Order § 3(b). Finally, Section 3 allows consular officers or the Commissioner of U.S. Customs and Border Protection to "decide on a case-by-case basis to authorize the issuance of a visa to, or to permit the entry of, a foreign national for whom entry is otherwise suspended if the foreign national has demonstrated to the officer's satisfaction that denying entry during the suspension period would cause undue hardship, and that his or her entry would not pose a threat to national security and would be in the national interest." Order § 3(c).

In sum, nationals of the designated countries who lack visas were, prior to the Order, unable to enter the United States under the Visa Waiver Program, 8 U.S.C. § 1187. Nationals who possess visas are exempted from the Order, as are most other nationals who have the ability to enter the United States through another travel document. *See* Order §§ 2, 3. The Order thus affects nationals of the designated countries who, lacking visas, were already unable to enter the United States but who had hoped to obtain a visa and to enter the United States within the 90 day period of the Order.[1]

C

The plaintiffs are three organizations and six individuals. Two of the organizations, the International Refugee Assistance Project ("IRAP") and HIAS, Inc., provide legal assistance and aid to refugees, while the third organization, the Middle East

[1] Other portions of the Order, not at issue here, suspend adjudication of applications under the Refugee Program for 120 days, subject to case-by-case waivers, and limit to 50,000 the number of refugees admitted in fiscal year 2017. Order § 6(a)(c).

Studies Association ("MESA"), is an organization of students and scholars of Middle Eastern studies. The six individual plaintiffs are U.S. citizens or lawful permanent residents who alleged that the Order would prevent or delay foreign-national family members from entering the United States.

On March 10, 2017, after Executive Order 13,780 was issued but before it went into effect, the plaintiffs filed their operative complaint, as well as a motion for a preliminary injunction to enjoin enforcement of the Order. They alleged, as relevant here, that the Order violates the Establishment Clause of the First Amendment and 8 U.S.C. § 1152(a), which prohibits discrimination based on nationality in issuing immigrant visas. After expedited briefing and argument, the district court entered a nationwide preliminary injunction that barred enforcement of Section 2(c) of the Order.

The district court began its analysis by concluding that at least three of the individual plaintiffs had standing.

On the merits, the court concluded that the plaintiffs were likely to succeed on their claim that the Order violated the Establishment Clause. Although the court acknowledged that "the Second Executive Order is facially neutral in terms of religion" and that "national security interests would be served by the travel ban," it nonetheless looked behind the Order to statements made during the presidential campaign by candidate Trump and concluded, based on these statements, that the Order was likely motivated by anti-Muslim animus. In looking behind the Order, the court refused to apply *Mandel*, stating as its reason that *Mandel* applied to the review of decisions by

immigration officers denying visas and "does not apply to the promulgation of a sweeping immigration policy at the highest levels of the political branches."

The district court also found that the plaintiffs were likely to succeed on a small portion of their statutory claim, concluding that the Order conflicted with federal law insofar as it had "the specific effect of halting the issuance of [immigrant] visas to nationals of the Designated Countries." Otherwise, it found that "an executive order barring entry to the United States based on nationality pursuant to the President's authority under § 1182(f) [did] not appear to run afoul of the provision in § 1152(a) barring discrimination in the issuance of immigrant visas." (Internal quotation marks omitted).

From the entry of the preliminary injunction, the government filed this appeal.

II

In affirming the district court's ruling based on the Establishment Clause, the majority looks past the face of the Order's statements on national security and immigration, which it concedes are neutral in terms of religion, and considers campaign statements made by candidate Trump to conclude that the Order denigrates Islam, in violation of the Establishment Clause. This approach (1) plainly violates the Supreme Court's directive in *Mandel*; (2) adopts a *new rule of law* that uses campaign statements to recast the plain, unambiguous, and religiously neutral text of an executive order; and (3) radically extends the Supreme Court's Establishment Clause holdings. I address these legal errors in turn.

A

I begin with the majority's failure faithfully to apply *Mandel*.

In *Mandel*, Ernest Mandel, a Belgian citizen, was denied a nonimmigrant visa to enter the United States to participate in conferences and to give speeches. In denying his admission to the United States, the Attorney General relied on 8 U.S.C. §§ 1182(a)(28)(D), (G)(v) and 1182(d)(3)(A), which provided that aliens who advocate or publish "the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship" shall be excluded from admission to the United States unless granted a waiver by the Attorney General. Mandel admitted that he was a Marxist who advocated the economic, governmental, and international doctrines of world communism, and the Attorney General refused to grant him a waiver. *Mandel*, 408 U.S. at 756, 759. University professors in the United States, who had invited Mandel to the United States to speak, as well as Mandel himself, filed an action challenging the constitutionality of the relevant statutory provisions and the Attorney General's exercise of his authority under those provisions. *Id.* at 759 60. They alleged that the relevant statutory provisions and the Attorney General's denial of a waiver were unconstitutional because they deprived the American plaintiffs of their First Amendment rights to hear and meet with Mandel. *Id.* at 760.

Despite its conclusion that the professors' First Amendment rights were well-established, the Supreme Court held that Mandel's exclusion was lawful. At the outset, the Court explicitly accepted that Mandel's exclusion implicated the First Amendment. It

found, however, that its "[r]ecognition that First Amendment rights are implicated . . . [was] not dispositive of [its] inquiry." *Mandel*, 408 U.S. at 765. The Court stated that, based on "ancient principles of the international law of nation-states," Congress could categorically bar those who advocated Communism from entry, explaining that "the power to exclude aliens is inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers a power to be exercised exclusively by the political branches of government." *Id.* The Court repeated Justice Harlan's holding that the government's power "to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications." *Id.* at 766 (quoting *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895)).

The Court then rejected the argument that the Attorney General's denial of a waiver violated the First Amendment. The Court forbade judges from interfering with the executive's "facially legitimate and bona fide" exercise of its immigration authority or balancing that exercise against constitutional rights. *Mandel*, 408 U.S. at 770. Specifically, it recognized that "Congress has delegated conditional exercise of this power [of exclusion] to the Executive" and declined to apply more scrutiny to executive exercise of that power than it would to Congress's own actions. *Id.* It concluded:

> We hold that when the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, *the courts will neither look behind the exercise of that discretion, nor test it by balancing its*

> *justification against the First Amendment interests* of those who seek personal communication with the applicant.

Id. (emphasis added).

The holding of *Mandel* ineluctably requires that we vacate the district court's preliminary injunction. The similarities between *Mandel* and this case are numerous and significant. In both cases, Congress delegated power to the executive to prohibit the entry of a certain class of foreign nationals. 8 U.S.C. § 1182(a)(28)(D), (d)(3)(A) (1970); 8 U.S.C. § 1182(f) (2016). The plaintiffs in each case challenged the executive's exercise of that statutory discretion as violative of their individual First Amendment rights. The court in *Mandel* rejected this challenge because, even assuming a constitutional violation lurked beneath the surface of the executive's implementation of his statutory authority, the reasons the executive had provided were "facially legitimate and bona fide." We must thus reject this similar challenge today.

The Court has consistently reaffirmed and applied *Mandel*'s holding. In *Fiallo v. Bell*, 430 U.S. 787 (1977), the Court declined to scrutinize a statute that gave different immigration status to a child born out of wedlock depending on whether it was the child's mother or father who was a citizen or lawful permanent resident. Although that statute involved two suspect classifications gender and legitimacy the Court, citing *Mandel*, nonetheless concluded that "it is not the judicial role in cases of this sort to probe and test the justifications" of immigration policies. *Id.* at 799. Accordingly, in response to the plaintiffs' arguments that the distinction was based "on an overbroad and

outdated stereotype," the Court indicated that "this argument should be addressed to the Congress rather than the courts." *Id.* at 799 n.9.

And both *Mandel* and *Fiallo* were reaffirmed more recently in Justice Kennedy's opinion in *Kerry v. Din*, 135 S. Ct. 2128, 2139 (2015) (Kennedy, J., concurring in the judgment). In *Din*, the Court considered a suit by a United States citizen who alleged that the government deprived her of a liberty interest protected under the Due Process Clause by denying her husband's visa application without adequate explanation, providing only a citation to the provision under which the visa was denied. Justice Kennedy, writing for himself and Justice Alito to provide the fourth and fifth votes in favor of the government, stated that "[t]he reasoning and the holding in *Mandel* control here" and that the reasoning of *Mandel* "has particular force in the area of national security." *Id.* at 2140. He concluded that "respect for the political branches' broad power over the creation and administration of the immigration system" meant that, because the government had provided Din with a facially legitimate and bona fide reason for its action, Din had no viable constitutional claim. *Id.* at 2141.

The plaintiffs can provide no coherent basis for their assertion that this case is not controlled by *Mandel* and its progeny. They do argue that the holding of *Mandel* does not apply to claims under the Establishment Clause, but they are unable to point to any case in which the Supreme Court has ever suggested the existence of such a limitation, or, indeed, any case in which it has suggested that some areas of law are not governed by the rule laid out in *Mandel*. Absent such a case, we are not now at liberty to craft out of whole cloth exceptions to controlling Supreme Court precedents.

To reach its conclusion, the majority does not adopt the plaintiffs' broad argument that *Mandel* does not even apply. Instead, in its attempt to escape *Mandel*'s clear holding, it asserts that "[w]here plaintiffs have seriously called into question whether the stated reason for the challenged action was provided in good faith," the court may "step away from our deferential posture and look behind the stated reason for the challenged action" to attempt to discern the action's purpose. *Ante* at 50. This approach, which totally undermines *Mandel*, is the foundation of its new rule that campaign statements may be considered to recast an unambiguous, later-adopted executive order on immigration. The majority states that even though the Order is on its face legitimate and provides reasons rooted in national security, because the plaintiffs "have more than plausibly alleged" bad faith, "we no longer defer" to the Order's stated purpose "and instead may 'look behind' [the Order]" in an attempt to discern whether the national security reason was *in fact* provided as a pretext for its religious purpose. *Ante* at 52. This approach casually dismisses *Mandel*, *Fiallo*, and *Din*.

If the majority's understanding had been shared by the Supreme Court, it would have compelled different results in each of *Mandel*, *Fiallo*, and *Din*, as in each of those cases the plaintiffs alleged bad faith with at least as much particularity as do the plaintiffs here. In *Mandel*, the allegations were such that Justice Marshall, writing in dissent, observed that "[e]ven the briefest peek behind the Attorney General's reason for refusing a waiver in this case would reveal that it is a sham." *Id.* at 778 (Marshall, J., dissenting). In *Fiallo*, Justice Marshall, again writing in dissent, pointed to the fact that the statute in question relied on "invidious classifications." *Fiallo*, 430 U.S. at 810 (Marshall, J.,

dissenting). And in *Din*, the plaintiffs argued that the consular decision should be reviewed because it fell within the "limited circumstances where the government provides no reason, or where the reason on its face is illegitimate." Brief for Respondent at 31, *Din*, 135 S. Ct. 2128 (No. 13-1402), 2015 WL 179409. But, as those cases hold, a lack of good faith must appear on the face of the government's action, not from looking behind it.

As support for its dramatic departure from Supreme Court precedent, the majority relies on a scattershot string of quotations drawn out of context from one sentence in *Din*. The carelessness of the majority's presentation is demonstrated simply by a comparison of its characterization of *Din* and the actual language of *Din* taken in context. Here is how the majority characterizes *Din*:

> Justice Kennedy explained that where a plaintiff makes "**an affirmative showing of bad faith**" that is "**plausibly alleged with sufficient particularity**," courts may "**look behind**" the challenged action to assess its "facially legitimate" justification.

Ante at 50. And here is what Justice Kennedy in *Din* actually said, with the language quoted by the majority in bold:

> Absent **an affirmative showing of bad faith** on the part of the consular officer who denied Berashk a visa which Din has not **plausibly alleged with sufficient particularity** *Mandel* instructs us not to "**look behind**" the Government's exclusion of Berashk for additional factual details beyond what its express reliance on § 1182(a)(3)(B) encompassed.

Din, 135 S. Ct. at 2141 (emphasis added).

More problematic is the majority's misunderstanding of *Din*'s actual holding, which the majority tries to reshape for its own ends. In *Din*, when the plaintiff refused to

accept the curt explanation of why her husband was denied a visa, she claimed that due process required that the government disclose the factual basis for its determination. Faced with Din's request for these underlying facts, the Supreme Court declined, instead applying *Mandel*'s requirement that the plaintiff must show that the government's reasons were not *facially* legitimate and not *facially* bona fide. As Justice Kennedy explained:

> Din claims due process requires she be provided with the facts underlying this determination, arguing *Mandel* required a similar factual basis.
>
> * * *
>
> Din perhaps more easily could mount a challenge to her husband's visa denial if she knew the specific subsection on which the consular office relied.
>
> * * *
>
> [But] the notice given was constitutionally adequate, particularly in light of the national security concerns the terrorism bar addresses. [Citing *Fiallo*, 430 U.S. at 795 96]. And even if Din is correct that sensitive facts could be reviewed by courts *in camera*, the dangers and difficulties of handling such delicate security material further counsel against requiring disclosure in a case such as this.
>
> * * *
>
> For these reasons, my conclusion is that the Government satisfied any obligation it might have had to provide Din with a *facially legitimate and bona fide reason* for its action when it provided notice that her husband was denied admission to the country under § 1182(a)(3)(B). *By requiring the Government to provide more, the Court of Appeals erred* in adjudicating Din's constitutional claims.

Din, 135 S. Ct. at 2140 41 (Kennedy, J., concurring in judgment) (emphasis added) (citations omitted). Nowhere did the *Din* Court authorize going behind the government's notice for the purpose of showing bad faith. The plaintiff had to show *facially* that the

notice was in bad faith, *i.e.*, not bona fide. The majority's selective quotations from *Din*, which conceal *Din*'s faithful application of *Mandel*, are simply misleading. Indeed, the impetus for the majority's approach is revealed when it states, "If we limited our purpose inquiry to review of the operation of a *facially neutral* order, we would be caught in an analytical loop, where the order would always survive scrutiny." *Ante* at 62 (emphasis added). That consequence that facially neutral executive orders survive review is precisely what *Mandel* requires.

In looking behind the face of the government's action for facts to show the alleged bad faith, rather than looking for bad faith on the face of the executive action itself, the majority grants itself the power to conduct an extratextual search for evidence suggesting bad faith, which is exactly what three Supreme Court opinions have prohibited. *Mandel*, *Fiallo*, and *Din* have for decades been entirely clear that courts are not free to look behind these sorts of exercises of executive discretion in search of circumstantial evidence of alleged bad faith. The majority, now for the first time, rejects these holdings in favor of its politically desired outcome.

B

Considering the Order on its face, as we are required to do by *Mandel*, *Fiallo*, and *Din*, it is entirely without constitutional fault. The Order was a valid exercise of the President's authority under 8 U.S.C. §§ 1182(f) and 1185(a) to suspend the entry of "any aliens" or "any class of aliens" and to prescribe "reasonable rules, regulations, and orders" regarding entry, so long as the President finds that the aliens' admission would be "detrimental to the interests of the United States." And Executive Order No. 13,780 was

not the first to be issued under this authority. Such orders were entered by Presidents Reagan, George H.W. Bush, Clinton, George W. Bush, and Obama.[2] Moreover, the particular reasons given for the issuance of the Executive Order respond directly to the described risk of terrorism from six countries, justifying the imposition of a 90-day pause in the admission of nationals from those countries while the Administration determines whether existing screening and vetting procedures are adequate.

The Executive Order begins by noting that the previous Administration, in conjunction with Congress, identified seven countries Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen "as presenting heightened concerns about terrorism and travel to the United States," specifically noting that the previous Administration's Secretary of Homeland Security designated Libya, Somalia, and Yemen as countries of concern for travel purposes based on terrorism and national security. Order § 1(b)(i). And finally it notes that Members of Congress had expressed concerns about "screening and vetting procedures" following terrorist attacks in 2016 in Europe, as well as in this country. *Id.*

Adding to the historical assessment of those risks, the Executive Order continues with its conclusions, based on additional data, that the conditions in the countries

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[2] *See, e.g.*, Exec. Order 12,324, 46 Fed. Reg. 48,109 (Sept. 29, 1981) (Reagan); Proclamation 5,517, 51 Fed. Reg. 30,470 (Aug. 22, 1986) (Reagan); Exec. Order 12,807, 57 Fed. Reg. 23,133 (May 24, 1992) (George H.W. Bush); Proclamation 6,958, 61 Fed. Reg. 60,007 (Nov. 22, 1996) (Clinton); Proclamation 7,359, 65 Fed. Reg. 60,831 (Oct. 10, 2000) (Clinton); Executive Order 13,276, 67 Fed. Reg. 69,985 (Nov. 15, 2002) (George W. Bush); Exec. Order 13,692, 80 Fed. Reg. 12,747 (Mar. 8, 2015) (Obama); Exec. Order 13,726, 81 Fed. Reg. 23,559 (Apr. 19, 2016) (Obama).

previously identified had worsened, at least with respect to six of the seven countries (excepting Iraq), noting that some of those countries were state sponsors of terrorism or were significantly compromised by terrorist organizations. Several of the countries were unwilling or unable to share or validate information about nationals seeking to travel to the United States, and in some, the conditions increasingly enabled "terrorist operatives or sympathizers to travel to the United States." Order § 1(d).

Finally, the Order addresses the particular circumstances of each of the six countries covered by the Order, noting for example, that Iran, Sudan, and Syria were state sponsors of terrorism; that the governments in Libya, Somalia, and Syria were rendered partially or entirely unable to resist terrorist organizations because of the organizations' activities; and that Iran, Libya, Syria, and Yemen either were not cooperating with the United States in its counterterrorism efforts or were unable to do so.

None of the facts or conditions recited as reasons for the issuance of the Executive Order have been challenged as untrue or illegitimate. Indeed, the plaintiffs conceded during oral argument that if another candidate had won the presidential election in November 2016 and thereafter entered this same Executive Order, they would have had no problem with the Order. As counsel for the plaintiffs stated, "I think in that case [the Order] could be constitutional." Similarly, the district court found the face of the Order to be neutral in terms of religion. And the majority too so concludes. *Ante* at 52, 59.

Moreover, these reasons amply support the modest action taken by the Executive Order, which imposes only a temporary pause of 90 days to assess whether the screening and vetting procedures that are applied to nationals from these high-risk countries are

adequate to identify and exclude terrorists. Even this pause is accompanied by an authorization to issue waivers designed to limit any harmful impact without compromising national security.

While the legitimate justifications for the Order are thoroughly established, its supposed ills are nowhere present on its face. Far from containing the sort of religious advocacy or disparagement that can violate the Establishment Clause, the Order contains no reference to religion whatsoever. Nor is there any trace of discriminatory animus. In short, under *Mandel* and its progeny, Executive Order 13,780 comfortably survives our review.[3]

C

The majority's new rule, which considers statements made by candidate Trump during the presidential campaign to conclude that the Executive Order does not mean what it says, is fraught with danger and impracticability. Apart from violating all established rules for construing unambiguous texts whether statutes, regulations, executive orders, or, indeed, contracts reliance on campaign statements to impose a new meaning on an unambiguous Executive Order is completely strange to judicial analysis.

[3] The opinions in support of affirmance betray an object beyond a disciplined analysis. Judge Gregory states, for example, that the Executive Order "drips with religious intolerance, animus, and discrimination," *ante* at 12, and Judge Wynn states similarly, "this Executive Order is no more than . . . naked invidious discrimination against Muslims," *ante* at 94. These statements flatly mischaracterize an order that undisputedly contains no facial reference to religion.

The Supreme Court has repeatedly warned against "judicial psychoanalysis of a drafter's heart of hearts." *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 862 (2005). And consistent with that warning, the Court has never, "in evaluating the legality of executive action, deferred to comments made by such officials to the media." *Hamdan v. Rumsfeld*, 548 U.S. 557, 623 24 n.52 (2006). The Court's reluctance to consider statements made in the course of campaigning derives from good sense and a recognition of the pitfalls that would accompany such an inquiry.

Because of their nature, campaign statements are unbounded resources by which to find intent of various kinds. They are often short-hand for larger ideas; they are explained, modified, retracted, and amplified as they are repeated and as new circumstances and arguments arise. And they are often ambiguous. A court applying the majority's new rule could thus have free reign to select whichever expression of a candidate's developing ideas best supports its desired conclusion.

Moreover, opening the door to the use of campaign statements to inform the text of later executive orders has no rational limit. If a court, dredging through the myriad remarks of a campaign, fails to find material to produce the desired outcome, what stops it from probing deeper to find statements from a previous campaign, or from a previous business conference, or from college?

And how would use of such statements take into account intervening acts, events, and influences? When a candidate wins the election to the presidency, he takes an oath of office to abide by the Constitution and the laws of the Nation; he appoints officers of the government and retains advisors, usually specialized in their field. Is there not the

possibility that a candidate might have different intentions than a President in office? And after taking office, a President faces new external events that may prompt new approaches altogether. How would a court assess the effect of these intervening events on presidential intent without conducting judicial psychoanalysis?

The foibles of such a rule are unbounded and its adoption would have serious implications for the democratic process. As Judge Kozinski said well when he wrote about the Ninth Circuit's use of the same campaign statements:

> Even if a politician's past statements were utterly clear and consistent, using them to yield a specific constitutional violation would suggest an absurd result namely, that the policies of an elected official can be forever held hostage by the unguarded declarations of a candidate. If a court were to find that campaign skeletons prevented an official from pursuing otherwise constitutional policies, what could he do to cure the defect? Could he stand up and recant it all ("just kidding!") and try again? Or would we also need a court to police the sincerity of that mea culpa piercing into the public official's "heart of hearts" to divine whether he really changed his mind, just as the Supreme Court has warned us not to? *See McCreary*, 545 U.S. at 862.

Washington v. Trump, No. 17-35105 (9th Cir. March 17, 2017) (Kozinski, J., dissenting from the denial of reconsideration en banc).

The danger of the majority's new rule is that it will enable any court to justify its decision to strike down any executive action with which it disagrees. It need only find one statement that contradicts the stated reasons for a subsequent executive action and thereby pronounce that reasons for the executive action are a pretext. This, I submit, is precisely what the majority opinion does.

Moreover, the unbounded nature of the majority's new rule will leave the President and his Administration in a clearly untenable position for future action. It is

undeniable that President Trump will need to engage in foreign policy regarding majority-Muslim nations, including those designated by the Order. And yet the majority now suggests that at least some of those future actions might also be subject to the same challenges upheld today. Presumably, the majority does not intend entirely to stop the President from creating policies that address these nations, but it gives the President no guidelines for "cleansing" himself of the "taint" they have purportedly identified.

Finally, the new rule would by itself chill political speech directed at voters seeking to make their election decision. It is hard to imagine a greater or more direct chill on campaign speech than the knowledge that any statement made may be used later to support the inference of some nefarious intent when official actions are inevitably subjected to legal challenges. Indeed, the majority does not even deny that it employs an approach that will limit communication to voters. Instead, it simply opines remarkably that such chilling is "a welcome restraint." *Ante* at 68.

The Supreme Court surely will shudder at the majority's adoption of this new rule that has no limits or bounds one that transforms the majority's criticisms of a candidate's various campaign statements into a constitutional violation.

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Finally, it is readily apparent that the plaintiffs' attempt to use campaign statements to transform a facially neutral executive action into an Establishment Clause violation would, in any event, be unlikely to succeed on the merits.

The thrust of the plaintiffs' argument, which the majority adopts, is that the Order violates the Establishment Clause's requirement of religious neutrality because it was

enacted "primarily for the purpose of targeting Muslims." To be sure, courts must ensure that government action is indeed motivated by a secular, rather than religious, purpose. *See Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). And while the government's "stated reasons" for an action "will generally get deference," it is true that "the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective." *McCreary*, 545 U.S. at 864. "The eyes that look to purpose belong to an 'objective observer,' one who takes account of the traditional external signs that show up in the 'text, legislative history, and implementation of the statute,' or comparable official act." *Id.* at 862 (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)).

But these generic standards are all of the doctrinal support that the plaintiffs and the majority can muster. For one, the Supreme Court has never applied the Establishment Clause to matters of national security and foreign affairs. And of the few government actions that the Supreme Court has invalidated based on a religious purpose, *McCreary*, 545 U.S. at 859 (remarking that the Court had "found government action motivated by an illegitimate purpose only four times since *Lemon*"), each is manifestly distinguishable from the Order here.

First, for all of the weight that the majority places on *McCreary*, it ignores that the Court there confronted a *facially religious* government action the display of the Ten Commandments in two county courthouses. The Court in *McCreary* thus began with a *presumption* that the display was intended to promote religion. *See* 545 U.S. at 867 69. When it examined the legislative history surrounding the displays, it did so only to reject the government's attempt to overcome that presumption with a secular, pedagogical

purpose a purpose that the Court declined to accept because it was adopted "only as a litigating position," *id.* at 871, "without a new resolution or repeal of the old [and expressly religious] one," *id.* at 870; *see also Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223 24 (1963) (holding that schools' policy of required Bible study and recitation of the Lord's Prayer violated Establishment Clause). In stark contrast, the district court here concluded, and the majority agrees, that nothing on the face of the Executive Order speaks to religion. *Ante* at 59 60. Under *McCreary*, we should therefore begin with the presumption that the Order is neutral toward religion.

To be sure, the Supreme Court in "unusual cases" will find a religious purpose even where the government action contains no facial reference to religion. *McCreary*, 545 U.S. at 865. The majority, quoting selectively from these cases, invokes them to justify its searching inquiry into whether the Order's secular justifications were subordinate to a religious purpose that it has gleaned only from extrinsic statements. The majority's approach, however, in no way accords with what the Court actually *did* in those cases. In each case, the Court found the government action inexplicable *but for* a religious purpose, and it looked to extrinsic evidence only to confirm its suspicion, prompted by the face of the action, that it had religious origins. *See Santa Fe*, 530 U.S. at 315 16 (invalidating school policy of allowing student-led "invocation" before football games because the policy's language and context showed that religious prayer was the "preferred message"); *Edwards v. Aguillard*, 482 U.S. 578, 585 86 (1987) (invalidating state law that required creationism to be taught with evolution because the law did nothing to accomplish its stated secular purpose of "protect[ing] academic freedom");

Wallace v. Jaffree, 472 U.S. 38, 56 61 (1985) (invalidating state law that provided for one minute of "meditation or voluntary prayer" at the start of each school day because bill's sponsor stated that sole purpose was to encourage school prayer and prior statute already provided for student meditation).

The Executive Order in this case fits nowhere within this line. It is framed and enforced without reference to religion, and the government's proffered national security justifications, which are consistent with the stated purposes of the Order, withstand scrutiny. Conflicting extrinsic statements made prior to the Order's enactment surely cannot supplant its facially legitimate national security purpose. *See McCreary*, 545 U.S. at 865 ("[T]he Court often . . . accept[s] governmental statements of purpose, in keeping with the respect owed in the first instance to such official claims"); *Mueller v. Allen*, 463 U.S. 388, 394 95 (1983) (referring to the Court's "reluctance to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state's program may be discerned from the face of the statute"). Indeed, to hold otherwise would fly in the face of the Court's decisions upholding government actions with connections to religion far more obvious than those here. *See Lynch v. Donnelly*, 465 U.S. 668, 681 (1984) (city's inclusion of crèche in Christmas display justified by "legitimate secular purposes," namely "to celebrate the Holiday and to depict the origins of that Holiday"); *McGowan v. Maryland*, 366 U.S. 420, 444 46 (1961) (upholding state's requirement that businesses be closed on Sundays because, while Sunday laws had obvious religious origins, their religious purpose had dissipated in favor of a secular one).

The decision in *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), on which the majority also relies, is similarly inapposite. The state law at issue in that case "carved out" a new school district that included only "a religious enclave of Satmar Hasidism, practitioners of a strict form of Judaism." *Id.* at 690. In *Kiryas Joel*, however, the government did not dispute that the lines were drawn with religion in mind. *Id.* at 699. Rather than searching for extrinsic statements as evidence of a religious purpose, the Court took the government at its word and treated as corroborative of its religious purpose the fact that "the district's creation ran uniquely counter to state practice." *Id.* at 702; *see also id.* at 729 (Kennedy, J., concurring in the judgment) ("There is no serious question that the legislature configured the school district, with purpose and precision, along a religious line. This *explicit* religious gerrymandering violates the First Amendment Establishment Clause" (emphasis added)).

The government here, by contrast, provides ample nonreligious justification for the Order and actively contests that it has any religious purpose. Far from running "counter" to typical national security practice, each of the Order's six affected countries was previously designated as "a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones." Order § 1(d). And an Order that affects all nationals of six countries, irrespective of their religion, is not so precisely hewn to religious lines that we can infer, based on its operation alone, a predominantly religious purpose.

Undeterred, the majority, pursuing its objective despite the costs, opens *Lemon*'s already controversial purpose inquiry even wider.[4] It engages in its own review of the national security justifications supporting the Order and concludes that protecting national security could not be the President's "primary purpose." As evidence, the majority points to the President's level of consultation with national security agencies before issuing the Order; the content of internal Department of Homeland Security reports; the comments of former national security officials made in an *amicus* brief; and its own assessment of the national security threats described in the Order. *Ante* at 60 62.

This intense factual scrutiny of a facially legitimate purpose, of course, flies in the face of *Mandel*, *Fiallo*, and *Din*. But even within traditional Establishment Clause doctrine, it is an unprecedented overreach. It goes far beyond the Court's inquiry in *McCreary*, where the government offered a secular "litigating position" for a *facially religious* action, 545 U.S. at 871, or in *Wallace*, where the government's proffered secular purpose for a statute that provided for "meditation or voluntary prayer" was belied by the fact that a previous law already provided for a minute of meditation, 472

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[4] While there is no question that it binds us, *Lemon*'s test, and particularly its inquiry into government purpose, has repeatedly been criticized as open-ended and manipulable. *See McCreary*, 545 U.S. at 902 (Scalia, J., dissenting) ("By shifting the focus of *Lemon*'s purpose prong from the search for a genuine, secular motivation to the hunt for a predominantly religious purpose, the Court converts what has in the past been a fairly limited inquiry into a rigorous review of the full record"); *see also*, *e.g.*, *Santa Fe*, 530 U.S. at 319 20 (Rehnquist, C.J., dissenting); *Kiryas Joel*, 512 U.S. at 720 (O'Connor, J., concurring in part and concurring in the judgment); *Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 655 57 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part). Should the majority not be wary of jumping when on thin ice?

U.S. at 59 61 (finding that the bill's "sole purpose" was religious). In those cases, the Court concluded that the government's secular purpose did not hold up even on its own terms that is, even accepting the *soundness* of the secular purpose, undisputed historical facts made clear that the secular purpose was not primary. The Court emphatically did not, however, question the *factual bases* underlying the government's proffered secular purpose.

The majority's intense factual inquiry is particularly inappropriate where the government's secular purpose is related to national security a subject, as the majority recognizes, on which we owe the executive significant deference. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 33 34 (2010) (explaining that, where the executive had concluded that material support to terrorist organizations "will ultimately inure to the benefit of their criminal, terrorist functions," "[t]hat evaluation of the facts by the Executive . . . is entitled to deference" because it "implicates sensitive and weighty interests of national security and foreign affairs").

Unless corrected by the Supreme Court, the majority's new approach, which is unsupported by any Supreme Court case, will become a sword for plaintiffs to challenge facially neutral government actions, particularly those affecting regions dominated by a single religion. Government officials will avoid speaking about religion, even privately, lest a court discover statements that could be used to ascribe a religious motivation to their future actions. And, in the more immediate future, our courts will be faced with the unworkable task of determining when this President's supposed religious motive has sufficiently dissipated so as to allow executive action toward these or other majority-

Muslim countries. The Establishment Clause demands none of these unfortunate and unprecedented results.

* * *

For all of the foregoing reasons, I would reject the plaintiffs' and the district court's Establishment Clause arguments and vacate the district court's injunction.

SHEDD, Circuit Judge, with whom Judge NIEMEYER and Judge AGEE join, dissenting[1]:

National security is a complex business with potentially grave consequences for our country. Recognizing this fact, the Supreme Court has observed that "it is obvious and unarguable that no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981).[2] This observation is especially true in today's world, where we face threats from radical terrorists who seek to cross our borders for the purpose of harming us and destroying our way of life. Although we often are quick to forget the fact, "the real risks, the real threats, of terrorist attacks are constant and not likely soon to abate," *Boumediene v. Bush*, 553 U.S. 723, 793 (2008); therefore, "the Government's interest in combating terrorism is an urgent objective of the highest order," *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010). Given the multitude of critical factors involved in protecting national security, including the delicacy of foreign relations and the worldwide intelligence information that is constantly generated, combined with the ever-changing threatening circumstances, "questions of national security . . . do not admit of easy answers, especially not as products of the necessarily limited analysis undertaken in a single case," *Lebron v. Rumsfeld*, 670 F.3d 540, 549 (4th Cir. 2012), and "they are and should be undertaken only by those directly responsible to

[1]Though I fully join Judge Niemeyer's and Judge Agee's well-reasoned dissenting opinions, I offer the following additional comments to explain why I believe the district court further abused its discretion in entering the preliminary injunction. Judge Niemeyer and Judge Agee have authorized me to state that they join in this dissenting opinion.

[2]I have omitted internal quotation marks, alterations, and citations here and throughout this opinion, unless otherwise noted.

the people whose welfare they advance or imperil," *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

Every President has the "constitutional responsibility for the security of the Nation as the Chief Executive and as Commander in Chief of our Armed forces." *El-Masri v. United States*, 479 F.3d 296, 304 (4th Cir. 2007). In this role, a President and his national security advisors (unlike federal judges at all levels, lawyers, and commentators) have constant access to information "that may describe new and serious threats to our Nation and its people." *Boumediene*, 553 U.S. at 797. For these reasons and more, "courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Dept. of Navy v. Egan*, 484 U.S. 518, 530 (1988).

This case involves the President's attempt to impose a *temporary pause* on the entry of nationals from six countries that indisputably present national security concerns. "It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952). Along this line, the Supreme Court has noted that "the Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border," *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004), and has explained that the President is not obligated to disclose his reasons "for deeming nationals of a particular country a special threat . . . and even if [he] did disclose them a court would be

ill equipped to determine their authenticity and utterly unable to assess their adequacy," *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999).

One thing is certain: to whatever extent it is permissible to examine the President's national security decision in this case, where the President has acted "pursuant to an express or implied authorization from Congress," the President's decision is entitled to "the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981). This is especially true when, as here, plaintiffs seek preliminary injunctive relief to stop the President from executing a national security policy, for in even the most routine cases, which this certainly is not, a preliminary injunction "is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010).

The obvious rationale underlying these important principles has been discussed many times by the Supreme Court, this Court, and others, but the district court totally failed to respect them. Rather than giving any deference to the President (or his national security advisors) regarding his national security assessment, or imposing a heavy burden on the plaintiffs to overcome the President's decision, or showing any sense of restraint in wielding the extraordinary remedy of injunctive relief, the district court simply cast aside the President's decision as nothing more than a sham based on its own ideas concerning the wisdom of the Executive Order. In doing so, the district court made the extraordinary finding - based on a *preliminary* evidentiary record - that the President exercised his otherwise lawful authority to effect the temporary pause primarily because

he bears animus towards Muslims and wants to impose a "Muslim ban." Remarkably, the district court made this finding while also acknowledging that the Executive Order is facially neutral, that there are heightened security risks with the countries listed in the Executive Order, and that national security interests would be served by the travel pause.

The shortcomings inherent in the district court's fact-finding are obvious. It is primarily based on the district court's selectively negative interpretation of political campaign statements made before the President swore his oath of office,[3] its acceptance of the national security assessment of *former* government officials (many of whom openly oppose this President), its failure to account for the national security assessment of the *current* Attorney General and Secretary of Homeland Security, its misplaced conclusion regarding the President's decision not to submit the Executive Order to the Executive bureaucracy for "inter-agency review," and the purported novelty of the temporary travel pause. Moreover, despite its express recognition of the dangers posed by the designated countries and the national security interests served by the temporary travel

[3]Ironically, courts are sensitive in defending their own integrity and often use the judicial oath of office as a shield against claims of bias. *See generally Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 891 (2009) (Roberts, C.J., dissenting) ("There is a presumption of honesty and integrity in those serving as adjudicators. All judges take an oath to uphold the Constitution and apply the law impartially, and we trust that they will live up to this promise."). Certainly, the President, who takes a similar oath of office, should be accorded the same trust. *See, e.g.*, *N.L.R.B. v. Enterprise Leas. Co. SE, LLC*, 722 F.3d 609, 671 (4th Cir. 2013) (Diaz, J., concurring in part and dissenting in part) ("The majority also gives short shrift to the fact that the President too swears an oath to uphold the Constitution, and that when he acts under its express authority, his actions should be accorded a presumption of constitutionality.").

pause, the district court - with no access to intelligence information[4] - criticized the President for failing to identify any instances of individuals who came from the designated countries having engaged in terrorist activity in the United States, faulted the President for not explaining why the temporary travel pause is the necessary response to the existing risks, and ultimately found that the President failed to prove that national security cannot be maintained without the temporary travel pause. As if all of this is not enough, the President's supposed goal of "banning Muslims" from the United States is not remotely served by the temporary travel pause, a fact that makes the district court's factual finding even more dubious.[5]

The district court's questionable fact-finding is sufficient (among other reasons) to vacate the injunction, but there is ultimately a more obvious fatal flaw in the injunction order: the court's complete failure to actually account for the public interest. In addition to the general restraint courts must show when considering injunctive relief, courts "should be particularly cautious when contemplating relief that implicates public

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[4]In *Waterman S.S. Corp.*, 333 U.S. at 111, the Court made the following apt observation: "The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports neither are nor ought to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret."

[5]The limited temporal and geographical scope of the Executive Order, coupled with the designated categorical exclusions and case-by-case waiver process, strongly supports the President's stated national security rationale rather than the district court's bias finding. Even without those exclusions and waivers, the temporary travel pause would only potentially affect approximately 10% of Muslims worldwide.

interests." *Salazar v. Buono*, 559 U.S. 700, 714 (2010).[6] Although the public interest generally favors the protection of constitutional rights, that interest must sometimes yield to the public interest in national security, *see, e.g., Defense Distrib. v. U.S. Dept. of State*, 838 F.3d 451, 458-60 (5th Cir. 2016), because "unless a society has the capability and will to defend itself from the aggressions of others, constitutional protections of any sort have little meaning," *Wayte v. United States*, 470 U.S. 598, 612 (1985). This is such a case.

The circumstances of this case are similar in material respects to those presented in *Winter*, and a straightforward application of that case warrants reversal here. The *Winter* plaintiffs complained that the United States Navy's sonar-training program harmed marine mammals and that the Navy should have prepared an environmental impact statement before conducting certain training exercises. The district court agreed and preliminarily enjoined the Navy from using sonar in certain circumstances during training exercises. The Ninth Circuit affirmed the injunction, but the Court reversed. Applying the standard four-part preliminary injunction test, the Court acknowledged the importance of plaintiff's ecological, scientific, and recreational interests in marine mammals and accepted for purposes of discussion that they had shown irreparable injury from the Navy's training exercises. However, the Court concluded that these factors were "outweighed by the public interest and the Navy's interest in effective, realistic training

[6]To obtain a preliminary injunction, a plaintiff must establish: (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in his favor, and (4) an injunction is in the public interest. *Winter v. Natural Res. Def. Counc., Inc.*, 555 U.S. 7, 20 (2008).

of its sailors." *Id.* at 23. In the Court's view: "A proper consideration of these factors alone require[d] denial of the requested injunctive relief." *Id.*

The Court explained that the lower courts "significantly understated the burden the preliminary injunction would impose on the Navy's ability to conduct realistic training exercises, and the injunction's consequent adverse impact on the public interest in national defense." *Id.* at 24. In reaching this conclusion, the Court noted that the case involved complex professional military decisions regarding training and control of a military force, to which "great deference" is ordinarily given, *id.*, and it observed that the record contained declarations from senior Navy officials that underscored the threat posed by enemy submarines and the need for extensive sonar training to counter the threat, as well as a declaration from the President that training with sonar was essential to national security. The Court emphasized that the lower courts "failed properly to defer" to senior Navy officers' judgment about the effect that a preliminary injunction would have on the effectiveness of the training. *Id.* at 27. Additionally, the Court pointed out that "despite the importance of assessing the balance of equities and the public interest in determining whether to grant a preliminary injunction, the District Court addressed these considerations in only a cursory fashion." *Id.* at 26. Ultimately, while acknowledging that "military interests do not always trump other considerations," the Court determined that "the proper determination of where the public interest lies does not strike us as a close question." *Id.*

As in *Winter*, the district court's public interest analysis misses the mark. Here, the facially neutral Executive Order explains in detail the President's underlying reasoning

for the temporary travel pause. Additionally, the record contains a joint letter from the Attorney General and Secretary of Homeland Security in which they detail their concerns "about weaknesses in our immigration system that pose a risk to our Nation's security," and in which they assert that "*it is imperative that we have a temporary pause on the entry of nationals from certain countries to allow this review to take place a temporary pause that will immediately diminish the risk we face from application of our current vetting and screening programs for individuals seeking entry to the United States from these countries*." To be sure, the district court found that the *President's* alleged bias is the primary reason for the temporary travel pause, but it found no such bias on the part of his Cabinet officials.[7] Moreover, the district court acknowledged that national security is in fact a secondary reason for the temporary travel pause, and it found that the countries designated in the Executive Order present heightened security risks and that national security interests would be served by the temporary travel pause.

Despite this record, the district court with no meaningful analysis - simply dismissed the public's interest in national security with the specious conclusion that "Defendants . . . have not shown, or even asserted, that national security cannot be maintained without an unprecedented six-country travel ban, a measure that has not been deemed necessary at any other time in recent history." *I.R.A.P. v. Trump*, 2017 Westlaw

[7]Similarly, plaintiffs' counsel admitted during oral argument that he has no basis to challenge the integrity of the Attorney General and Secretary of Homeland Security. The apparent good-faith of these officials, which is an inconvenient fact for the plaintiffs, leads inexorably to the unanswered question of why the district court essentially ignored or rejected their detailed national security advice to the President.

1018235, *17 (D. Md. 2017). As noted, national security is the most compelling of public interests, and the question of how best to protect public safety in this area does not, as the district court implies, boil down to a least-restrictive means test, *Padilla v. Hanft*, 423 F.3d 386, 395 (4th Cir. 2005) ("We believe that the district court ultimately accorded insufficient deference to that determination, effectively imposing upon the President the equivalent of a least-restrictive-means test. To subject to such exacting scrutiny the President's determination that criminal prosecution would not adequately protect the Nation's security at a very minimum fails to accord the President the deference that is his when he acts pursuant to a broad delegation of authority from Congress."), or require a danger that satisfies the court's "independent foreign policy analysis," *Regan v. Wald*, 468 U.S. 222, 242 (1984). Therefore, the relevant point is not whether the temporary travel pause is the *only* way, or even the best way, to protect national security. The simple fact of the matter is that regardless of any ulterior motive one might ascribe to the President, the record still conclusively establishes that the temporary travel pause will in fact promote an important national security objective.

Undoubtedly, protection of constitutional rights is important, but there are often times in the federal system when constitutional rights must yield for the public interest. As we have explained, for example, in applying the state secrets doctrine, a plaintiff with a plausibly viable constitutional claim can be barred from pursuing it "not through any fault of his own, but because his personal interest in pursuing his civil claim is subordinated to the collective interest in national security." *El-Masri*, 479 F.3d at 313. In my view, the very serious national security interest served by the temporary travel pause

(as determined by those who are duly empowered to make the decision and who have access to current intelligence information) greatly outweighs the alleged temporary and relatively minor harm that will befall these few plaintiffs. The district court abused its discretion by failing to strike this balance. *See, e.g.*, *Sarsour v. Trump*, 2017 Westlaw 1113305, *15 (E.D.Va. 2017) ("Based on the record now before the Court, the parties' respective interests described above, the subject matter of EO 2, and the protections to the public that EO 2 is intended to provide, Plaintiffs have not established that the public interest favors issuance of immediate relief in this action.").

Today's decision may be celebrated by some as a victory for individual civil rights and justice, and by others as a political defeat for this President. Yet, it is shortsighted to ignore the larger ramifications of this decision. Regrettably, at the end of the day, the real losers in this case are the millions of individual Americans whose security is threatened on a daily basis by those who seek to do us harm. Even if the district court's instinct is correct and no tangible harm directly results from its order enjoining the President from attempting to protect American citizens, the injunction prohibits the government from addressing a serious risk identified by the Attorney General and Homeland Security Secretary; therefore, the security of our nation is indisputably lessened as a result of the injunction. Moreover, the President and his national security advisors (and perhaps future

Presidents) will be seriously hampered in their ability to exercise their constitutional duty to protect this country.[8]

[8]At oral argument, several judges (including myself) questioned when, if ever, the President could free himself from the stigma of bias that the district court has enshrined by its *preliminary* "factfinding." Notably, no one has provided a satisfactory response.

AGEE, Circuit Judge, with whom Judge NIEMEYER and Judge SHEDD join, dissenting:

In their haste to reach the merits of the plaintiffs' Establishment Clause claim, my colleagues in the majority neglect to follow the longstanding and well-defined requirements of Article III of the United States Constitution. They err, as did the district court, in holding that the plaintiffs had standing to bring an Establishment Clause claim. For that reason, I respectfully dissent from the majority's decision to uphold the district court's preliminary injunction. The plaintiffs do not have standing to bring the current action.[1]

I.

A.

Article III limits the federal judiciary's authority to adjudicate only "cases" and "controversies." U.S. Const. art. III, § 2. "[S]tanding is an integral component of the case or controversy requirement." *CGM, LLC v. BellSouth Telecomms., Inc.*, 664 F.3d 46, 52 (4th Cir. 2011); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.").[2] A plaintiff must satisfy three elements to

[1] I join the well-written dissents of Judge Niemeyer and Judge Shedd in full. But, for the reasons stated herein, I would find it unnecessary to reach the merits of the plaintiffs' Establishment Clause claim.

[2] I have omitted internal alterations, citations, and quotation marks here and throughout this dissent, unless otherwise noted.

establish standing: (1) "the plaintiff must have suffered an injury in fact an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2) "there must be a causal connection between the injury and the conduct complained of the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court"; and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Defenders of Wildlife*, 504 U.S. at 560 61. "The party invoking federal jurisdiction bears the burden of establishing these elements." *Id.* at 561.

Due to the difficulty of determining injury in Establishment Clause cases, "rules of standing recognize that noneconomic or intangible injury may suffice to make an Establishment Clause claim justiciable." *Suhre v. Haywood Cty.*, 131 F.3d 1083, 1086 (4th Cir. 1997); *see also Moss v. Spartanburg Cty. Sch. Dist. Seven*, 683 F.3d 599, 605 (4th Cir. 2012) ("Many of the harms that Establishment Clause plaintiffs suffer are spiritual and value-laden, rather than tangible and economic."). However, "a mere abstract objection to unconstitutional conduct is not sufficient to confer standing." *Suhre*, 131 F.3d at 1086; *see also Moss*, 683 F.3d at 605 ("Nonetheless, we must guard against efforts to use this principle to derive standing from the bare fact of disagreement with a government policy, even passionate disagreement premised on Establishment Clause principles. Such disagreement, taken alone, is not sufficient to prove spiritual injury."). For example, "a citizen of Omaha, Nebraska who finds a religious symbol in the Haywood County Courthouse [in North Carolina] to be offensive in the abstract would

not have standing to challenge it. The injury to our hypothetical Omaha plaintiff partakes of a generalized grievance, based on nothing more than each citizen's shared individuated right to a government that shall make no law respecting the establishment of religion." *Suhre*, 131 F.3d at 1086; *accord Defenders of Wildlife*, 504 U.S. at 575 ("[T]o entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public."). Conversely, "direct contact with an unwelcome religious exercise or display works a personal injury distinct from and in addition to each citizen's general grievance against unconstitutional government conduct." *Suhre*, 131 F.3d at 1086.

B.

The district court determined that three of the individual plaintiffs (Meteab, John Doe #1, and John Doe #3) had sufficiently pleaded that they had suffered stigmatization due to the Executive Order. *See* J.A. 780 (finding that the plaintiffs claimed "the anti-Muslim animus underlying the Second Executive Order inflicts *stigmatizing injuries* on them all" (emphasis added)). Because Section 2(c) also allegedly prevents the family members of these plaintiffs from entering the country, the district court held that they had asserted injuries sufficient to confer standing to pursue their Establishment Clause claim.

Doe #1 is a lawful permanent resident and "non-practicing Muslim[]." J.A. 213, 305. His wife, also a non-practicing Muslim and Iranian national, has applied for an immigrant visa. She is currently awaiting an embassy interview, a condition precedent to

the determination of whether to grant a visa. *See* 22 C.F.R. § 42.62(b) ("Every alien executing an immigrant visa application must be interviewed by a consular officer who shall determine on the basis of the applicant's representations and the visa application and other relevant documentation (1) The proper immigrant classification, if any, of the visa applicant, and (2) The applicant's eligibility to receive a visa."). Doe #1 alleges that the Executive Order has caused him and his wife to experience "significant fear, anxiety and insecurity . . . regarding their future." J.A. 246. He argues that because he is afraid that he will not be allowed to reenter the United States if he travels to Iran, Section 2(c) "forces [him] to choose between [his] career and being with [his] wife." J.A. 306. Doe #1 maintains that "the anti-Muslim views that are driving the Executive Order, as well as the Order itself, have caused [him] significant stress and anxiety." J.A. 306. He is allegedly concerned for his safety.

Like Doe #1, Doe #3 is a lawful permanent resident, although nothing in the record indicates his religious preference.[3] In any event, Doe #3 applied for an immigrant visa on behalf of his wife, an Iranian national. In May 2016, the United States Embassy "informed [her] that her documentation was complete and she needed to wait for administrative processing, but that she should be able to join her husband in two to three months." J.A. 246. With his wife in Iran, Doe #3 maintains that "[t]heir continued separation has placed extraordinary stress on John Doe #3 and his wife, and their

[3] The pleadings make only one religious reference with respect to Doe #3: "The anti-Muslim attitudes that are driving this Executive Order have caused me stress and anxiety and made me question whether I even belong in this country despite everything I have sacrificed and invested in making a life here." J.A. 310.

relationship." J.A. 247. He "feel[s] as though they've been unable to start their lives together because of the delays and uncertainty caused by the Executive Order." J.A. 247. Doe #3 asserts that he and his wife "are being torn apart by this situation and the uncertainty and delay." J.A. 310. He believes that the anti-Muslim message of the Executive Order has caused him stress and anxiety and to feel like an outsider.

Meteab is also a lawful permanent resident and Muslim. His wife and children are here in the United States. However, Meteab has three brothers who wish to resettle in North America as refugees. Two of the three have received approval for resettlement in the United States but have not yet obtained travel documents. The remaining brother has been approved for resettlement in Canada. Meteab contends that, as a result of the Executive Order, he "and his wife have experienced anti-Muslim sentiment and felt very uncomfortable and insecure in their community, causing them acute mental stress." J.A. 250. The couple "ha[s] experienced hostility in public, with people staring at Mr. Meteab's wife, who wears a hijab, and refusing to stop for them at crosswalks." J.A. 250.

C.

The district court held that, "where the [allegedly anti-Muslim] Executive Order was issued by the federal government, and the three Individual Plaintiffs have family members who are directly and adversely affected in that they are barred from entry to the United States as a result of the terms of the Executive Orders, these Individual Plaintiffs have alleged a personal injury as a consequence of the alleged Establishment Clause violation." J.A. 787. However, as the record reflects, the district court clearly erred in finding that Meteab had standing to challenge Section 2(c) of the Executive Order.

Meteab's brothers are refugees, and Section 2(c) does not apply to refugees. The district court recognized in its opinion that "[t]he Plaintiffs' Establishment Clause . . . arguments focused primarily on the travel ban for citizens of the six Designated Countries in Section 2(c) of the Second Executive Order." J.A. 809. The court elaborated that the plaintiffs had "not sufficiently develop[ed] . . . argument[s relating to refugees] to warrant an injunction on those sections at this time." J.A. 810. Therefore, Meteab cannot base standing to challenge Section 2(c) on any "prolonged separation" from his refugee brothers, who are covered by a different section of the Executive Order. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) ("[A] plaintiff must demonstrate standing for each claim he seeks to press."); *Allen v. Wright*, 468 U.S. 737, 752 (1984) ("Typically, however, the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted."), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. ___, 134 S. Ct. 1377 (2014). Thus, Meteab can show Establishment Clause standing only if his alleged stigmatization is a cognizable injury for standing purposes.

As for Doe #3, his wife was granted a visa during the pendency of this appeal, so he, too, is left with only stigma to make his Establishment Clause claim of standing. For the reasons stated below, such a stigma claim alone is insufficient to confer standing under the record in this case.

Perhaps recognizing these deficits, the majority bases its affirmation of the district court's standing determination only on Doe #1. But Doe #1 does not have standing either

because the stigma that he alleges to have suffered and the potential denial of a visa to his wife are two distinct harms, neither of which meet basic standing requirements. Setting aside Doe #1's allegation that he experienced stigmatization himself, the imagined future denial of a visa to his wife is simply too vague and speculative to meet the constitutional standard of a concrete and "actual or imminent, not conjectural or hypothetical" injury. *Defenders of Wildlife*, 504 U.S. at 560. The majority's conception of "injury-in-fact" by Doe #1 is conjectural and hypothetical; he had no reasonable expectation that his wife would join him in the United States at any particular time either prior to the drafting of the Executive Order or at any time during the suspension period.

1.

The plaintiffs' pleadings show that their alleged injuries consist solely of their personal perception of stigmatization. In the complaint, they allege, "The March 6 Order also contains language that associates Muslims with violence, terrorism, bigotry, and hatred, inflicting *stigmatic and dignitary harms*." J.A. 207 (emphasis added). Despite the majority's holding, the stigma that plaintiffs claim to have suffered is not a cognizable injury because it is simply a subjective disagreement with a government action. To allow these plaintiffs to pursue their claims based on an idiosyncratic projection of stigmatization is to grant every would-be Establishment Clause plaintiff who develops negative feelings in response to some action by the Government a court proceeding in which to vent his subjective reactions as a legal claim. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 489 (1982) ("Were we to accept respondents' claim of standing in this case, there would

be no principled basis for confining our exception to litigants relying on the Establishment Clause."). Indeed, to find standing here is to find standing for not only all Muslims in America, but *any* American who may find the Executive Order (or any other Government action) personally disagreeable, which is "beyond all reason." *See Defenders of Wildlife*, 504 U.S. at 566.

The Supreme Court "ha[s] consistently held that a plaintiff raising only a generally available grievance about government claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large does not state an Article III case or controversy." *Id.* at 573 74; *accord Valley Forge*, 454 U.S. at 482 83 (stating that the Supreme Court "repeatedly has rejected claims of standing predicated on the right, possessed by every citizen, to require that the Government be administered according to law"). The Court has rejected a generalized finding of standing based on "the need for an available plaintiff, without whom the Establishment Clause would be rendered virtually unenforceable by the judiciary." *Valley Forge*, 454 U.S. at 470. The plaintiffs here "fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees." *Id.* at 485. The majority does not provide any principled instruction on how its sweeping standing ruling is cabined to this particular case, and thus its holding far oversteps the bounds of traditional judicial authority. *See id.* at 471 (stating that Article III is a limitation on "judicial power"); *see also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004) ("The

command to guard jealously and exercise rarely our power to make constitutional pronouncements requires strictest adherence when matters of great national significance are at stake."), *abrogated on other grounds by Lexmark*, 134 S. Ct. 1377; *Defenders of Wildlife*, 504 U.S. at 576 ("Vindicating the public interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive.").

The majority relies heavily on two Fourth Circuit cases, *Suhre* and *Moss*, but these cases are inapposite.[4] In *Suhre*, local officials displayed the Ten Commandments in the county courthouse where the plaintiff, a resident of the county, often visited. 131 F.3d at 1084 85. Suhre, an avowed atheist and serial litigant, took offense to the display and "aver[red] that contact with the display cause[d] him distress." *Id.* at 1085. We ultimately found that Suhre had alleged a "cognizable injury caused by personal contact with a public religious display." *Id.* at 1090.

In *Moss*, a school district "adopted a policy allowing public school students to receive two academic credits for off-campus religious instruction offered by private educators." 683 F.3d at 601. The plaintiffs, including two students and their parents, urged the Court to "adopt a per se rule that students and parents always have standing to bring suit against policies at their school when they allege a violation of the Establishment Clause, regardless of whether they allege or can prove personal injury."

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[4] *Suhre* is a religious display case, a type of Establishment Clause claim that arguably belongs in its own category. *See* 131 F.3d at 1086 ("Religious display cases are an even more particularized subclass of Establishment Clause standing jurisprudence.").

Id. at 605. We rejected that argument and held that, although injuries in such cases are often intangible, plaintiffs must have been "spiritually affronted as a result of direct and unwelcome contact with an alleged religious establishment within their community." *Id.* Because one student had no "personal exposure" to the policy other than mere awareness of its existence, we held that the student lacked standing, despite that student "feel[ing] like an outsider" in the school environment. *Id.* at 606. However, we found that the other student had standing to bring a claim because she actually received a solicitation letter from a religious institution that participated in the school's program and "changed [her] conduct in adverse ways as a result of [her] perceived outsider status." *Id.* at 607.

In both of these cases, local governments took direct actions in relation to their constituents in an immediate and concrete way. All residents who entered the courthouse in *Suhre* were personally exposed to the display of the Ten Commandments, while the academic policy in *Moss* was actually sent to the student. As a consequence, the plaintiffs in those cases did come into direct contact with the alleged Establishment Clause violations.[5]

In contrast, the Executive Order here applies only to prospective immigrants. The order's focus faces outward towards the alien residents of the subject countries, not

[5] The out-of-circuit cases on which the majority also relies are likewise inapposite for the same reasons that distinguish *Suhre* and *Moss*. *See Awad v. Ziriax*, 670 F.3d 1111, 1116, 1122 (10th Cir. 2012) (analyzing a "proposed constitutional amendment that would prevent Oklahoma state courts from considering or using Sharia law"); *Catholic League for Religious and Civil Rights v. City and Cty. of San Francisco*, 624 F.3d 1043, 1048 53 (9th Cir. 2010) (reviewing standing in a case challenging a city resolution that ordered Catholics in San Francisco to cease discriminating against same-sex couples).

inward towards persons in the United States like the plaintiffs. That circumstance is in direct distinction to the religious display in *Suhre* or the academic policy in *Moss*. Section 2(c) of the facially-neutral Executive Order applies only to "nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen." Section 3(b)(i) explicitly exempts "any lawful permanent resident of the United States," like the plaintiffs, from the travel suspension, thus not applying to Does #1 and #3 and Meteab. The majority posits that, because the policy at issue came from the President himself that somehow metamorphosizes into the "direct contact" *Suhre* requires. Majority Op. 39. This distorts the standing inquiry as the source of the directive is irrelevant. What matters is whether the plaintiff came into direct contact with the religious establishment. And that is not the case here simply because the President is the party signing an order.

Despite the majority's giving short shrift to *In re Navy Chaplaincy*, 534 F.3d 756 (D.C. Cir. 2008), the case is directly on point. There, "[a] group of Protestant Navy chaplains sued the Navy, alleging that the Navy's operation of its retirement system discriminates in favor of Catholic chaplains in violation of the Establishment Clause." *Id.* at 758.[6] The plaintiffs "conceded that the Navy did not deny them any benefits or opportunities on account of their religion." *Id.* at 760. Rather, they maintained "that *other* chaplains suffered such discrimination." *Id.* The plaintiffs contended that they had standing because "they ha[d] been subjected to the Navy's message of religious

[6] It is irrelevant that *In re Navy Chaplaincy* is a favoritism case as opposed to a condemnation case as alleged here, as they are two sides of the same Establishment Clause coin.

preference as a result of the Navy's running a retirement system that favors Catholic chaplains." *Id.* The D.C. Circuit rejected this argument and found that they did not "have standing based on their exposure to the Navy's alleged message of religious preference." *Id.* at 761. Like the Protestant Navy chaplains, the plaintiffs here claim offense to a message directed at others, who happen to be nationals of other countries. The plaintiffs' claims of stress or stigmatization are subjective reactions, not direct contact with the Executive Order, and amount to disagreements with a government policy. *See Moss*, 683 F.3d at 604 05. As a result, the plaintiffs' claim of injury by way of stigma is a general grievance, insufficient to confer standing. *Suhre*, 131 F.3d at 1086.[7]

2.

Perhaps recognizing the problems posed by basing standing only on the subjective feelings of the plaintiffs, the majority also holds that the alleged stigma suffered by Doe #1, combined with prolonged separation from his wife, is enough to support standing, thereby creating a kind of "stigma plus" standard.[8] However, the majority's construct

[7] Some of the plaintiffs, including Doe #1, have expressed fear that they will be denied reentry into the country if they travel to the subject countries to visit their family while the Executive Order is in effect. This fear is unfounded and contradicted by the plain terms of the Executive Order. Does #1 and 3 and Meteab are all lawful permanent residents. Section 3(b)(i) of the Executive Order exempts "any lawful permanent resident of the United States" from the temporary suspension of entry.

[8] In its attempt to distinguish *In re Navy Chaplaincy*, the majority implicitly holds that stigma alone is not enough to support standing. The majority states that, "contrary to the Government's assertion, all Muslims in the United States do not have standing to bring this suit. Only those persons who suffer direct, cognizable injuries as a result of EO-2 have standing to challenge it." Majority Op. 40 n.11. The majority avers that Doe (Continued)

erroneously conflates Doe #1's Establishment Clause standing claim with his claim under the Immigration and Nationality Act ("INA"), which the Supreme Court has prohibited. *See DaimlerChrysler Corp.*, 547 U.S. at 352 ("[O]ur standing cases confirm that a plaintiff must demonstrate standing for each claim he seeks to press."). Plaintiffs are required to "demonstrate standing *separately* for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000) (emphasis added). The majority haphazardly merges alleged injuries unique to two different claims, and personal to different people, to manufacture standing. [9]

#1 "is feeling the direct, painful effects of the Second Executive Order both its alleged message of religious condemnation *and* the prolonged separation it causes between him and his wife in his everyday life." *Id.* at 40. The majority is right in that regard stigma is not enough.

[9] Although not the focus of this dissent, I also would find that Doe #1 does not have standing to bring an INA claim; he lacks a concrete injury. It is pure speculation whether Doe #1's wife will receive a visa. Doe #1 has presented no evidence showing that his wife is likely to receive a visa, much less when, but for the operation of the executive order. Or that the executive order would tangibly affect the processing of her application in any way. *See* Opening Br. 19 20 ("Likewise, Doe #1's wife did not have her visa interview scheduled before the Revoked Order took effect, and had already been waiting roughly six weeks, making it similarly speculative whether the 90-day pause will affect her."); *see also The Immigrant Visa Process: Interview*, U.S. Dep't of State, https://travel.state.gov/content/visas/en/immigrate/immigrant-process/interview.html (last visited May 23, 2017) (saved as ECF opinion attachment) (stating that, although "[m]ost appointments are set within 60 days of [the National Visa Center's] receipt of all requested documentation[,] . . . we *cannot predict when an interview appointment will be available*," and warning that "[t]here may be a wait of *several months* for an interview date to become available" (emphasis added)). Nor has the Government denied the visa application of Doe #1's spouse.

Any injury caused by the Executive Order is not redressable because an injunction will not establish that Doe #1's wife will receive a visa, as exemplified by her current status. *See The Immigrant Visa Process: Interview*, *supra* ("Based on U.S. law, not (Continued)

The majority reasons that Doe #1 has third-party standing to bring an Establishment Clause claim. Not so. Plaintiffs do not have standing to allege violations of the Establishment Clause on behalf of their immigrant relatives. *See Whitmore v. Arkansas*, 495 U.S. 149, 161 n.2 (1990) (restating the general rule "that a litigant must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties"); *cf. Defenders of Wildlife*, 504 U.S. at 562 ("[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish."). The relatives, in turn, do not have rights of entry or any Establishment Clause rights. *Kerry v. Din*, 576 U.S. __, 135 S. Ct. 2128, 2131 (2015) ("But because Berashk is an unadmitted and nonresident alien, he has no right of entry into the United States, and no cause of action to press in furtherance of his claim for admission."); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (suggesting that "the people protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community"). Doe #1 is "seeking to vindicate, not [his] own rights, but the rights of others." *Moss*, 683 F.3d at 606.

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everyone who applies for a visa will be found eligible to come to the United States."). Doe #1 does not have standing under the INA.

Doe #1 has no right to, or even a reasonable expectation of, a time certain meeting with his wife in America. His alleged injury is based on a mere conjecture that his wife will have her embassy interview and obtain a discretionary visa within the ninety-day suspension period of the Executive Order when the State Department has cautioned, well before the Executive Order, that it may take an indefinite period to schedule interviews much less adjudicate visa applications. *See The Immigrant Visa Process: Interview*, *supra* note 9 (stating that, although "[m]ost appointments are set within 60 days of [the National Visa Center's] receipt of all requested documentation[,] . . . we *cannot predict when an interview appointment will be available*," and warning that "[t]here may be a wait of *several months* for an interview date to become available" (emphasis added)). Any effect of the Executive Order on that speculative possibility is simply not determinable and thus fails to meet the constitutional standard of an injury "actual or imminent, not conjectural or hypothetical." *Defenders of Wildlife*, 504 U.S. at 560.

The majority underscores the fragility of its standing hypotheses when it avers, without any citation to precedent or evidence, that the Executive Order creates harm to the plaintiffs because "dedicating time and resources to a global review process[, for which Section 2(c) was designed to facilitate,] will further slow the adjudication of pending [visa] applications." Majority Op. 36. Nothing in the record supports this assertion or ties any nexus to Doe #1 or his spouse. Doe #1 simply fails to carry his burden as to standing under the standard required by the Supreme Court. No

constitutionally cognizable "harm" which is "certainly impending" to Doe #1 or to him via his spouse has been proffered. *Defenders of Wildlife*, 504 U.S. at 564 n.2.[10]

For all these reasons, Doe #1 has no "legally protected interest," *Defenders of Wildlife*, 504 U.S. at 560, and no standing to pursue his Establishment Clause claim.[11]

II.

As the plaintiffs lack standing to pursue their cause of action, I respectfully dissent and would vacate the grant of a preliminary injunction by the district court.

[10] Similarly, there is no feasible way to determine, except by pure speculation, how or whether the Executive Order's visa waiver process might affect a particular visa application. Nothing in the record supports the majority's conclusion that pursuing a waiver would affect any plaintiff. Rather, the majority has arbitrarily substituted its conjecture for evidence. The visa waiver process could just as likely allow Doe #1's wife to obtain her visa as not during the temporary suspension period.

[11] The district court did not determine whether other individual plaintiffs or the organizational plaintiffs have standing to bring the Establishment Clause claim. That would be a matter to be considered by the district court in the first instance in any further proceedings.

Per Curiam

SUPREME COURT OF THE UNITED STATES

Nos. 16 1436 (16A1190) and 16 1540 (16A1191)

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.
No. 16–1436 (16A1190) *v.*
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.

ON APPLICATION FOR STAY AND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.
No. 16–1540 (16A1191) *v.*
HAWAII, ET AL.

ON APPLICATION FOR STAY AND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 26, 2017]

PER CURIAM.

These cases involve challenges to Executive Order No. 13780, Protecting the Nation From Foreign Terrorist Entry Into the United States. The order alters practices concerning the entry of foreign nationals into the United States by, among other things, suspending entry of nationals from six designated countries for 90 days. Respondents challenged the order in two separate lawsuits. They obtained preliminary injunctions barring enforcement of several of its provisions, including the 90-day suspension of entry. The injunctions were upheld in large measure by the Courts of Appeals.

The Government filed separate petitions for certiorari, as well as applications to stay the preliminary injunctions

entered by the lower courts. We grant the petitions for certiorari and grant the stay applications in part.

I

A

On January 27, 2017, President Donald J. Trump signed Executive Order No. 13769, Protecting the Nation From Foreign Terrorist Entry Into the United States. 82 Fed. Reg. 8977 (EO–1). EO–1 addressed policies and procedures relating to the entry of foreign nationals into this country. Among other directives, the order suspended entry of foreign nationals from seven countries identified as presenting heightened terrorism risks—Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen—for 90 days. §3(c). Executive officials were instructed to review the adequacy of current practices relating to visa adjudications during this 90-day period. §3(a). EO–1 also modified refugee policy, suspending the United States Refugee Admissions Program (USRAP) for 120 days and reducing the number of refugees eligible to be admitted to the United States during fiscal year 2017. §§5(a), (d).

EO–1 was immediately challenged in court. Just a week after the order was issued, a Federal District Court entered a nationwide temporary restraining order enjoining enforcement of several of its key provisions. *Washington* v. *Trump*, 2017 WL 462040 (WD Wash., Feb. 3, 2017). Six days later, the Court of Appeals for the Ninth Circuit denied the Government's emergency motion to stay the order pending appeal. *Washington* v. *Trump*, 847 F. 3d 1151 (2017). Rather than continue to litigate EO–1, the Government announced that it would revoke the order and issue a new one.

A second order followed on March 6, 2017. See Protecting the Nation From Foreign Terrorist Entry Into the United States, Exec. Order No. 13780, 82 Fed. Reg. 13209 (EO–2). EO–2 describes "conditions in six of the . . . coun-

tries" as to which EO–1 had suspended entry, stating that these conditions "demonstrate [that] nationals [of those countries] continue to present heightened risks to the security of the United States," §1(e), and that "some of those who have entered the United States through our immigration system have proved to be threats to our national security," §1(h).

Having identified these concerns, EO–2 sets out a series of directives patterned on those found in EO–1. Several are relevant here. First, EO–2 directs the Secretary of Homeland Security to conduct a global review to determine whether foreign governments provide adequate information about nationals applying for United States visas. §2(a). EO–2 directs the Secretary to report his findings to the President within 20 days of the order's "effective date," after which time those nations identified as deficient will be given 50 days to alter their practices. §§2(b), (d)–(e).

Second, EO–2 directs that entry of nationals from six of the seven countries designated in EO–1—Iran, Libya, Somalia, Sudan, Syria, and Yemen—be "suspended for 90 days from the effective date" of the order. §2(c). EO–2 explains that this pause is necessary to ensure that dangerous individuals do not enter the United States while the Executive is working to establish "adequate standards . . . to prevent infiltration by foreign terrorists"; in addition, suspending entry will "temporarily reduce investigative burdens on agencies" during the Secretary's 20-day review. *Ibid.* A separate section provides for case-by-case waivers of the entry bar. §3(c).

Third, EO–2 suspends "decisions on applications for refugee status" and "travel of refugees into the United States under the USRAP" for 120 days following its effective date. §6(a). During that period, the Secretary of State is instructed to review the adequacy of USRAP application and adjudication procedures and implement

whatever additional procedures are necessary "to ensure that individuals seeking admission as refugees do not pose a threat" to national security. *Ibid.*

Fourth, citing the President's determination that "the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States," EO–2 "suspend[s] any entries in excess of that number" for this fiscal year. §6(b).

Finally, §14 of EO–2 establishes the order's effective date: March 16, 2017.

B

Respondents in these cases filed separate lawsuits challenging EO–2. As relevant, they argued that the order violates the Establishment Clause of the First Amendment because it was motivated not by concerns pertaining to national security, but by animus toward Islam. They further argued that EO–2 does not comply with certain provisions in the Immigration and Nationality Act (INA), 66 Stat. 187, as amended.

In No. 16–1436, a Federal District Court concluded that respondents were likely to succeed on their Establishment Clause claim with respect to §2(c) of EO–2—the provision temporarily suspending entry from six countries—and entered a nationwide preliminary injunction barring the Government from enforcing §2(c) against any foreign national seeking entry to the United States. *International Refugee Assistance Project* v. *Trump*, F. Supp. 3d , 2017 WL 1018235 (D Md., Mar. 16, 2017) (*IRAP*). The District Court in No. 16–1540—likewise relying on the Establishment Clause—entered a broader preliminary injunction: The court enjoined nationwide enforcement of all of §§2 and 6. *Hawaii* v. *Trump*, F. Supp. 3d , 2017 WL 1167383 (D Haw., Mar. 29, 2017) (entering preliminary injunction); F. Supp. 3d , 2017 WL 1011673 (D Haw., Mar. 15, 2017) (entering temporary

restraining order). In addition to the §2(c) suspension of entry, this injunction covered the §6(a) suspension of refugee admissions, the §6(b) reduction in the refugee cap, and the provisions in §§2 and 6 pertaining only to internal executive review.

These orders, entered before EO–2 went into effect, prevented the Government from initiating enforcement of the challenged provisions. The Government filed appeals in both cases.

The Court of Appeals for the Fourth Circuit ruled first. On May 25, over three dissenting votes, the en banc court issued a decision in *IRAP* that largely upheld the order enjoining enforcement of §2(c). 857 F. 3d 554. The majority determined that respondent John Doe #1, a lawful permanent resident whose Iranian wife is seeking entry to the United States, was likely to succeed on the merits of his Establishment Clause claim. The majority concluded that the primary purpose of §2(c) was religious, in violation of the First Amendment: A reasonable observer familiar with all the circumstances—including the predominantly Muslim character of the designated countries and statements made by President Trump during his Presidential campaign—would conclude that §2(c) was motivated principally by a desire to exclude Muslims from the United States, not by considerations relating to national security. Having reached this conclusion, the court upheld the preliminary injunction prohibiting enforcement of §2(c) against any foreign national seeking to enter this country.

On June 1, the Government filed a petition for certiorari seeking review of the Fourth Circuit's decision. It also filed applications seeking stays of both injunctions, including the *Hawaii* injunction still pending before the Ninth Circuit. In addition, the Government requested that this Court expedite the certiorari stage briefing. We accordingly directed respondents to file responses to the stay appli-

cations by June 12 and respondents in *IRAP* to file a brief in opposition to the Government's petition for certiorari by the same day.

Respondents' June 12 filings injected a new issue into the cases. In *IRAP*, respondents argued that the suspension of entry in §2(c) would expire on June 14. Section 2(c), they reasoned, directs that entry "be suspended for 90 days from the effective date of" EO–2. The "effective date" of EO–2 was March 16. §14. Although courts had enjoined portions of EO–2, they had not altered its effective date, nor so much as mentioned §14. Thus, even though it had never been enforced, the entry suspension would expire 90 days from March 16: June 14. At that time, the dispute over §2(c) would become moot. Brief in Opposition 13–14.

On the same day respondents filed, the Ninth Circuit ruled in *Hawaii*. F. 3d , 2017 WL 2529640 (June 12, 2017) (*per curiam*). A unanimous panel held in favor of respondents the State of Hawaii and Dr. Ismail Elshikh, an American citizen and imam whose Syrian mother-in-law is seeking entry to this country. Rather than rely on the constitutional grounds supporting the District Court's decision, the court held that portions of EO–2 likely exceeded the President's authority under the INA. On that basis it upheld the injunction as to the §2(c) entry suspension, the §6(a) suspension of refugee admissions, and the §6(b) refugee cap. The Ninth Circuit, like the Fourth Circuit, concluded that the injunction should bar enforcement of these provisions across the board, because they would violate the INA "in all applications." *Id.*, at *28. The court did, however, narrow the injunction so that it would not bar the Government from undertaking the internal executive reviews directed by EO–2.

We granted the parties' requests for supplemental briefing addressed to the decision of the Ninth Circuit. Before those briefs were filed, however, the ground shifted again.

On June 14, evidently in response to the argument that §2(c) was about to expire, President Trump issued a memorandum to Executive Branch officials. The memorandum declared the effective date of each enjoined provision of EO–2 to be the date on which the injunctions in these cases "are lifted or stayed with respect to that provision." Presidential Memorandum for the Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Director of National Intelligence (June 14, 2017). The memorandum further provided that, to the extent necessary, it "should be construed to amend the Executive Order." *Ibid.* The Government takes the view that, if any mootness problem existed previously, the President's memorandum has cured it.

The parties have since completed briefing, with the Government requesting that we construe its supplemental brief in *Hawaii* as a petition for certiorari. There is no objection from respondents, and we do so. Both petitions for certiorari and both stay applications are accordingly ripe for consideration.

II

The Government seeks review on several issues. In *IRAP*, the Government argues that respondent Doe lacks standing to challenge §2(c).* The Government also contends that Doe's Establishment Clause claim fails on the merits. In its view, the Fourth Circuit should not have asked whether §2(c) has a primarily religious purpose. The court instead should have upheld EO–2 because it rests on the "facially legitimate and bona fide" justification of protecting national security. *Kleindienst* v. *Mandel*, 408

*On June 24, 2017, this Court received a letter from counsel for Doe advising that Doe's wife received an immigrant visa on or about June 22, 2017. The parties may address the significance of that development at the merits stage. It does not affect our analysis of the stay issues in these cases.

U. S. 753, 770 (1972). In addition, the Fourth Circuit erred by focusing on the President's campaign-trail comments to conclude that §2(c)—religiously neutral on its face—nonetheless has a principally religious purpose. At the very least, the Government argues, the injunction is too broad.

In *Hawaii*, the Government likewise argues that respondents Hawaii and Dr. Elshikh lack standing and that (at a minimum) the injunction should be narrowed. The Government's principal merits contention pertains to a statutory provision authorizing the President to "suspend the entry of all aliens or any class of aliens" to this country "[w]henever [he] finds that the entry of any aliens or of any class of aliens . . . would be detrimental to the interests of the United States." 8 U. S. C. §1182(f). The Ninth Circuit held that "[t]here is no sufficient finding in [EO–2] that the entry of the excluded classes would be detrimental to the interests of the United States." *Hawaii*, 2017 WL 2529640, at *14. This, the Government argues, constitutes impermissible judicial second-guessing of the President's judgment on a matter of national security.

In addition to seeking certiorari, the Government asks the Court to stay the injunctions entered below, thereby permitting the enjoined provisions to take effect. According to the Government, it is likely to suffer irreparable harm unless a stay issues. Focusing mostly on §2(c), and pointing to the descriptions of conditions in the six designated nations, the Government argues that a 90-day pause on entry is necessary to prevent potentially dangerous individuals from entering the United States while the Executive reviews the adequacy of information provided by foreign governments in connection with visa adjudications. Additionally, the Government asserts, the temporary bar is needed to reduce the Executive's investigative burdens while this review proceeds.

A

To begin, we grant both of the Government's petitions for certiorari and consolidate the cases for argument. The Clerk is directed to set a briefing schedule that will permit the cases to be heard during the first session of October Term 2017. (The Government has not requested that we expedite consideration of the merits to a greater extent.) In addition to the issues identified in the petitions, the parties are directed to address the following question: "Whether the challenges to §2(c) became moot on June 14, 2017."

B

We now turn to the preliminary injunctions barring enforcement of the §2(c) entry suspension. We grant the Government's applications to stay the injunctions, to the extent the injunctions prevent enforcement of §2(c) with respect to foreign nationals who lack any bona fide relationship with a person or entity in the United States. We leave the injunctions entered by the lower courts in place with respect to respondents and those similarly situated, as specified in this opinion. See *infra,* at 11–12.

Crafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents. See *Winter* v. *Natural Resources Defense Council*, *Inc.*, 555 U. S. 7, 20, 24 (2008); 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §2948 (3d ed. 2013). The purpose of such interim equitable relief is not to conclusively determine the rights of the parties, *University of Tex.* v. *Camenisch*, 451 U. S. 390, 395 (1981), but to balance the equities as the litigation moves forward. In awarding a preliminary injunction a court must also "conside[r] . . . the overall public interest." *Winter*, *supra*, at 26. In the course of doing so, a court "need not grant the total relief sought by the applicant but may mold its

decree to meet the exigencies of the particular case." Wright, *supra*, §2947, at 115.

Here, of course, we are not asked to grant a preliminary injunction, but to stay one. In assessing the lower courts' exercise of equitable discretion, we bring to bear an equitable judgment of our own. *Nken* v. *Holder*, 556 U. S. 418, 433 (2009). Before issuing a stay, "[i]t is ultimately necessary . . . to balance the equities—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Barnes* v. *E-Systems, Inc. Group Hospital Medical & Surgical Ins. Plan*, 501 U. S. 1301, 1305 (1991) (Scalia, J., in chambers) (internal quotation marks omitted). This Court may, in its discretion, tailor a stay so that it operates with respect to only "some portion of the proceeding." *Nken*, *supra*, at 428.

The courts below took account of the equities in fashioning interim relief, focusing specifically on the concrete burdens that would fall on Doe, Dr. Elshikh, and Hawaii if §2(c) were enforced. They reasoned that §2(c) would "directly affec[t]" Doe and Dr. Elshikh by delaying entry of their family members to the United States. *IRAP*, 857 F. 3d, at 585, n. 11; see *Hawaii*, 2017 WL 2529640, at *7–*8, *24. The Ninth Circuit concluded that §2(c) would harm the State by preventing students from the designated nations who had been admitted to the University of Hawaii from entering this country. These hardships, the courts reasoned, were sufficiently weighty and immediate to outweigh the Government's interest in enforcing §2(c). Having adopted this view of the equities, the courts approved injunctions that covered not just respondents, but parties similarly situated to them—that is, people or entities in the United States who have relationships with foreign nationals abroad, and whose rights might be affected if those foreign nationals were excluded. See *Mandel*, 408 U. S., at 763–765 (permitting American plaintiffs to challenge the exclusion of a foreign national on the

ground that the exclusion violated their own First Amendment rights).

But the injunctions reach much further than that: They also bar enforcement of §2(c) against foreign nationals abroad who have no connection to the United States at all. The equities relied on by the lower courts do not balance the same way in that context. Denying entry to such a foreign national does not burden any American party by reason of that party's relationship with the foreign national. And the courts below did not conclude that exclusion in such circumstances would impose any legally relevant hardship on the foreign national himself. See *id*., at 762 ("[A]n unadmitted and nonresident alien . . . ha[s] no constitutional right of entry to this country"). So whatever burdens may result from enforcement of §2(c) against a foreign national who lacks any connection to this country, they are, at a minimum, a good deal less concrete than the hardships identified by the courts below.

At the same time, the Government's interest in enforcing §2(c), and the Executive's authority to do so, are undoubtedly at their peak when there is no tie between the foreign national and the United States. Indeed, EO–2 itself distinguishes between foreign nationals who have some connection to this country, and foreign nationals who do not, by establishing a case-by-case waiver system primarily for the benefit of individuals in the former category. See, *e.g.*, §§3(c)(i)–(vi). The interest in preserving national security is "an urgent objective of the highest order." *Holder* v. *Humanitarian Law Project*, 561 U. S. 1, 28 (2010). To prevent the Government from pursuing that objective by enforcing §2(c) against foreign nationals unconnected to the United States would appreciably injure its interests, without alleviating obvious hardship to anyone else.

We accordingly grant the Government's stay applications in part and narrow the scope of the injunctions as to

§2(c). The injunctions remain in place only with respect to parties similarly situated to Doe, Dr. Elshikh, and Hawaii. In practical terms, this means that §2(c) may not be enforced against foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States. All other foreign nationals are subject to the provisions of EO–2.

The facts of these cases illustrate the sort of relationship that qualifies. For individuals, a close familial relationship is required. A foreign national who wishes to enter the United States to live with or visit a family member, like Doe's wife or Dr. Elshikh's mother-in-law, clearly has such a relationship. As for entities, the relationship must be formal, documented, and formed in the ordinary course, rather than for the purpose of evading EO–2. The students from the designated countries who have been admitted to the University of Hawaii have such a relationship with an American entity. So too would a worker who accepted an offer of employment from an American company or a lecturer invited to address an American audience. Not so someone who enters into a relationship simply to avoid §2(c): For example, a nonprofit group devoted to immigration issues may not contact foreign nationals from the designated countries, add them to client lists, and then secure their entry by claiming injury from their exclusion.

In light of the June 12 decision of the Ninth Circuit vacating the injunction as to §2(a), the executive review directed by that subsection may proceed promptly, if it is not already underway. EO–2 instructs the Secretary of Homeland Security to complete this review within 20 days, after which time foreign governments will be given 50 days further to bring their practices into line with the Secretary's directives. §§2(a)–(b), (d). Given the Government's representations in this litigation concerning the resources required to complete the 20-day review, we fully expect that the relief we grant today will permit the Exec-

utive to conclude its internal work and provide adequate notice to foreign governments within the 90-day life of §2(c).

C

The *Hawaii* injunction extends beyond §2(c) to bar enforcement of the §6(a) suspension of refugee admissions and the §6(b) refugee cap. In our view, the equitable balance struck above applies in this context as well. An American individual or entity that has a bona fide relationship with a particular person seeking to enter the country as a refugee can legitimately claim concrete hardship if that person is excluded. As to these individuals and entities, we do not disturb the injunction. But when it comes to refugees who lack any such connection to the United States, for the reasons we have set out, the balance tips in favor of the Government's compelling need to provide for the Nation's security. See *supra,* at 9–11; *Haig* v. *Agee*, 453 U. S. 280, 307 (1981).

The Government's application to stay the injunction with respect to §§6(a) and (b) is accordingly granted in part. Section 6(a) may not be enforced against an individual seeking admission as a refugee who can credibly claim a bona fide relationship with a person or entity in the United States. Nor may §6(b); that is, such a person may not be excluded pursuant to §6(b), even if the 50,000-person cap has been reached or exceeded. As applied to all other individuals, the provisions may take effect.

* * *

Accordingly, the petitions for certiorari are granted, and the stay applications are granted in part.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

Nos. 16 1436 (16A1190) and 16 1540 (16A1191)

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.
No. 16–1436 (16A1190) *v.*
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.

ON APPLICATION FOR STAY AND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.
No. 16–1540 (16A1191) *v.*
HAWAII, ET AL.

ON APPLICATION FOR STAY AND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 26, 2017]

JUSTICE THOMAS, with whom JUSTICE ALITO and JUSTICE GORSUCH join, concurring in part and dissenting in part.

I agree with the Court that the preliminary injunctions entered in these cases should be stayed, although I would stay them in full. The decision whether to stay the injunctions is committed to our discretion, *ante*, at 9–10, but our discretion must be "guided by sound legal principles," *Nken* v. *Holder*, 556 U. S. 418, 434 (2009) (internal quotation marks omitted). The two "most critical" factors we must consider in deciding whether to grant a stay are "(1) whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits" and "(2) whether the applicant will be irreparably injured

absent a stay." *Ibid.* (internal quotation marks omitted). Where a party seeks a stay pending certiorari, as here, the applicant satisfies the first factor only if it can show both "a reasonable probability that certiorari will be granted" and "a significant possibility that the judgment below will be reversed." *Barnes* v. *E-Systems, Inc. Group Hospital Medical & Surgical Ins. Plan*, 501 U. S. 1301, 1302 (1991) (Scalia, J., in chambers). When we determine that those critical factors are satisfied, we must "balance the equities" by "explor[ing] the relative harms to applicant and respondent, as well as the interests of the public at large." *Id.*, at 1304–1305 (internal quotation marks omitted); cf. *Nken*, *supra*, at 435 (noting that the factors of "assessing the harm to the opposing party and weighing the public interest" "merge when the Government is the opposing party").

The Government has satisfied the standard for issuing a stay pending certiorari. We have, of course, decided to grant certiorari. See *ante*, at 8–9. And I agree with the Court's implicit conclusion that the Government has made a strong showing that it is likely to succeed on the merits—that is, that the judgments below will be reversed. The Government has also established that failure to stay the injunctions will cause irreparable harm by interfering with its "compelling need to provide for the Nation's security." *Ante*, at 13. Finally, weighing the Government's interest in preserving national security against the hardships caused to respondents by temporary denials of entry into the country, the balance of the equities favors the Government. I would thus grant the Government's applications for a stay in their entirety.

Reasonable minds may disagree on where the balance of equities lies as between the Government and respondents in these cases. It would have been reasonable, perhaps, for the Court to have left the injunctions in place only as to respondents themselves. But the Court takes the addi-

tional step of keeping the injunctions in place with regard to an unidentified, unnamed group of foreign nationals abroad. No class has been certified, and neither party asks for the scope of relief that the Court today provides. "[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief *to the plaintiffs*" in the case, *Califano* v. *Yamasaki*, 442 U. S. 682, 702 (1979) (emphasis added), because a court's role is "to provide relief" only "to claimants . . . who have suffered, or will imminently suffer, actual harm." *Lewis* v. *Casey*, 518 U. S. 343, 349 (1996). In contrast, it is the role of the "political branches" to "shape the institutions of government in such fashion as to comply with the laws and the Constitution." *Ibid.*

Moreover, I fear that the Court's remedy will prove unworkable. Today's compromise will burden executive officials with the task of deciding—on peril of contempt—whether individuals from the six affected nations who wish to enter the United States have a sufficient connection to a person or entity in this country. See *ante*, at 11–12. The compromise also will invite a flood of litigation until this case is finally resolved on the merits, as parties and courts struggle to determine what exactly constitutes a "bona fide relationship," who precisely has a "credible claim" to that relationship, and whether the claimed relationship was formed "simply to avoid §2(c)" of Executive Order No. 13780, *ante*, at 11, 12. And litigation of the factual and legal issues that are likely to arise will presumably be directed to the two District Courts whose initial orders in these cases this Court has now—unanimously—found sufficiently questionable to be stayed as to the vast majority of the people potentially affected.

U.S. Department of Justice
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441 G Street, NW
Sixth Floor
Washington, DC 20530

Telephone: (202) 514-3642

September 30, 2020

Austin Evers
American Oversight
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Suite B255
Washington, DC 20005
FOIA@americanoversight.org

Re: DOJ-2018-006172
18-cv-2846 (D.D.C.)
VRB:TAZ:JMS

Dear Austin Evers:

This is an interim response to your Freedom of Information Act (FOIA) request, dated and received in this Office on June 20, 2018, in which you requested email records containing specified search terms and search combinations, dating from March 6, 2017. This response is made on behalf of the Offices of the Attorney General (OAG) and Legal Policy (OLP).

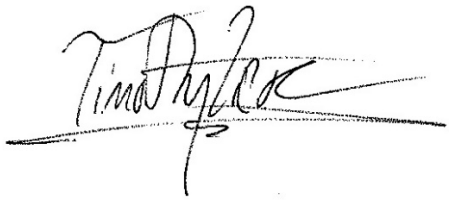
Please be advised that a search has been conducted on behalf of OAG and OLP. At this time, pursuant to the narrowing agreement set forth in the October 1, 2019 Joint Status Report, see ECF No. 27, this Office has processed an additional 1,427 pages of potentially responsive material, and the material initially found to be responsive has been sent out on consultation. For your information, located in the processed material for this month was a draft report of the Government Accountability Office (GAO). The corresponding final GAO report is publicly available online at https://www.gao.gov/assets/700/693162.pdf. In the interest of administrative efficiency, we hope this information satisfies you with respect to that material. We will complete our response to you for the remaining material initially found to be responsive after the consultation process is complete.

Additionally, this Office advised, by letters dated May 31, June 30, July 31, and August 31, 2020, that we processed potentially responsive material, the material initially found to be responsive was sent out on consultation, and we would respond to you after the consultation process was complete. For your information, the consultation process to which we referred in those responses is still ongoing. As a result, we will respond to you again once that consultation process is complete, which we anticipate will be soon.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c) (2018). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

If you have any questions regarding this response, please contact Kristin Brudy-Everett of the United States Attorney's Office for the District of Columbia, at (202) 252-2536.

Sincerely,



Timothy Ziese
Senior Supervisory Attorney

United States Government Accountability Office

Report to Congressional Requesters

July 2018

CRIMINAL ALIEN STATISTICS

Information on Incarcerations, Arrests, Convictions, Costs, and Removals

July 2018

CRIMINAL ALIEN STATISTICS

Information on Incarcerations, Arrests, Convictions, Costs, and Removals

GAO Highlights

Highlights of GAO-18-433, a report to congressional requesters

Why GAO Did This Study

As of 2014, DHS estimated the total alien—a person who is not a citizen or national of the United States—population in the United States was about 27.1 million. Members of the alien population that have been arrested and convicted of crimes in the United States are referred to as criminal aliens. The costs associated with incarcerating criminal aliens are borne by the federal government, states, and localities. GAO was asked to update its March 2011 report on criminal alien statistics.

This report addresses, among other things, the (1) number and nationality of incarcerated criminal aliens, (2) number of criminal alien arrests and convictions, (3) estimated costs associated with incarcerating criminal aliens, and (4) experiences of criminal aliens after incarceration in federal prison.

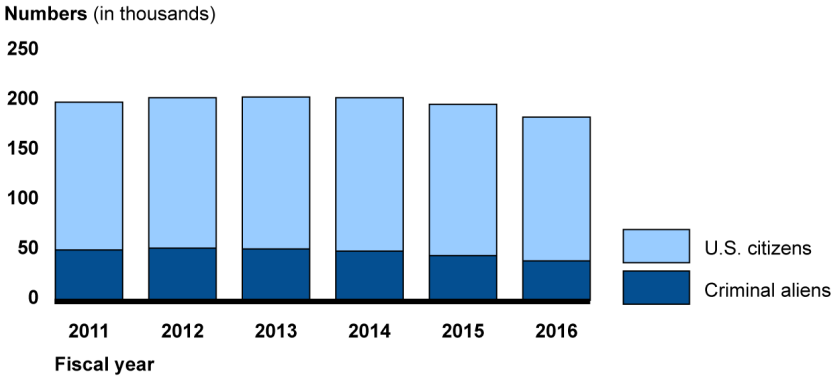
GAO analyzed the most recent data available on criminal aliens, generally from fiscal years 2010 through 2016. Specifically, GAO analyzed data for criminal aliens incarcerated in federal prisons from fiscal years 2011 through 2016, and this group is the federal criminal alien population studied for this report. GAO also analyzed data for certain criminal aliens incarcerated in state prisons and local jails that received SCAAP funding from fiscal years 2010 through 2015, and this group is referred to as the state and local study population reviewed for this report. SCAAP data represents a portion of all criminal aliens incarcerated in state prisons and local jails. GAO used SCAAP data because there are no reliable data available on all criminal aliens incarcerated in every U.S. state prison and local jail.

View GAO-18-433. For more information, contact Gretta L. Goodwin at (202) 512-8777 or goodwing@gao.gov.

What GAO Found

From fiscal years 2011 through 2016, the criminal alien proportion of the total estimated federal inmate population generally decreased, from about 25 percent to 21 percent (as shown in the figure below). During this period, the estimated number of criminal aliens incarcerated in federal prisons decreased from about 50,400 to about 39,500, or 22 percent. Ninety-one percent of these criminal aliens were citizens of one of six countries, including Mexico, Honduras, El Salvador, Dominican Republic, Colombia, and Guatemala.

Estimated Number of Individuals, by Citizenship, Incarcerated in Federal Prisons from Fiscal Years 2011 through 2016



Source: GAO analysis of Bureau of Prisons data. | GAO-18-433

Based on data from the Department of Justice's (DOJ) State Criminal Alien Assistance Program (SCAAP), which reimburses states and localities for a portion of criminal alien incarceration costs, the number of SCAAP criminal alien incarcerations in state prisons and local jails that received SCAAP reimbursements also decreased from about 282,300 in fiscal year 2010 to about 169,300 in fiscal year 2015, or 40 percent. The decrease can be attributed to (1) general declines in the number of SCAAP criminal alien incarcerations in each of the participating state prisons and local jails that participated in SCAAP, and (2) a reduction in the number of states and localities that participated in SCAAP. Seventy-six percent of SCAAP criminal alien incarcerations in fiscal year 2015 were born in one of six countries, including Mexico, El Salvador, Honduras, Guatemala, Cuba, and Germany.

Based on a random sample of criminal aliens incarcerated in federal prisons during fiscal years 2011 through 2016 and based on a random sample of SCAAP criminal aliens incarcerated in state prisons and local jails during fiscal years 2010 through 2015, GAO estimated the following:

- The approximately 197,000 federal criminal aliens included in GAO's analysis were arrested/transferred about 1.4 million times for approximately 2 million offenses from over 43 years (from 1974 through 2017); 42 percent of the offenses that these criminal aliens were arrested for were related to immigration and 26 percent were related to drugs or traffic violations.

GAO analyzed (a) DOJ data on criminal alien incarcerations, arrests, convictions, and costs; (b) conviction data from the five state prison systems with the largest number of SCAAP criminal alien incarcerations in fiscal year 2015; and (c) DHS data on removals.

For its arrest analyses, GAO selected generalizable random samples of (1) 500 criminal aliens from about 197,000 that were incarcerated in federal prisons from fiscal years 2011 through 2016 and (2) 500 SCAAP criminal aliens from about 533,000 that were incarcerated in state prisons and local jails from fiscal years 2010 through 2015. These samples included only those criminal aliens who had a Federal Bureau of Investigation (FBI) number—a unique identifier. This unique identifier allowed GAO to obtain arrest/transfer histories for these criminal aliens from FBI's database, which includes data from law enforcement agencies across the nation.

While the samples selected for the arrest analyses allowed GAO to estimate and provide insights about the arrest history of the criminal aliens in the study populations, these findings are not generalizable to the arrest history of criminal aliens not included in these populations. These data did not allow GAO to distinguish between a new arrest and a transfer from one agency to another; therefore, these are collectively referred to as "arrests/transfers." An arrest/transfer can be for multiple offenses. GAO's arrest analyses have a margin of error of plus or minus 7 percentage points or fewer.

For GAO's analyses of state conviction data, information obtained from the selected state prison systems is not generalizable to all state prison systems, but provides useful insights on why criminal aliens were incarcerated.

- The approximately 533,000 SCAAP criminal aliens included in GAO's analysis were arrested/transferred about 3.5 million times for approximately 5.5 million offenses from over 53 years (from 1964 through 2017); 52 percent of the offenses that these SCAAP criminal aliens were arrested for were related to traffic violations, drug offenses, or immigration offenses.

An arrest does not necessarily result in prosecution or a conviction of all, or any, of the offenses for which an individual is arrested. GAO's analyses found that 92 percent of the criminal aliens incarcerated in federal prison from fiscal years 2011 through 2016 were convicted of primary offenses related to immigration or drugs—a primary offense is the one with the longest maximum sentence, as determined by the relevant agency. At the state level, SCAAP criminal aliens incarcerated in fiscal year 2015 in Arizona, California, Florida, New York, and Texas state prison systems were convicted of various primary offenses. While the most common primary offenses varied by each of the five states, they generally related to drug, homicide, or sex offenses.

GAO's analyses found that the total annual estimated federal costs to incarcerate criminal aliens decreased from about $1.56 billion to about $1.42 billion from fiscal years 2010 through 2015. These costs included federal prison costs and reimbursements to state prison and local jail systems for a portion of their costs. GAO's analyses also show that selected annual estimated operating costs of state prison systems to incarcerate SCAAP criminal aliens decreased from about $1.17 billion to about $1.11 billion from fiscal years 2010 through 2015. These selected costs included correctional officer salaries, medical care, food service, and utilities.

Of the approximately 165,700 criminal aliens who completed a term of incarceration in federal prison from fiscal years 2011 through 2016, about 157,400 or 95 percent were subsequently removed from the United States by the Department of Homeland Security (DHS). The majority (about 146,500) of the criminal aliens who completed a term of federal prison incarceration did not have a subsequent reincarceration in a federal prison. However, about 19,300 were subsequently reincarcerated in a federal prison at least once and about 5,500 were reincarcerated in a state prison or local jail system that received SCAAP funding. These experiences after federal prison incarceration are not mutually exclusive. For example, criminal aliens could have been removed from the United States by DHS after their incarceration in federal prison, then reentered the United States and subsequently become reincarcerated in either a federal or state prison or local jail.

Federal Prison Reincarcerations of Criminal Aliens, Fiscal Years 2011 through 2016

Number of federal prison reincarcerations	Number of criminal aliens	Percent
0	146,500	88.4
1	16,700	10.1
2	2,200	1.3
3	300	0.2
4 or more	<100	<0.1
Total[a]	**165,700**	**100**

Source: GAO analysis of Bureau of Prisons data. | GAO-18-433

[a]Numbers may not sum to totals due to rounding. Percentages may not add to 100 due to rounding.

Contents

Figures

Abbreviations

ACRIMe	Alien Criminal Response Information Management System
BJA	Bureau of Justice Assistance
BOP	Bureau of Prisons
DHS	Department of Homeland Security
DOJ	Department of Justice
FBI	Federal Bureau of Investigation
IAR	Immigration Alien Response
ICE	Immigration and Customs Enforcement
NSD	National Security Division
NGI	Next Generation Identification
PCEPI	Personal Consumption Expenditures Price Index
SCAAP	State Criminal Alien Assistance Program
USCIS	U.S. Citizenship and Immigration Services

U.S. GOVERNMENT ACCOUNTABILITY OFFICE
441 G St. N.W.
Washington, DC 20548

July 17, 2018

The Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate

The Honorable Steve King
House of Representatives

The Honorable Pete Sessions
House of Representatives

In 2014, the Department of Homeland Security (DHS) estimated the total alien population in the United States was about 27.1 million. Of that number, DHS reported that about 12.1 million aliens were without lawful status or presence.[1] The Immigration and Nationality Act defines an alien as a person who is not a citizen or national of the United States.[2] Aliens, with or without lawful status, who have been arrested and convicted of crimes are known as criminal aliens.[3] U.S. Immigration and Customs Enforcement (ICE), one of DHS's component agencies, is responsible for identifying, apprehending, detaining, litigating charges of removability

[1]According to DHS, the remaining approximately 15 million aliens includes lawful permanent residents (13.2 million), resident nonimmigrants (1.7 million), and individuals granted refugee or asylee status (0.1 million), as of 2014. Data on alien populations come from DHS's Office of Immigration Statistics, see DHS Office of Immigration Statistics, *Estimates of the Lawful Permanent Resident Population in the United States: January 2014* (Washington, D.C.: June 2017); *Estimates of the Size and Characteristics of the Resident Nonimmigrant Population in the United States: Fiscal Year 2014* (Washington, D.C.: December 2016); *Refugees and Asylees: 2014* (Washington, D.C.: April 2016); and *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2014* (Washington, D.C.: July 2017). DHS's *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2014* is the most recent report that DHS issued on this population.

[2]See 8 U.S.C. § 1101(a)(3), (a)(22). A "national of the United States" means a U.S. citizen, or a person who, though not a U.S. citizen, owes permanent allegiance to the United States, which can include individuals who were born in American Samoa or in the Commonwealth of the Northern Mariana Islands who have chosen to be U.S. nationals instead of U.S. citizens.

[3]For our report purposes, criminal aliens are aliens with or without lawful status convicted in the United States of crimes. According to DOJ officials, other entities may define criminal aliens differently, and some entities may report on foreign-born individuals—which could include aliens and U.S. citizens.

against, and removing aliens, including criminal aliens, who are in the United States in violation of U.S. immigration law.[4] The costs associated with incarcerating criminal aliens are borne by the federal government as well as states and localities.[5] Aliens convicted in federal court and sentenced to a term of imprisonment are committed to the custody of the Department of Justice's (DOJ) Bureau of Prisons (BOP), and the federal government bears the total cost of incarcerating these criminal aliens. The federal government also reimburses states and localities for a portion of state and local incarceration costs for criminal alien populations that meet the criteria for reimbursement for DOJ's Bureau of Justice Assistance (BJA) State Criminal Alien Assistance Program (SCAAP).[6]

We most recently reported information on criminal alien statistics in 2011.[7] You asked that we update and expand upon the information in that report. Specifically, this report provides information on the following:

[4]Under U.S. immigration law, an alien may be removable on statutory grounds of inadmissibility or deportability. See 8 U.S.C. §§ 1182, 1227, 1229a(c), (e)(2). An alien determined to be removable and not eligible for any requested relief or protection is to be removed pursuant to an administratively final order of removal. 8 C.F.R. § 1241.1.

[5]States and localities include the 50 states, the District of Columbia, counties and cities, and U.S. territories—American Samoa, Guam, Puerto Rico, Northern Mariana Islands, and the U.S. Virgin Islands.

[6]By statute, only the costs of incarceration for "undocumented criminal aliens" are eligible for reimbursement under SCAAP. This statute defines "undocumented criminal alien" for the purposes of SCAAP reimbursement as an alien who has been convicted of a felony or two or more misdemeanors and (1) entered the United States without inspection, (2) was the subject of removal proceedings at the time he or she was taken into custody, or (3) was admitted as a nonimmigrant and at the time he or she was taken into custody had failed to maintain the nonimmigrant status or to comply with the conditions of such status. See 8 U.S.C. § 1231(i)(3)(B). Generally, incarcerated criminal aliens for whom there is no record of admission or who failed to maintain nonimmigrant status after being admitted would be considered eligible for SCAAP reimbursement. An alien with some type of lawful class of admission, such as a permanent resident, at the time of their arrest would generally not meet the SCAAP definition of an undocumented criminal alien unless the alien was in removal proceedings at the time of arrest.

[7]GAO, Criminal Alien Statistics: Information on Incarcerations, Arrests, and Costs, GAO-11-187 (Washington, D.C.: Mar. 24, 2011). In addition, GAO reported on criminal alien statistics in GAO*, Information on Criminal Aliens Incarcerated in Federal and State Prisons and Local Jails*, GAO-05-337R (Washington, D.C.: Apr. 7, 2005); and *Information on Certain Illegal Aliens Arrested in the United States*, GAO-05-646R (Washington, D.C.: May 9, 2005).

- What is the number and nationality of criminal aliens incarcerated in federal and state prisons and local jails in the United States over the last 6 years?
- What is known about criminal alien arrests and convictions?
- What is known about the costs of incarcerating criminal aliens in the United States?
- What is known about the removability from the United States of criminal aliens incarcerated in federal prison and the experiences of criminal aliens after incarceration in federal prison?

In addition, as you requested, we also describe what is known about certain individuals with international terrorism-related convictions. This information is provided in an appendix.

Table 1 summarizes key terms and definitions used in this report.

Table 1: Common Terms and Definitions Used in GAO's Report

Term	Definition
Alien	Any person who is not a citizen or national of the United States.
Criminal alien	An alien, with or without lawful status, convicted in the United States of a crime.
State Criminal Alien Assistance Program (SCAAP) criminal alien[a]	A criminal alien—as defined above—incarcerated in a state prison or local jail and for whom a state or locality received federal reimbursement through SCAAP.
Primary offenses (for federal convictions)	When convicted of multiple federal offenses, the primary offense is the one with the longest maximum sentence as determined by the relevant federal agency.
Removability from the United States	Under U.S. immigration law, an alien may be removable on statutory grounds of inadmissibility or deportability. An alien determined to be removable and not eligible for any requested relief or protection is to be removed pursuant to an administrative final order of removal.[b]

Source: GAO. | GAO-18-433

[a]SCAAP criminal aliens are a subset of all criminal aliens incarcerated in state prisons and local jails because (1) not all states and localities may choose to apply for SCAAP reimbursement and (2) criminal aliens with lawful immigration status who were not the subject of removal proceedings at the time they were taken into custody do not meet the statutory criteria for SCAAP reimbursement. See 8 U.S.C. § 1231(i)(3)(B). Further, to be eligible for reimbursement, the aliens must meet the following criteria: (1) had at least one felony or two misdemeanor convictions for violations of state or local law and (2) were incarcerated for at least 4 consecutive days during the reporting period. For our analyses, "state prisons and local jails" include those in U.S. territories, unless otherwise noted.

[b]See 8 U.S.C. §§ 1182, 1227, 1229a(c), (e)(2); see also 8. C.F.R. § 1241.1.

In general, we analyzed data separately for criminal aliens incarcerated in federal prisons and SCAAP criminal aliens incarcerated in state prisons and local jails—which we refer to as our two study populations.[8] The time periods we analyzed varied for our federal study population compared to our state and local study population because they reflect updates since we last reported on these issues in 2011 and because we used the most recent data available at the time of our analysis.[9] Our federal study population generally includes criminal aliens incarcerated from fiscal years 2011 through 2016.[10] Our state and local study population includes SCAAP criminal aliens incarcerated in state prisons and local jails from fiscal years 2010 through 2015.[11] Overall, our findings are not generalizable to criminal aliens not included in our federal and state and local study populations. However, they provide valuable insights into the criminal aliens incarcerated in the United States. For example, we used SCAAP data because there are no reliable population data on all criminal aliens incarcerated in every U.S. state prison and local jail.[12] SCAAP

[8]For our analyses, "state prisons and local jails" include those in U.S. territories, unless otherwise noted.

[9]GAO-11-187.

[10]We used both BOP snapshot (point in time) and inmate-level data to conduct our analyses, as described throughout this report. The BOP inmate-level data included about 198,000 criminal aliens incarcerated in federal prisons from 2011 through 2016. For some of our analyses, we used a smaller subset of the BOP inmate-level data as explained throughout the report. However, when analyzing federal costs to incarcerate criminal aliens in federal prisons, we used BOP snapshot data from fiscal years 2010 through 2015, as these years ensured there were no reporting gaps from our prior report and these were the most recent data available on federal costs for reimbursing states and localities.

[11]We used both SCAAP jurisdiction-level and inmate-level data to conduct our analyses, as described throughout this report. For the SCAAP inmate-level data, we were not able to determine how many unique SCAAP criminal aliens were in the data set, since a SCAAP criminal alien could have more than one incarceration in the same fiscal year. As a result, when reporting on these data for certain analyses, we refer to SCAAP criminal alien incarcerations rather than SCAAP criminal aliens. However, we were able to determine that approximately 533,000 SCAAP inmate-level records had a unique Federal Bureau of Investigation (FBI) number, which we used for certain analyses. For some of our analyses, we used a smaller subset of the SCAAP inmate-level data as explained throughout the report.

[12]In addition to SCAAP data, DOJ's Bureau of Justice Statistics collects data on noncitizens incarcerated in state prisons but these data do not include all states. For example, in 2016, the Bureau of Justice Statistics reported that certain states—including California, which has the highest number of SCAAP criminal aliens—did not report or were unable to report data on the number of noncitizens. U.S. Department of Justice, Bureau of Justice Statistics, *Prisoners in 2015*, (Washington, D.C., Dec. 2016).

provides reliable data on certain criminal aliens incarcerated in state prisons and local jails but does not include (a) criminal aliens incarcerated in states or localities that did not apply for and receive federal reimbursement for costs of incarceration and (b) aliens with lawful immigration status who were not the subject of removal proceedings at the time they were taken into custody.[13] Further, to be eligible for reimbursement, the aliens must meet the definition of "undocumented criminal alien" under the SCAAP statute and the following criteria: (1) had at least one felony or two misdemeanor convictions for violations of state or local law and (2) were incarcerated for at least 4 consecutive days during the reporting period.[14] Thus, our state and local criminal alien data represent only a portion of the total population of criminal aliens incarcerated at the state and local level.

To determine the number and nationalities—based on country of citizenship or country of birth data—of incarcerated criminal aliens, we analyzed BOP data on criminal aliens incarcerated in federal prisons from fiscal years 2011 through 2016 and SCAAP data on SCAAP criminal alien incarcerations in state prisons and local jails from fiscal years 2010 through 2015.[15] BOP obtains country of citizenship data from presentence investigation reports, which may be based on documentation or be self-

[13]SCAAP data represent the number of incarcerations, rather than number of SCAAP criminal aliens, since these aliens could have multiple SCAAP incarcerations in the same fiscal year.

[14]See 8 U.S.C. § 1231(i)(3)(B).

[15]Each year's SCAAP program is based on SCAAP criminal aliens incarcerated during the prior fiscal year, July 1 through June 30. For example, the fiscal year 2016 SCAAP program will include SCAAP criminal aliens that were incarcerated in state prisons and local jails from July 1, 2014 to June 30, 2015. According to DOJ officials, private facilities are not eligible for SCAAP reimbursement, and states and localities are not eligible to apply on their behalf. For the BOP data, we used the average of 12 monthly snapshots to account for possible differences in incarceration numbers month to month for each fiscal year. In addition, we used inmate data to determine the number of unique inmates, versus a snapshot in time, which may include duplicates across fiscal years.

reported.[16] SCAAP country of birth data are provided to DOJ by states and localities that participate in SCAAP.[17]

To determine the number and types of offenses for which criminal aliens were arrested and convicted, we analyzed various federal and state data. Specifically, for arrests, we matched a random sample of 500 criminal aliens from our federal study population and 500 SCAAP criminal aliens from the state and local study population to DOJ's FBI database that maintains data from reporting law enforcement agencies across the nation.[18] While the samples we selected for our analyses allowed us to estimate and provide valuable insights about the arrest history of the approximately 197,000 criminal aliens in our federal study population and the approximately 533,000 SCAAP criminal aliens in our state and local study population, our analyses are not generalizable to the arrest history of criminal aliens not in these study populations. We analyzed the arrest histories of criminal aliens in our samples to estimate the number and types of offenses for which criminal aliens in our federal and state and local study populations were arrested/transferred. We defined an

[16]A federal probation officer completes a presentence investigation report after conducting a presentence interview as well as an independent investigation of the offense and the defendant's background. See 18 U.S.C. § 3552. BOP officials stated that BOP's citizenship data could be updated over time as BOP obtains additional information from other sources, such as information from DHS. We did not independently verify citizenship data.

[17]We did not independently verify country of birth of SCAAP criminal aliens incarcerated in state prisons and local jails.

[18]For this analysis, we only included criminal aliens from each study population if they had an FBI number available. This is a unique identifier used by the FBI, as this was needed to match data across databases. As such, the study populations that we projected to for these analyses were smaller than the originating study populations. For example, our federal study population started with approximately 198,000 criminal aliens, about 197,000 of whom had FBI numbers. For this analysis, we therefore included approximately 197,000 criminal aliens in our federal study population. For our state and local study population, there were approximately 533,000 SCAAP records that had a unique FBI number in the SCAAP data set that were included in our study population. Some of the records in our samples of 500 criminal aliens from our federal study population and 500 SCAAP criminal aliens from the state and local study population had to be excluded for various reasons, including invalid FBI numbers. As a result, we analyzed data for 496 criminal aliens in our federal study population and 487 SCAAP criminal aliens in our state and local study population. All percentage estimates presented in this report for these analyses have a margin of error of plus or minus 7 percentage points or fewer. All estimates of the number of arrests/transfers or offenses have a relative error of plus or minus 14 percent of the estimate or less. The 7 percentage point margin of error and 14 percent relative error represent the upper bounds for the estimates included in this report. See appendix I for more details.

arrest/transfer as one of these actions occurring on the same day by the same arresting agency. The data did not allow us to distinguish between a new arrest and a transfer from one agency to another; therefore, we refer to these collectively as "arrests/transfers." The criminal aliens in our samples had arrests/transfers that ranged from 1964 through 2017.[19] Because law enforcement entities send arrest information to the FBI on a voluntary basis, FBI data on arrest history may not include all arrests.[20] An arrest does not necessarily result in prosecution or a conviction of all, or any, of the offenses for which an individual is arrested. To determine the primary offenses for which the approximately 198,000 criminal aliens in our federal study population were convicted and incarcerated, we analyzed BOP conviction data for criminal aliens incarcerated in federal prisons from fiscal years 2011 through 2016. In addition, to determine the types of primary offenses for which SCAAP criminal aliens were convicted, we analyzed conviction data from five state prison systems—Arizona, California, Florida, New York, and Texas—from fiscal years 2010 through 2015. We selected these five state prison systems because they had the most SCAAP criminal alien incarcerations in fiscal year 2015. Collectively, these five state prison systems accounted for 64 percent of the SCAAP criminal alien incarcerations in state prisons during fiscal year 2015.[21] They are also the same state prison systems that we analyzed in our 2011 report on criminal aliens.[22] The information obtained from the selected state prison systems is not generalizable to all state prison systems, but provides useful insights about why SCAAP criminal aliens were incarcerated.

To determine the costs associated with incarcerating criminal aliens in the United States, we obtained and analyzed cost and inmate data from BOP, SCAAP, and states and localities. Specifically, we analyzed costs to (1)

[19]FBI officials provided all available records on the criminal aliens in our study populations in August and September 2017. Therefore, any additional arrest/transfer data that were added to these records through the end of the calendar year 2017 would not be included in our analysis.

[20]In the month of December 2017, the FBI reported that approximately 23,300 local, state, tribal, federal, and international partners submitted criminal and/or civil electronic submissions to the FBI.

[21]Our analysis included state prison systems that participated in SCAAP and did not include U.S. territories. State prison systems in Arkansas, West Virginia, Vermont, and the District of Columbia did not receive reimbursement for SCAAP criminal aliens incarcerated in fiscal year 2015.

[22]GAO-11-187.

the federal government, (2) state prison systems, and (3) selected states and localities. To determine the annual costs to the federal government to incarcerate criminal aliens, for fiscal years 2010 through 2015, we calculated and combined: (1) the estimated costs to incarcerate criminal aliens in federal prisons and (2) the costs to reimburse states and localities for incarcerating SCAAP criminal aliens. To determine the estimated costs associated with incarcerating SCAAP criminal aliens in state prisons, we used a study by DOJ's Bureau of Justice Statistics that estimated state prison expenditures for medical care, food service, and utilities for all 50 state prison systems in 2001.[23] Applying relevant price deflators and SCAAP reimbursement data, we calculated these selected operating costs (medical care, food service, and utilities) for incarcerating SCAAP criminal aliens for each state prison system that sought SCAAP reimbursement from fiscal years 2010 through 2015. While our estimates provide insight into state expenditures to incarcerate SCAAP criminal aliens, our estimates may not represent actual costs if per capita prison expenditures for incarcerating criminal aliens grew at a different rate than the inflation factors that we used for each category. In addition to estimated operating costs for medical care, food service, and utilities, we also used data on correctional officer salaries from SCAAP. To determine the cost of incarcerating SCAAP criminal aliens in selected states and localities, we analyzed cost and SCAAP data for five state prison systems—Arizona, California, Florida, New York, and Texas—and five local jail systems—Maricopa County, Arizona; Orange County, California; Los Angeles County, California; Essex County, New Jersey; and Harris County, Texas. We selected these state prison and local jail systems because they had the most SCAAP criminal alien incarcerations in 2015.[24]

To determine what is known about the removability from the United States of criminal aliens incarcerated in federal prison and the experiences of criminal aliens after incarceration in federal prison, we matched data from criminal aliens incarcerated in federal prison with

[23]Bureau of Justice Statistics, *State Prison Expenditures*, *2001* (Washington, D.C.: June 2004). These were the most recent cost data available for our purposes. Data were not available on local jail systems.

[24]We selected the top six local jail systems, which accounted for 19 percent of all SCAAP criminal alien incarcerations in local jails for fiscal year 2015. However, we could not estimate total costs for New York City, New York, as was done in the 2011 GAO report. Officials from this locality stated that they no longer apply for SCAAP funds, and they did not provide us an average daily cost per inmate, see GAO-11-187.

other available data sources using various identifiers, including alien numbers and FBI numbers.[25] Specifically, to analyze the potential removability from the United States of criminal aliens at the time they were incarcerated in federal prison, we matched BOP data on criminal aliens incarcerated from fiscal years 2011 through 2016 with data from ICE's Alien Criminal Response Information Management System (ACRIMe). ICE specialists use ACRIMe to provide an indication of an individual's identity and potential removability to law enforcement partners, at the request of the law enforcement partner. Because a criminal alien's removability from the United States can change over time, we identified the ACRIMe record with a date that was closest to the date the criminal alien first entered federal prison during our period of analysis and used this record for our analysis. To determine what is known about the experiences of criminal aliens after their incarceration in federal prison, we matched data from those criminal aliens who completed a term of incarceration in federal prison from fiscal years 2011 through 2016 with DHS and DOJ data to determine if these criminal aliens were subsequently removed from the United States, reincarcerated, and/or received naturalized citizenship. We compared the dates the criminal alien completed a term of incarceration in federal prison with the dates of encounters with the federal government and/or law enforcement agencies to determine if those encounters took place after the criminal alien completed a term of incarceration in federal prison. For more details on our scope and methodology, see appendix I.

We determined that the data used in each of our analyses were sufficiently reliable for the purposes of this report by analyzing available documentation, such as related data dictionaries; interviewing officials knowledgeable about the data; conducting electronic tests to identify missing data and anomalies; and following up with officials, as appropriate.

We conducted this performance audit from August 2016 to July 2018 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that

[25]An alien number, or alien registration number, is a unique number assigned to a noncitizen's administrative file for tracking purposes.

the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Background

SCAAP Overview and Reimbursement

SCAAP is intended to provide reimbursement to states and localities for a portion of the correctional officer salary costs associated with incarcerating criminal aliens who meet the definition of "undocumented criminal alien" under the SCAAP statute and the following criteria: (1) had at least one felony or two misdemeanor convictions for violations of state or local law and (2) were incarcerated for at least 4 consecutive days during the reporting period.[26] Therefore, SCAAP is not intended to reimburse states and localities for all of the costs associated with incarcerating all criminal aliens.

When applying for SCAAP, states and localities must submit information to DOJ on their state prison or local jail system, such as correctional officer salary costs, as well as records for each criminal alien incarceration that include identifying information, such as the alien's name and date of birth. DOJ reviews the information provided by the states and localities to determine if any of the individual records are invalid for reimbursement because the individual was incarcerated for fewer than the required 4 days or the incarceration dates were outside the eligibility year, among other things. DOJ also sends the records to DHS, which provides information related to the individual's immigration or citizenship status. Specifically, DOJ uses the information provided by DHS to determine if each individual (1) met the definition of "undocumented criminal alien" (called SCAAP undocumented criminal alien), (2) lacked documentation to confirm the individual's immigration status (called SCAAP unknown criminal aliens), or (3) verified that the individual was a U.S. citizen or an alien who did not meet the definition of "undocumented criminal alien," and therefore was ineligible for reimbursement under SCAAP.[27] According to ICE officials, some of the SCAAP unknown criminal aliens may be in the United States without lawful status.

[26]See 8 U.S.C. § 1231(i)(3)(B).

[27]Within DHS, ICE and the U.S. Citizenship and Immigration Services (USCIS) both provide additional data to DOJ, including class of admission, which DOJ uses to help categorize valid records into ineligible, eligible SCAAP undocumented criminal aliens, and eligible SCAAP unknown criminal aliens.

However, if they have not come into contact with DHS authorities, ICE would not be able to verify their immigration status. For the fiscal year 2016 SCAAP program, which includes records for incarcerations during fiscal year 2015, DOJ determined that 20 percent of the incarcerations for which states or localities submitted a request for SCAAP reimbursement were ineligible for SCAAP reimbursement.[28]

The amount DOJ awards states and localities in SCAAP reimbursements depends on the extent to which DHS data can help verify the alien's status at the time of incarceration and the SCAAP budget, which is appropriated by Congress each year.[29] First, states and localities are eligible to receive reimbursement for 100 percent of the correctional officer salary costs they expended to incarcerate SCAAP undocumented criminal aliens and partial reimbursement for SCAAP unknown criminal aliens, subject to available appropriations. For SCAAP unknown criminal aliens, states are eligible for reimbursement for 85 percent of correctional officer salary costs, counties are eligible for 86 percent reimbursement of the same costs, and cities are eligible for 62 percent reimbursement.[30] Second, depending upon appropriations, the SCAAP program will reimburse a percentage of the states' and localities' eligible correctional officer salary costs.

[28]SCAAP records do not represent the number of unique individuals incarcerated since these individuals could be incarcerated in multiple SCAAP states or localities during the same reporting period. As such, these records represent the number of incarcerations—which could include duplicate SCAAP criminal aliens.

[29]Yearly appropriations for SCAAP are as follows (in thousands): fiscal year 2011: $273,352; fiscal year 2012: $240,000; fiscal year 2013: $237,123; fiscal year 2014: $180,000; fiscal year 2015: $185,000; fiscal year 2016: $210,000; and fiscal year 2017: $210,000.

[30]In 2011, we reported that DOJ's methodology for reimbursing states and localities for SCAAP unknown criminal aliens was based on an analysis that the former Immigration and Naturalization Service conducted in 2000, which analyzed the records of aliens submitted for SCAAP reimbursement in 1997 whose status was at that time unknown. Based upon this analysis, DOJ officials stated that the former Immigration and Naturalization Service determined that 65 percent of those SCAAP unknown criminal aliens submitted for SCAAP reimbursement by states did not have legal status, 60 percent submitted for reimbursement by cities did not have legal status, and 80 percent submitted for reimbursement by counties did not have legal status. See GAO-11-187. Since then, DOJ has assessed its reimbursement methodology and, beginning in fiscal year 2011, made changes to how it reimburses states and localities for SCAAP unknown criminal aliens.

Arrest Histories and Removability from the United States

Individuals arrested by federal, state, and local law enforcement authorities are generally fingerprinted and their prints may be sent to the FBI.[31] The FBI creates a unique identification number for each individual allowing, among other things, law enforcement to determine an individual's arrest history. The FBI shares these fingerprints with DHS, which enables the sharing of certain biographic, criminal history, and immigration information between the agencies. If there is a match in DHS's system, the FBI sends an inquiry, called an Immigration Alien Query, to ICE's ACRIMe.[32] ICE specialists working on ACRIMe inquiries are to use an individual's biographic and/or biometric identifiers to search various criminal, customs, and immigration databases and determine what is known about an individual's citizenship status or potential removability from the United States. This determination, transmitted in the form of an Immigration Alien Response (IAR), is then sent back to the FBI and shared with the law enforcement authority from which the fingerprints originated.[33] The IAR is also shared with the appropriate ICE field office so that ICE can determine what enforcement action, if any, to take against the individual.[34]

According to ICE officials, the IAR provides a good indication of an individual's potential removability from the United States at a specific point in time; however, ICE's response to these inquiries may not indicate an individual's immigration status with certainty. According to ICE

[31]According to FBI officials, the FBI receives fingerprints from federal, state, local, and tribal criminal justice law enforcement agencies and non-criminal justice agencies. These agencies provide fingerprints at their discretion during various points of the criminal justice lifecycle, potentially including during the arrest process and at the time of booking, and for other non-criminal justice purposes, such as at the time an individual files an application for employment. According to FBI officials, the FBI has agreements with 20 states through the National Fingerprint File Program, which allows for automatic file sharing. In addition, the FBI has agreements with some other states to facilitate electronic file sharing. However, some arrest information may not be provided to the FBI.

[32]ACRIMe is an information system used by ICE to receive and respond to inquiries from federal, state, and local law enforcement agencies about individuals arrested, subject to background checks, or otherwise encountered by those agencies. These inquiries can come directly from the entity or through a match across the FBI and DHS data systems. According to ICE officials, in fiscal year 2017, ICE provided approximately 1.52 million responses to about 13,000 entities.

[33]ICE officials also reported that the IAR also fulfills ICE's statutory requirement to provide immigration status on request.

[34]See 78 Fed. Reg. 10,623 (Feb. 14, 2013).

officials, immigration status can be difficult to determine because various agencies maintain information on immigration status in separate databases. ICE officials also stated that the IAR is intended to provide law enforcement agencies with enough information about aliens in their custody that the law enforcement entities can make an informed decision about how to handle the alien, including whether the alien may be removable from the United States. In addition, an individual's immigration status can change over time. For example, an alien with lawful permanent resident status who is convicted of certain crimes may be subject to removal from the United States, which could result in the loss of their lawful permanent resident status.

ICE may remove aliens, including criminal aliens, from the United States who are subject to a final order of removal or following an administrative removability review.[35] ICE may detain these aliens after DHS has encountered these individuals directly or ICE may issue an immigration detainer to federal, state, or local law enforcement agencies for an alien in federal, state, or local custody after the alien is arrested for a criminal offense and if the officer has probable cause to believe that the alien is removable from the United States.[36] For example, a criminal alien incarcerated in federal prison for whom ICE has issued a detainer may be transferred to ICE custody at the time they complete their term of incarceration in federal prison.[37] Individuals removed by ICE may be

[35]Depending on the circumstance, removal orders may be issued by an immigration court, ICE, U.S. Customs and Border Protection, or federal courts.

[36]The immigration detainer provides notification of ICE's intent to take custody of a removable alien in federal, state, or local custody after that alien is released from such custody. U.S. Immigration and Customs Enforcement, *Policy Number 10074.2: Issuance of Immigration Detainers by ICE Immigration Officers.* Effective April 2, 2017.

[37]ICE and BOP coordinate to identify criminal aliens in federal prisons who may be removable, and ICE may initiate their removal proceedings before an immigration judge, through the Institutional Hearing Program—a coordinated effort between DHS and DOJ to identify criminal aliens who are serving federal prison sentences and complete their removal proceedings while they are incarcerated. According to DOJ, this process may allow immigration removal cases to be adjudicated prior to an individual's release from federal prison. In addition, according to BOP officials, an ICE liaison has been working with BOP on a daily basis since November 2016 to assist with identifying foreign-born aliens in BOP custody; processing aliens for removal; transferring aliens who are removable from the custody of BOP to ICE, pursuant to an immigration detainer; and ensuring the Institutional Hearing Program is functioning effectively and efficiently.

subject to administrative or criminal consequences on subsequent reentry because of the prior removal.[38]

In some circumstances, an alien may be released from ICE custody due to the decision of an immigration judge, DHS official, or as otherwise required by law. For example, ICE may have limited authority to detain an alien who is subject to a final order of removal for more than 180 days if the individual is unlikely to be able to be removed in the reasonably foreseeable future.[39]

Criminal Alien Incarcerations Have Declined and Incarcerated Criminal Aliens Were Primarily Citizens from One of Six Countries

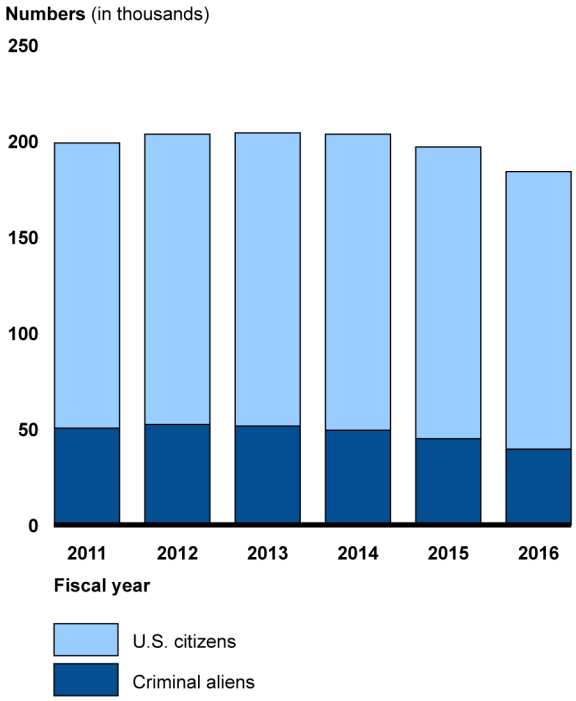
[38]See, e.g., 8 U.S.C. § 1182(a)(6).

[39]See *Zadvydas v. Davis*, 533 U.S. 678 (2001); but see *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018).

The Number of Criminal Aliens Incarcerated in Federal Prisons Decreased from Fiscal Years 2011 through 2016 and More Than 90 Percent Were Citizens from Six Countries

The estimated number of criminal aliens incarcerated in federal prisons decreased 22 percent, from about 50,400 in fiscal year 2011 to about 39,500 in fiscal year 2016—decreasing each year since fiscal year 2013. During this same time, the estimated number of total inmates incarcerated in federal prisons decreased 8 percent, from about 199,100 in fiscal year 2011 to about 184,000 in fiscal year 2016, as shown in figure 1.[40]

Figure 1: Estimated Number of Individuals, by Citizenship, Incarcerated in Federal Prisons from Fiscal Years 2011 through 2016



Source: GAO analysis of Bureau of Prisons data. | GAO-18-433

Note: We estimated the number of inmates by calculating the average of 12 monthly snapshot data for each fiscal year. Snapshot data represent a point in time and may not include all inmates that were incarcerated in each year. Data do not include inmates in the witness security program and

[40]We estimated the number of inmates by calculating the average of BOP's 12 monthly snapshot data for each fiscal year. Snapshot data represent a point in time and may not include all inmates that were incarcerated in each year. Data do not include inmates in the witness security program and unsentenced inmates. BOP obtains country of citizenship data from various sources, including presentence investigation reports, which may be based on documentation, such as a birth certificate or immigration documents, or be self-reported. BOP officials stated that country of citizenship could be updated over time as BOP obtains additional information from other sources, such as information from DHS.

unsentenced inmates. These data do not represent unique criminal aliens across the years, as criminal aliens may be incarcerated in more than one fiscal year. The figure above does not include inmates with missing or unknown citizenship data—which represent less than 0.1 percent of the total number of inmates in each fiscal year.

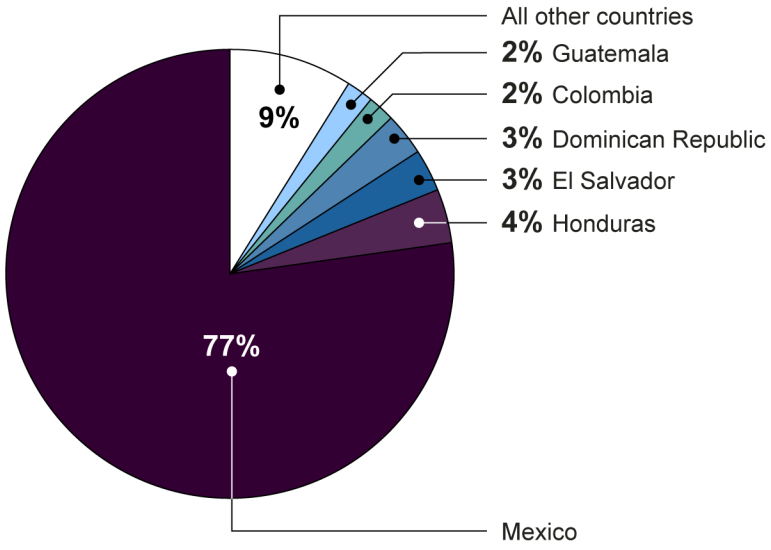
The criminal alien proportion of the total estimated federal inmate population also generally decreased from fiscal years 2011 through 2016.[41] Specifically, criminal aliens accounted for 25 percent of the total federal inmate population in fiscal year 2011 and 21 percent in fiscal year 2016.

From fiscal years 2011 through 2016, there were a total of about 198,000 unique criminal aliens that were incarcerated in federal prison.[42] These criminal aliens accounted for 35 percent of the total number of unique inmates incarcerated from fiscal years 2011 through 2016. As shown in figure 2, 77 percent of the approximately 198,000 unique criminal aliens incarcerated in federal prisons from fiscal years 2011 through 2016 were citizens of Mexico. Ninety-one percent were citizens of one of six countries, including Mexico.

[41]The criminal alien proportion of all inmates in federal prisons increased slightly from 25 percent in fiscal year 2011 to 26 percent in fiscal year 2012, then decreased each fiscal year from 2013 through 2016.

[42]The BOP inmate-level data are based on overall population data from fiscal years 2011 through 2016 and not snapshots of a point in time. Data do not include inmates in the witness security program and unsentenced inmates.

Figure 2: Percentage of Criminal Aliens Incarcerated in Federal Prisons by Country of Citizenship, Fiscal Years 2011 through 2016

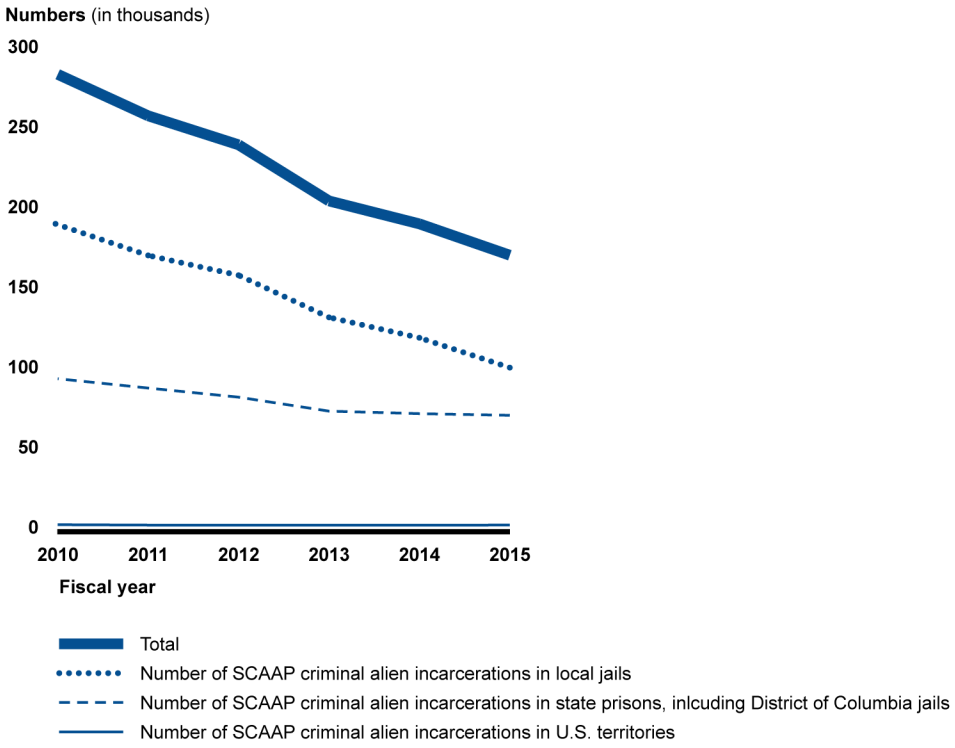


Source: GAO analysis of Bureau of Prisons data. | GAO-18-433

SCAAP Criminal Alien Incarcerations Decreased 40 Percent from Fiscal Years 2010 through 2015; More Than 75 Percent Were Born in One of Six Countries

From fiscal years 2010 through 2015, the total number of SCAAP criminal alien incarcerations in state prisons and local jails decreased 40 percent from about 282,300 in fiscal year 2010 to about 169,300 in fiscal year 2015—decreasing each year—as shown in figure 3.[43]

Figure 3: Number of State Criminal Alien Assistance Program (SCAAP) Criminal Alien Incarcerations from Fiscal Years 2010 through 2015



Source: GAO analysis of Bureau of Justice Assistance data. | GAO-18-433

Note: SCAAP data represent the number of incarcerations, rather than number of SCAAP criminal aliens since these aliens could have multiple SCAAP incarcerations in the same fiscal year. The decrease in the number of SCAAP criminal alien incarcerations can be partially attributed to fewer SCAAP incarcerations. Of the 710 states and localities that participated in SCAAP each of the 6 fiscal years, 80 percent had fewer SCAAP criminal alien incarcerations in fiscal year 2015 compared to fiscal year 2010, and 75 percent had fewer SCAAP criminal alien inmate days in fiscal year 2015 compared to fiscal year 2010. The decrease in the number of SCAAP criminal alien incarcerations can also be partially attributed to general declines in the number of states and localities participating

[43]SCAAP data represent the number of incarcerations, rather than number of SCAAP criminal aliens, since aliens could have multiple SCAAP incarcerations in the same fiscal year. As stated previously, SCAAP criminal aliens represent a portion of the total population of criminal aliens incarcerated in state prisons and local jails.

in SCAAP. The number of states and localities participating in SCAAP decreased 13 percent—from 929 in fiscal year 2010 to 811 in fiscal year 2015.

From fiscal years 2010 through 2015, the number of SCAAP criminal alien incarcerations in state prisons and local jails decreased by 25 and 48 percent, respectively.[44] The decrease in the number of SCAAP criminal alien incarcerations can be partially attributed to fewer SCAAP incarcerations. Of the 710 states and localities that participated in SCAAP each of the 6 fiscal years, 80 percent had fewer SCAAP criminal alien incarcerations in fiscal year 2015 compared to fiscal year 2010, and 75 percent had fewer SCAAP criminal alien inmate days in fiscal year 2015 compared to fiscal year 2010. Further, the decrease can also be partially attributed to general declines in the number of states and localities participating in SCAAP. The number of states and localities participating in SCAAP decreased 13 percent—from 929 in fiscal year 2010 to 811 in fiscal year 2015.[45]

Of the total number of inmate days for all inmates in state prisons and local jails that received SCAAP reimbursements, SCAAP criminal alien incarcerations accounted for 5 percent of all inmate days from fiscal years 2010 through 2015. Of the total number of inmate days for all inmates in U.S. territories that received SCAAP reimbursements, SCAAP criminal alien incarcerations accounted for 3 percent of all days from fiscal years 2010 through 2015.

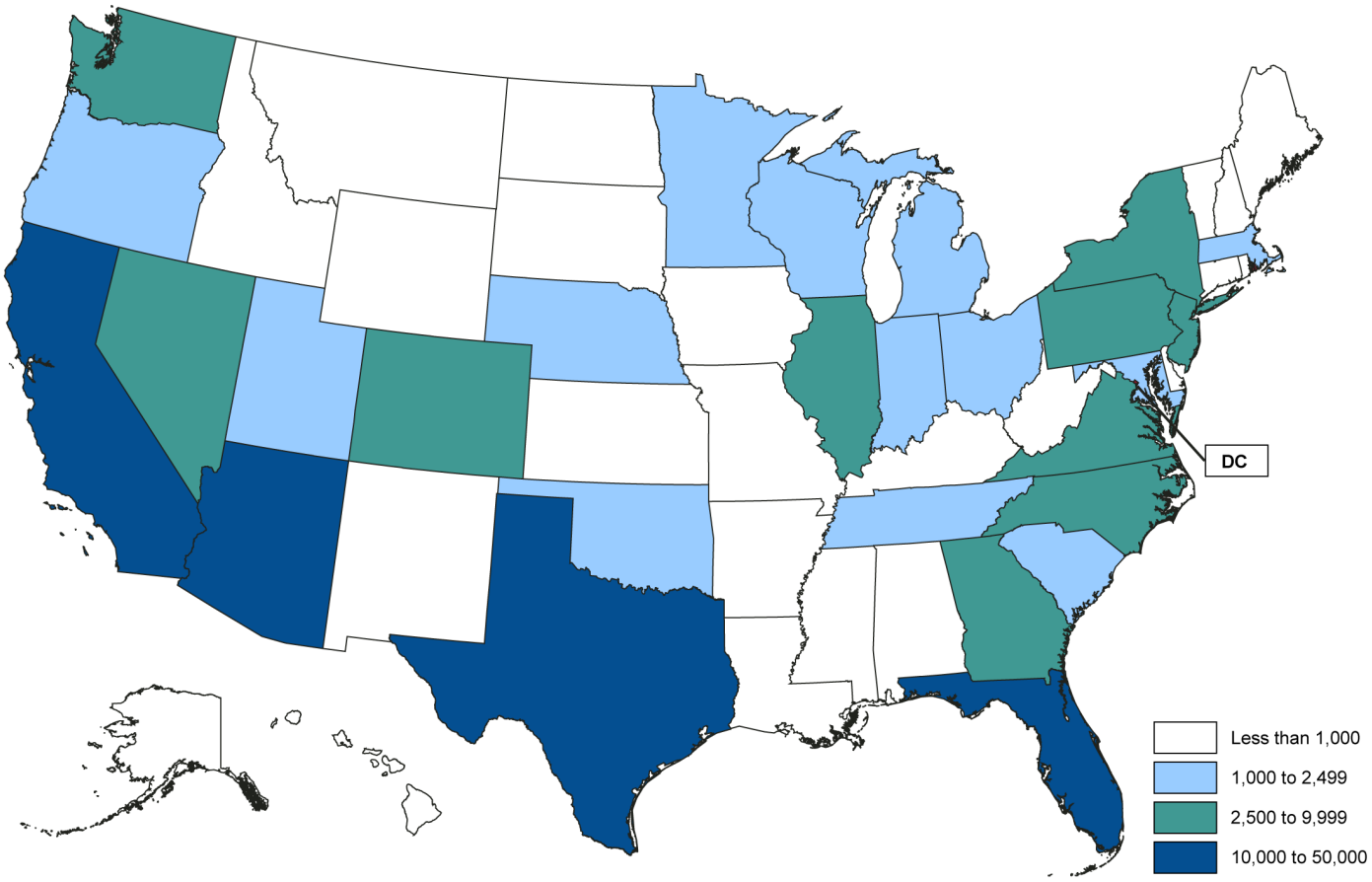
Further, of the approximately 169,300 SCAAP criminal alien incarcerations in state prisons and local jails nationwide in fiscal year 2015, 66 percent occurred in seven states—California, Texas, Florida, Arizona, New Jersey, New York, and Illinois. In fiscal year 2015, SCAAP criminal aliens accounted for 4 to 10 percent of all inmate days in each of

[44]During our selected time period, the following state prison systems did not participate in SCAAP: West Virginia in fiscal year 2010; West Virginia and the District of Columbia in fiscal years 2011 and 2012; Missouri, Tennessee, Wyoming, West Virginia, and the District of Columbia in fiscal year 2013; West Virginia and the District of Columbia in fiscal year 2014; and Arkansas, West Virginia, Vermont, and the District of Columbia in fiscal year 2015. For all 6 years, every state had at least one state prison or local jail system that participated in SCAAP except for the District of Columbia, Vermont, and Wyoming. In addition, not all of the same localities applied in both 2011 and 2015.

[45]Between 46 and 50 state prison systems—including the District of Columbia—participated in SCAAP from fiscal years 2010 through 2015. During this same time period, between 875 to 760 local jail systems participated in SCAAP each fiscal year and between 4 and 5 U.S. territories participated in SCAAP each fiscal year. 710 jurisdictions participated in SCAAP in all 6 fiscal years.

these seven states. See figure 4 for the number of SCAAP criminal aliens in each state in fiscal year 2015.[46]

Figure 4: Number of State Criminal Alien Assistance Program (SCAAP) Criminal Alien Incarcerations in Each State, Fiscal Year 2015



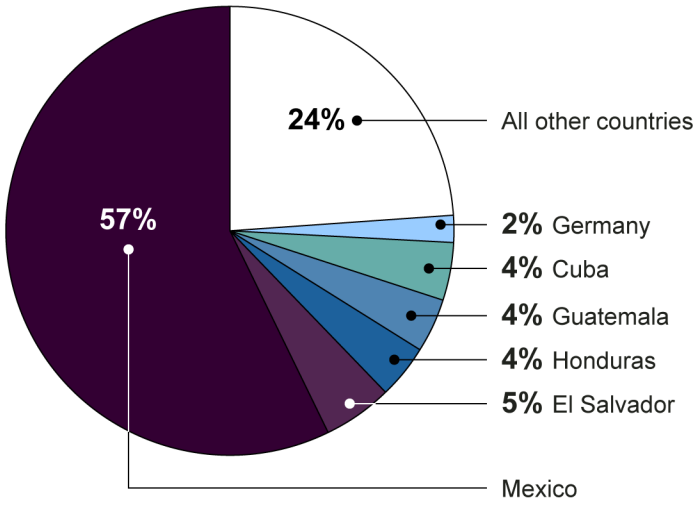
Source: GAO analysis of Bureau of Justice Assistance data. | GAO-18-433

Note: The above figure includes SCAAP criminal alien incarcerations in state prisons and local jails in each of the states. U.S. territories that received SCAAP reimbursements are not included in the above figure. Vermont and the District of Columbia did not have a state prison or local jail system that applied for reimbursement for criminal aliens incarcerated in fiscal year 2015. SCAAP data represent the number of incarcerations, rather than number of SCAAP criminal aliens, since these aliens could have multiple SCAAP incarcerations in the same fiscal year.

[46]See appendix II for data on SCAAP criminal alien incarcerations in state prisons and local jails by state for fiscal years 2010 through 2015.

As shown in figure 5, 57 percent of the SCAAP criminal aliens incarcerated in state prisons and local jails in fiscal year 2015 were born in Mexico. Seventy-six percent were born in one of six countries, including Mexico.[47]

Figure 5: Percentage of State Criminal Alien Assistance Program (SCAAP) Criminal Alien Incarcerations by Country of Birth, Fiscal Year 2015



Source: GAO analysis of Bureau of Justice Assistance data. | GAO-18-433

Note: SCAAP data do not represent the number of unique SCAAP criminal aliens since these aliens could have multiple SCAAP incarcerations during the reporting period.

[47]We did not include about 2,700 incarcerations where the country of birth of the SCAAP criminal alien was unknown. SCAAP country of birth data are provided to DOJ by states and localities. We did not independently verify country of birth of SCAAP criminal aliens. SCAAP data do not represent the number of unique SCAAP criminal aliens since these aliens could have multiple SCAAP incarcerations during the reporting period.

Federal, State, and Local Arrests of Criminal Aliens Were Mostly Related to Immigration and Drug Offenses, As Were Federal Convictions

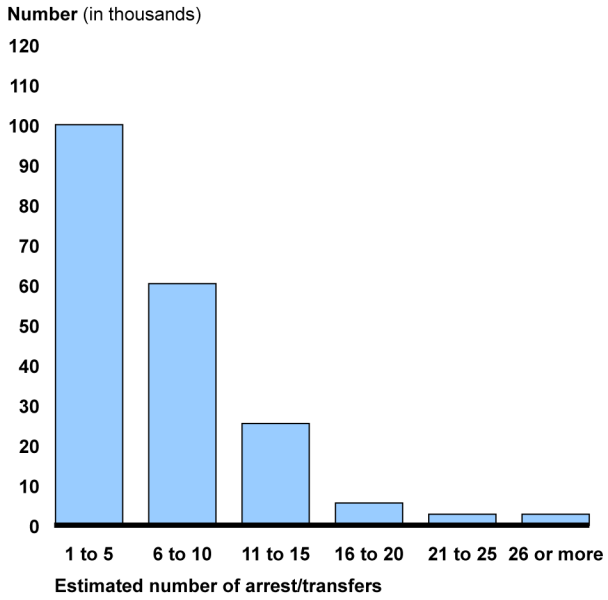
About Half of Criminal Aliens in Our Study Populations Had One to Five Arrests or Transfers and Most Had at Least One Immigration Offense

Federal criminal alien population. Based on our random sample of 500 criminal aliens incarcerated in federal prisons during fiscal years 2011 through 2016, we estimated that the about 197,000 criminal aliens in our federal study population were arrested/transferred about 1.4 million times from 1974 through 2017, averaging about 7 arrests/transfers per criminal alien.[48] We estimated that 81 percent of these arrests/transfers occurred from 2000 through 2017. An arrest does not necessarily result in prosecution or a conviction of all, or any, of these offenses.

[48]These dates, 1974 through 2017, represent the dates of the oldest and newest arrest/transfer records in our FBI dataset. Since the data did not allow us to determine the difference between a new arrest and a transfer from one arresting agency to another, we are reporting on arrests and transfers together. For this analysis, we only included criminal aliens in the study population if they had an FBI number available, as this was needed to match data across databases. Of the approximately 198,000 criminal aliens incarcerated in federal prisons from fiscal years 2011 through 2016, about 197,000 had FBI numbers. As such, for this analysis, we drew a random sample of 500 criminal aliens from our federal study population of about 197,000 criminal aliens. Some of the records in our sample of 500 criminal aliens had to be excluded for various reasons. As a result, we analyzed data for 496 criminal aliens. While our analyses allowed us to estimate and provide valuable insights about the arrest history of the approximately 197,000 criminal aliens in our federal study population, our analyses are not intended to infer conclusions about the arrest history of criminal aliens not in this study population. Because our sample is drawn from our federal study population and does not include the SCAAP criminal aliens from our state and local study population, results cannot be compared to the results we presented in our 2011 report, see GAO-11-187. Law enforcement entities send arrest information to the FBI on a voluntary basis; as a result, FBI data on arrest history may not include all arrests. All percentage estimates presented in this report have a margin of error of plus or minus 7 percentage points or fewer. All estimates of the number of arrests/transfers or offenses have a relative error of plus or minus 14 percent of the estimate or less. See appendix I for more details on the margin of error for these estimates. See appendix III for the breakdown of arrests/transfers by federal arresting agencies and state and local arresting agencies.

As shown in figure 6, about 100,000 (51 percent) of the criminal aliens in our federal study population had one to five arrests/transfers in their arrest history record since 1974.[49]

Figure 6: Estimated Number of Arrests/Transfers from 1974 through 2017 per Criminal Alien Incarcerated in Federal Prisons from Fiscal Years 2011 through 2016 who had an FBI Number



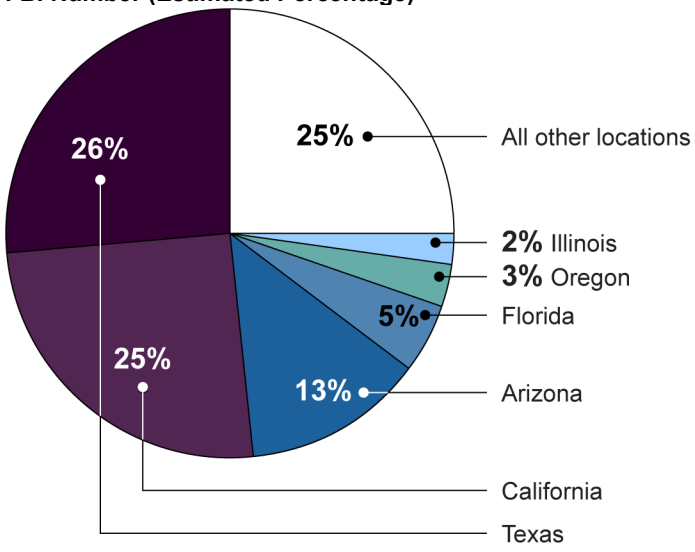
Source: GAO analysis of Federal Bureau of Investigation (FBI) data. | GAO-18-433

Note: While our analyses allowed us to estimate and provide valuable insights about the arrest history of our study population, which consisted of about 197,000 criminal aliens incarcerated in federal prisons from fiscal years 2011 through 2016 with an FBI number, our analyses are not intended to infer conclusions about the arrest history of criminal aliens not in this study population. Law enforcement entities send arrest information to the FBI on a voluntary basis; as a result, FBI data on arrest history may not include all arrests. The data did not allow us to determine the difference between a new arrest and a transfer from one arresting agency to another; as such, we are reporting on arrests and transfers collectively. All estimates in this figure have a margin of error of +/- 5 percentage points or fewer.

As shown in figure 7, we estimated that 65 percent of criminal aliens in our federal study population were arrested/transferred in one of three states—Texas, California, and Arizona.

[49]We estimated that about 9,900 (5 percent) of the approximately 197,000 criminal aliens in our federal study population had one arrest/transfer since 1974.

Figure 7: Location of Arrests/Transfers from 1974 through 2017 for Criminal Aliens Incarcerated in Federal Prisons from Fiscal Years 2011 through 2016 who had an FBI Number (Estimated Percentage)



Source: GAO analysis of Federal Bureau of Investigation (FBI) data. | GAO-18-433

Note: While our analyses allowed us to estimate and provide valuable insights about the arrest history of our study population, which consisted of about 197,000 criminal aliens incarcerated in federal prisons from fiscal years 2011 through 2016 with an FBI number, our analyses are not intended to infer conclusions about the arrest history of criminal aliens not in this study population. Law enforcement entities send arrest information to the FBI on a voluntary basis; as a result, FBI data on arrest history may not include all arrests. The data did not allow us to determine the difference between a new arrest and a transfer from one arresting agency to another; as such, we are reporting on arrests and transfers collectively. All estimates in this figure have a margin of error of +/- 5 percentage points or fewer. Percentages may not add to 100 due to rounding.

We estimated that the approximately 197,000 criminal aliens in our federal study population were arrested/transferred for a total of about 2 million offenses, averaging about 10 offenses per criminal alien.[50] A single arrest can be for multiple offenses, and being arrested for one or more offenses does not necessarily result in prosecution or a conviction of all, or any, of the offenses for which an individual was arrested. Of the approximately 2 million offenses, we estimated that 42 percent were related to immigration and 26 percent were related to drugs or traffic violations, as shown below in table 2. Each offense category in the table may include an attempt or conspiracy to commit the respective offense.

Table 2: Estimated Number and Percent of Attempted or Committed Offenses for Which Criminal Aliens Incarcerated in Federal Prisons from Fiscal Years 2011 through 2016 who had an FBI Number Were Arrested/Transferred from 1974 through 2017

Arrest offense	Estimated number	Estimated percent
Immigration[a]	874,400	42.4
Drugs	336,600	16.3
Traffic violations	204,400	9.9
Obstruction of justice	141,300	6.8
Assault	108,400	5.3
Miscellaneous	74,200	3.6
Larceny/theft	70,300	3.4
Fraud, forgery, and counterfeiting	62,300	3.0
Burglary	44,900	2.2
Weapons violations	44,500	2.2
Motor vehicle theft	19,500	0.9
Sex offenses	13,500	0.7
Disorderly conduct	12,300	0.6
Stolen property	14,300	0.7

[50]These include offenses associated with arrests or transfers by federal arresting agencies and state and local arresting agencies. For our analysis, (a) multiple counts of the same offense were counted once, (b) duplicate offenses on the same day may be counted more than once if the person was transferred to another agency on the same day and that agency submitted the same offense to the FBI, and (c) duplicate offenses on the same day submitted by the same agency may be counted more than once if there was not enough information to determine that two offenses were the same. Because we selected samples from both our federal study population and our state and local study population, results cannot be compared to the results we presented in our 2011 report, see GAO-11-187. See appendix I for information on the margin of error for these estimates and a complete description of each of the offense categories.

Arrest offense	Estimated number	Estimated percent
Property damage	17,500	0.8
Robbery	13,500	0.7
Homicide	6,000	0.3
Kidnapping	5,600	0.3
Arson	400	< 0.1
Terrorism	400	< 0.1
Total[b]	**2,064,100**	**100**

Source: GAO analysis of Federal Bureau of Investigation (FBI) data. | GAO-18-433

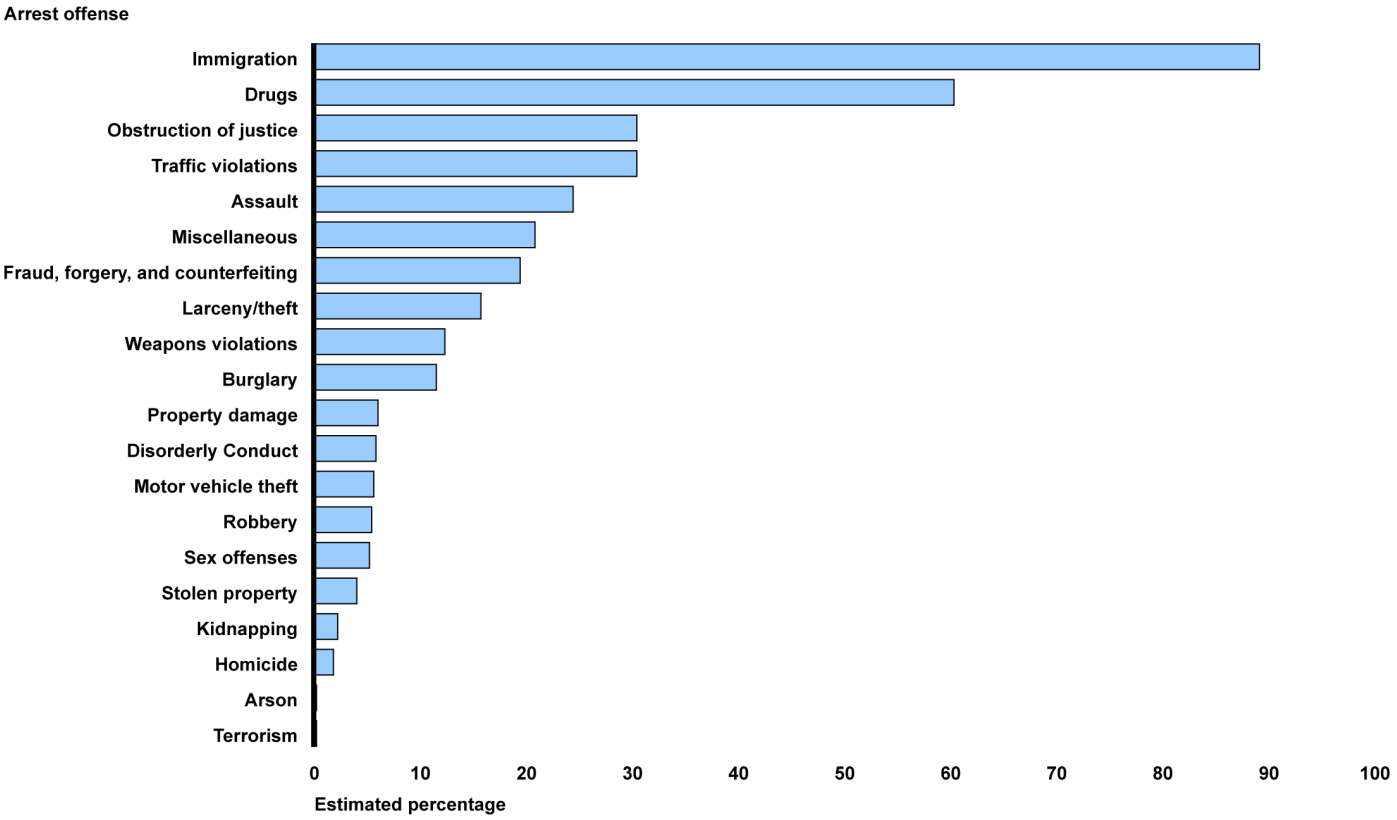
Note: These include offenses associated with arrests or transfers by federal arresting agencies and state and local arresting agencies. Offenses may include an attempt or conspiracy to commit the respective offense. While our analyses allowed us to estimate and provide valuable insights about the arrest history of our study population, which consisted of about 197,000 criminal aliens incarcerated in federal prisons from fiscal years 2011 through 2016 with an FBI number, our analyses are not intended to infer conclusions about the arrest history of criminal aliens not in this study population. Law enforcement entities send arrest information to the FBI on a voluntary basis; as a result, FBI data on arrest history may not include all arrests. The numbers in the table above represent the number of offenses we estimated that criminal aliens were arrested or transferred for; they do not represent the number of times that criminal aliens were arrested or transferred for each offense. All estimates in this table have a margin of error of +/- 3 percentage points or fewer.

[a]Offenses included in our immigration category include both criminal immigration offenses (about 369,200) and civil immigration violations— administrative grounds of removability (about 494,600). For the remaining immigration offenses, the data did not allow us to distinguish whether the offense was criminal or civil.

[b]Numbers may not sum to totals because of rounding. Percentages may not sum to 100 due to rounding.

We estimated that 89 percent of the approximately 197,000 criminal aliens in our federal study population were arrested/transferred at least once for an immigration offense and that 60 percent were arrested/transferred at least once for a drug offense. Figure 8 shows the estimated percentage of criminal aliens arrested/transferred at least once by offense category—which may include an attempt or conspiracy to commit the offense.

Figure 8: Estimated Percentage of Criminal Aliens Incarcerated in Federal Prisons from Fiscal Years 2011 through 2016 who had an FBI Number that were Arrested/Transferred At Least Once from 1974 through 2017 by Offense Category, Attempted or Committed



Source: GAO analysis of Federal Bureau of Investigation (FBI) data. | GAO-18-433

Note: Offenses may include an attempt or conspiracy to commit the respective offense. While our analyses allowed us to estimate and provide valuable insights about the arrest history of our study population, which consisted of about 197,000 criminal aliens incarcerated in federal prisons from fiscal years 2011 through 2016 with an FBI number, our analyses are not intended to infer conclusions about the arrest history of criminal aliens not in this study population. Law enforcement entities send arrest information to the FBI on a voluntary basis; as a result, FBI data on arrest history may not include all arrests. The data did not allow us to determine the difference between a new arrest and a transfer from one arresting agency to another; as such, we are reporting on arrests and transfers collectively. All estimates in this figure have a margin of error of +/- 5 percentage points or fewer.

SCAAP criminal alien population. Based on our random sample of 500 SCAAP criminal aliens incarcerated in state prisons and local jails, we estimated that our state and local study population of about 533,000 SCAAP criminal aliens were arrested/transferred about 3.5 million times from 1964 through 2017, averaging about 7 arrests/transfers per SCAAP

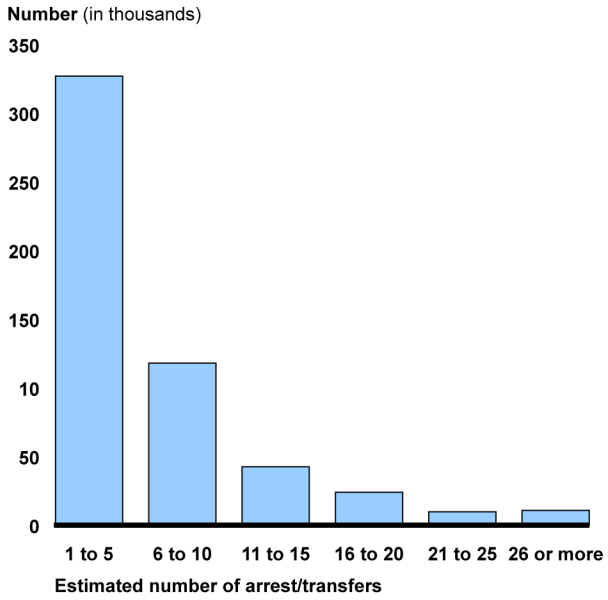
criminal alien.[51] We estimated that 85 percent of these arrests/transfers occurred from 2000 through 2017. An arrest does not necessarily result in prosecution or a conviction of all, or any, of these offenses.

As shown in figure 9, about 327,000 (61 percent) of the SCAAP criminal aliens in our state and local study population had one to five arrests/transfers in their arrest history record since 1964.[52]

[51]These dates, 1964 through 2017, represent the dates of the oldest and newest arrest/transfer records in our FBI dataset. For this analysis, we only included SCAAP criminal aliens in the study population if they had an FBI number available, as this was needed to match data across databases. We determined that approximately 533,000 inmate-level records of SCAAP criminal aliens incarcerated between fiscal years 2010 through 2015 had a unique FBI number. As such, for this analysis, we drew a random sample of 500 criminal aliens from our state and local study population of approximately 533,000 SCAAP criminal aliens with a unique FBI number. Some of the records in our sample of 500 SCAAP criminal aliens had to be excluded for various reasons, including invalid FBI numbers. As a result, we analyzed data for 487 SCAAP criminal aliens. While our analyses allowed us to estimate and provide valuable insights about the arrest history of the about 533,000 SCAAP criminal aliens in our state and local study population, our analyses are not intended to infer conclusions about the arrest history of criminal aliens not in this study population. Because our sample is drawn from our state and local study population and does not include criminal aliens from our federal study population, results cannot be compared to the results we presented in our 2011 report, see GAO-11-187. Law enforcement entities send arrest information to the FBI on a voluntary basis; as a result, FBI data on arrest history may not include all arrests. See appendix I for more details on the margin of error for these estimates. See appendix III for the breakdown of arrests/transfers by federal arresting agencies and state and local arresting agencies. As stated previously, SCAAP criminal aliens represent a portion of the total population of criminal aliens incarcerated in state prisons and local jails.

[52]We estimated that about 41,600 (8 percent) of the approximately 533,000 SCAAP criminal aliens in our state and local study population had one arrest/transfer since 1964.

Figure 9: Estimated Number of Arrests/Transfers from 1964 through 2017 per State Criminal Alien Assistance Program (SCAAP) Criminal Alien Incarcerated in State Prisons and Local Jails from Fiscal Years 2010 through 2015 who had an FBI Number

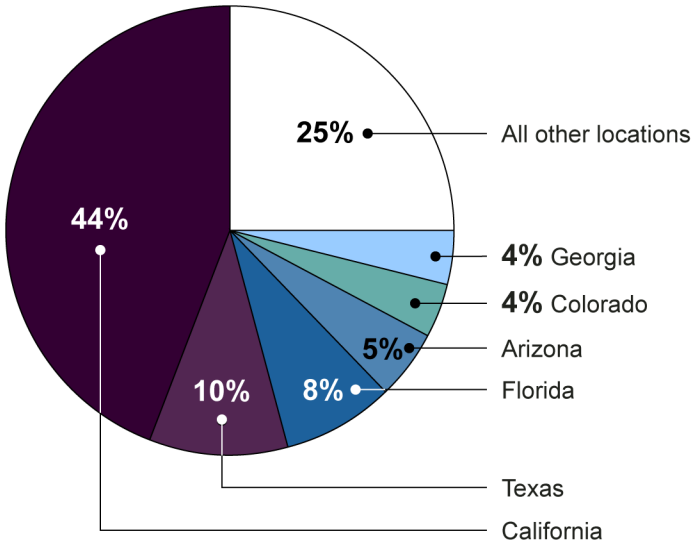


Source: GAO analysis of Federal Bureau of Investigation (FBI) data. | GAO-18-433

Note: While our analyses allowed us to estimate and provide valuable insights about the arrest history of our study population, which consisted of about 533,000 SCAAP criminal aliens incarcerated in state prisons and local jails from fiscal years 2010 through 2015 with an FBI number, our analyses are not intended to infer conclusions about the arrest history of criminal aliens not in this study population. Law enforcement entities send arrest information to the FBI on a voluntary basis; as a result, FBI data on arrest history may not include all arrests. The data did not allow us to determine the difference between a new arrest and a transfer from one arresting agency to another; as such, we are reporting on arrests and transfers collectively. All estimates in this figure have a margin of error of +/- 5 percentage points or fewer.

As shown in figure 10, we estimated that 62 percent of the SCAAP criminal aliens in our state and local study population were arrested/transferred in one of three states—California, Texas, and Florida.

Figure 10: Location of Arrests/Transfers from 1964 through 2017 for State Criminal Alien Assistance Program (SCAAP) Criminal Aliens Incarcerated in State Prisons and Local Jails from Fiscal Years 2010 through 2015 who had an FBI Number (Estimated Percentage)



Source: GAO analysis of Federal Bureau of Investigation (FBI) data. | GAO-18-433

Note: While our analyses allowed us to estimate and provide valuable insights about the arrest history of our study population, which consisted of about 533,000 SCAAP criminal aliens incarcerated in state prisons and local jails from fiscal years 2010 through 2015 with an FBI number, our analyses are not intended to infer conclusions about the arrest history of criminal aliens not in this study population. Law enforcement entities send arrest information to the FBI on a voluntary basis; as a result, FBI data on arrest history may not include all arrests. The data did not allow us to determine the difference between a new arrest and a transfer from one arresting agency to another; as such, we are reporting on arrests and transfers collectively. All estimates in this figure have a margin of error of +/- 6 percentage points or fewer. Percentages may not add to 100 due to rounding.

We estimated that the approximately 533,000 SCAAP criminal aliens in our state and local study population were arrested/transferred for a total of about 5.5 million offenses averaging about 10 offenses per SCAAP

criminal alien.[53] A single arrest can be for multiple offenses, and being arrested for one or more offenses does not necessarily result in prosecution or a conviction of all, or any, of the offenses for which an individual was arrested. Of the approximately 5.5 million offenses, we estimated that 52 percent were related to traffic violations, drug offenses, or immigration offenses, as shown below in table 3. Each offense category in the table may include an attempt or conspiracy to commit the respective offense.

Table 3: Estimated Number and Percent of Attempted or Committed Offenses for Which State Criminal Alien Assistance Program (SCAAP) Criminal Aliens Incarcerated in State Prisons and Local Jails from Fiscal Years 2010 through 2015 who had an FBI Number were Arrested/Transferred from 1964 through 2017

Arrest offense	Estimated number	Estimated percent
Traffic violations	1,226,000	22.4
Immigration[a]	852,000	15.6
Drugs	761,200	13.9
Obstruction of justice	665,000	12.2
Assault	397,000	7.3
Larceny/theft	276,700	5.1
Miscellaneous	257,000	4.7
Fraud, forgery, and counterfeiting	200,100	3.7
Burglary	175,000	3.2
Weapons violations	124,700	2.3
Sex offenses	120,300	2.2
Disorderly conduct	90,800	1.7
Motor vehicle theft	90,800	1.7
Stolen property	75,500	1.4
Robbery	54,700	1.0

[53]These include offenses associated with arrests or transfers by federal arresting agencies and state and local arresting agencies. See appendix III for the breakdown of offenses for arrests/transfers by federal arresting agencies and state and local arresting agencies. For our analysis, (a) multiple counts of the same offense were counted once, (b) duplicate offenses on the same day may be counted more than once if the person was transferred to another agency on the same day and that agency submitted the same offense to the FBI, and (c) duplicate offenses on the same day submitted by the same agency may be counted more than once if there was not enough information to determine that two offenses were the same. Because we selected samples from both our federal study population and our state and local study population, results cannot be compared to the results we presented in our 2011 report, see GAO-11-187. See appendix I for information on the margin of error for these estimates and a complete description of each of the offense categories.

Arrest offense	Estimated number	Estimated percent
Property damage	50,300	0.9
Homicide	27,300	0.5
Kidnapping	18,600	0.3
Arson	3,300	0.1
Terrorism	1,100	<0.1
Total[b]	**5,467,200**	**100**

Source: GAO analysis of Federal Bureau of Investigation (FBI) data. | GAO-18-433

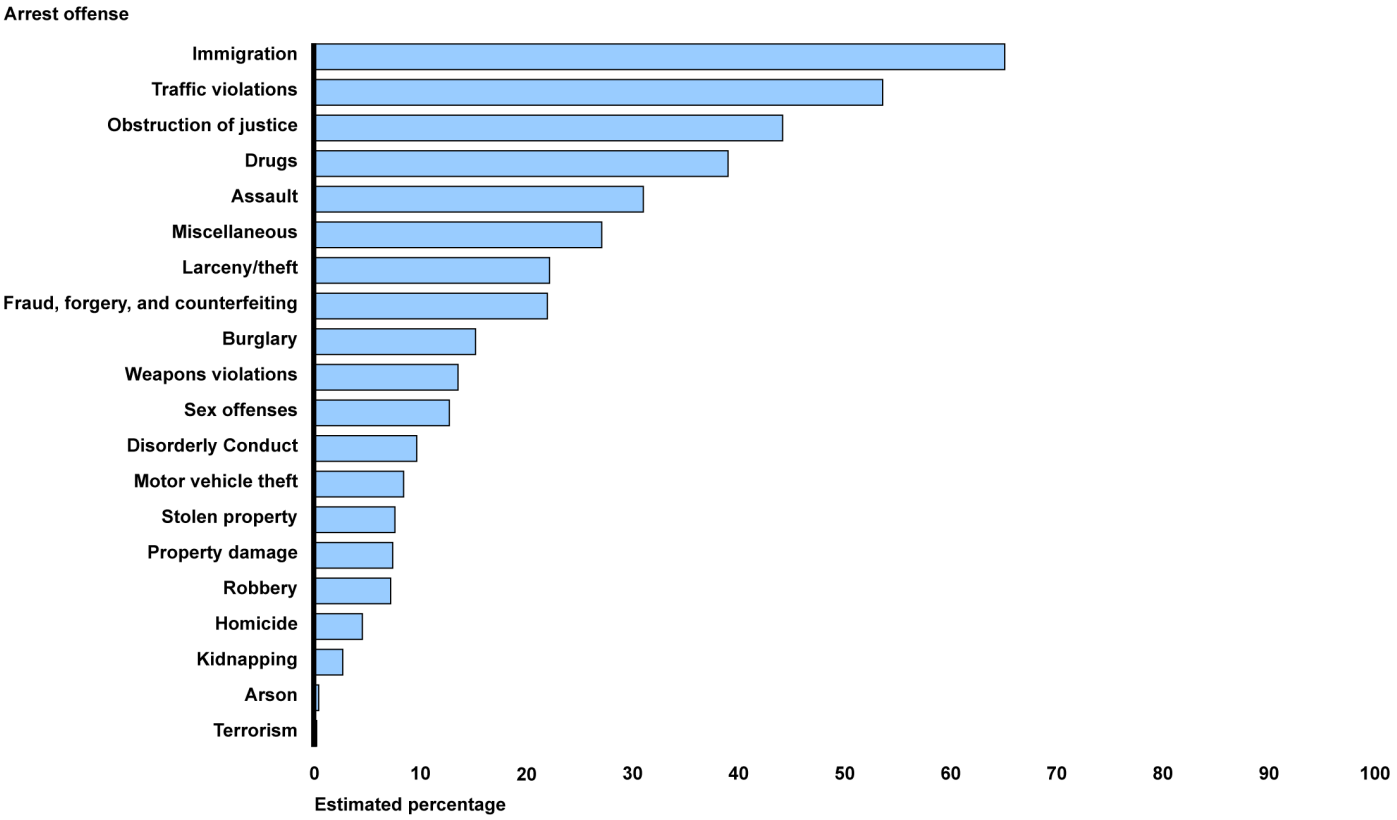
Note: These include offenses associated with arrests or transfers by federal arresting agencies and state and local arresting agencies. Offenses may include an attempt or conspiracy to commit the respective offense. While our analyses allowed us to estimate and provide valuable insights about the arrest history of our study population, which consisted of about 533,000 SCAAP criminal aliens incarcerated in state prisons and local jails from fiscal years 2010 through 2015 with an FBI number, our analyses are not intended to infer conclusions about the arrest history of criminal aliens not in this study population. Law enforcement entities send arrest information to the FBI on a voluntary basis; as a result, FBI data on arrest history may not include all arrests. The numbers in the table above represent the number of offenses we estimated that SCAAP criminal aliens were arrested or transferred for; they do not represent the number of times that SCAAP criminal aliens were arrested or transferred for each offense. All estimates in this table have a margin of error of +/- 3 percentage points or fewer.

[a]Offenses included in our immigration category included both criminal immigration offenses (about 229,700) and civil immigration violations— administrative grounds of removability (about 616,800). For the remaining immigration offenses, the data did not allow us to distinguish whether the offense was criminal or civil.

[b]Numbers may not sum to totals because of rounding. Percentages may not sum to 100 due to rounding.

We estimated that 65 percent of the approximately 533,000 SCAAP criminal aliens in our state and local study population were arrested/transferred at least once for an immigration offense and 54 percent were arrested/transferred at least once for a traffic offense. Figure 11 shows the percentage of SCAAP criminal aliens arrested/transferred at least once by offense category—which may include an attempt or conspiracy to commit the offense.

Figure 11: Estimated Percentage of State Criminal Alien Assistance Program (SCAAP) Criminal Aliens Incarcerated in State Prisons and Local Jails from Fiscal Years 2010 through 2015 who had an FBI Number that were Arrested/Transferred At Least Once from 1964 through 2017 by Offense Category, Attempted or Committed



Source: GAO analysis of Federal Bureau of Investigation (FBI) data. | GAO-18-433

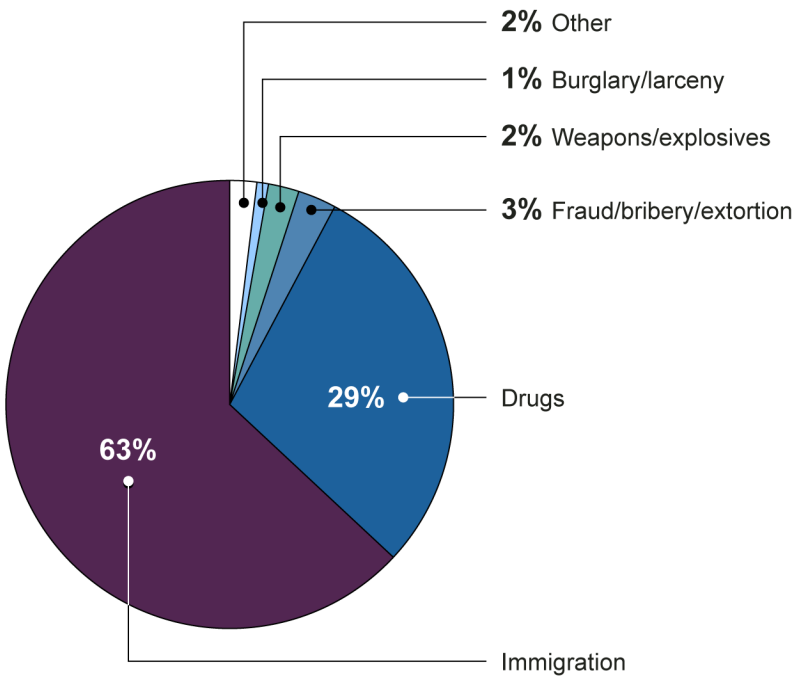
Note: Offenses may include an attempt or conspiracy to commit the respective offense. While our analyses allowed us to estimate and provide valuable insights about the arrest history of our study population, which consisted of about 533,000 SCAAP criminal aliens incarcerated in state prisons and local jails from fiscal years 2010 through 2015 with an FBI number, our analyses are not intended to infer conclusions about the arrest history of criminal aliens not in this study population. Law enforcement entities send arrest information to the FBI on a voluntary basis; as a result, FBI data on arrest history may not include all arrests. The data did not allow us to determine the difference between a new arrest and a transfer from one arresting agency to another; as such, we are reporting on arrests and transfers collectively. All estimates in this figure have a margin of error of +/- 5 percentage points or fewer.

Immigration and Drug Offenses Accounted for the Majority of Federal Convictions of Criminal Aliens, While Selected State Convictions of Criminal Aliens Varied

Because an arrest does not necessarily result in prosecution or a conviction of all, or any, of the offenses for which an individual is arrested, we also analyzed BOP conviction data on criminal aliens incarcerated in federal prisons from fiscal years 2011 through 2016. As shown in figure 12, the approximately 198,000 unique criminal aliens in our federal study population that were incarcerated from fiscal years 2011 through 2016 had more than 218,700 primary offenses for which they were convicted. According to BOP data, 92 percent of primary offenses for which these criminal aliens were convicted were related to immigration (63 percent) or drugs (29 percent).[54]

[54]If a criminal alien was incarcerated more than once during this time period, each primary offense will be included in these data. As such, there could be more than one primary offense per unique criminal alien. See appendix I for a complete description of each of the offense categories. Offenses may include any attempt or conspiracy to commit the respective offense. BOP data do not include inmates in the witness security program and unsentenced inmates.

Figure 12: Primary Offense Category, Attempted or Committed, for Which the Approximately 198,000 Criminal Aliens Incarcerated in Federal Prisons from Fiscal Years 2011 through 2016 Were Convicted



Source: GAO analysis of Bureau of Prisons data. | GAO-18-433

Note: "Other" includes sex offenses, homicide/aggravated assault, court/corrections, robbery, counterfeit/embezzlement, continuing criminal enterprises, national security, and miscellaneous. If an alien was incarcerated more than once during this time period, each primary offense for which the alien was convicted will be included in these data. As such, there could be more than one primary offense per unique criminal alien. Offenses for which criminal aliens were convicted may include an attempt or conspiracy to commit the respective offense.

In addition to analyzing BOP conviction data for the approximately 198,000 criminal aliens incarcerated in federal prisons from fiscal years 2011 through 2016, we also analyzed U.S. Sentencing Commission data on federal convictions during the same time period to further our understanding of criminal alien convictions. Criminal aliens with convictions in the U.S. Sentencing Commission data may have also been included in our federal study population if they were convicted in federal court and sentenced in fiscal years 2011 through 2016 and also incarcerated in federal prison during this same time period. Specifically, according to U.S. Sentencing Commission data, 91 percent of the approximately 28,000 primary offenses for which criminal aliens were convicted in federal courts and sentenced in fiscal year 2016 were for

immigration (66 percent) or drugs (25 percent)—and illegal reentry accounted for 91 percent of the immigration offenses. See appendix IV for additional details on current trends in U.S. Sentencing Commission data on federal convictions. In addition, appendix V provides information on individuals—including U.S. citizens and criminal aliens—convicted as a result of international terrorism investigations.

Since there are no reliable data on criminal aliens incarcerated in all state prisons and local jails, we analyzed conviction data from the five state prison systems that had the largest number of SCAAP criminal alien incarcerations in fiscal year 2015. Primary offenses for which SCAAP criminal aliens incarcerated in fiscal year 2015 were convicted varied across these selected state prison systems:

- Arizona: Drug offenses accounted for 47 percent of the more than 6,300 primary offenses for which SCAAP criminal aliens were convicted
- California: Homicide and sex offenses accounted for about 53 percent of the more than 18,600 primary offenses for which SCAAP criminal aliens were convicted
- Florida: Homicide and sex offenses accounted for 45 percent of the nearly 6,300 primary offenses for which SCAAP criminal aliens were convicted
- New York: Homicide and sex offenses accounted for 49 percent of the nearly 3,400 primary offenses for which SCAAP criminal aliens were convicted
- Texas: Sex, drug, and assault offenses accounted for 52 percent of the nearly 9,600 primary offenses for which SCAAP criminal aliens were convicted

For more information on convictions of SCAAP criminal aliens in these five state prison systems, see appendix VI.

Estimated Federal and State Costs for Incarcerating Criminal Aliens Decreased from Fiscal Years 2010 through 2015

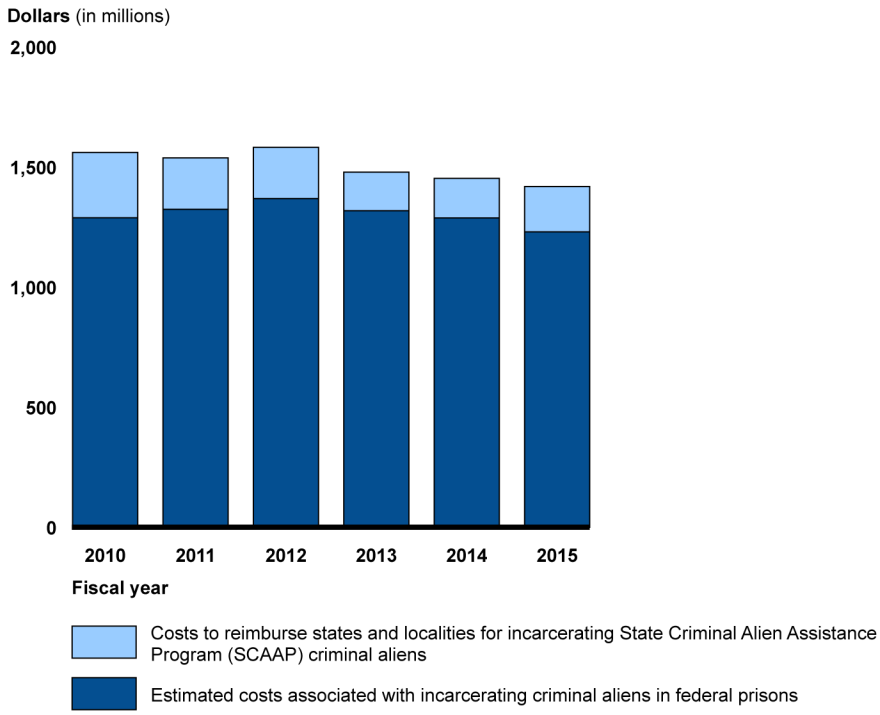
Federal Costs to Incarcerate Criminal Aliens and Federal Reimbursements to States and Localities Decreased from Fiscal Years 2010 through 2015

As previously stated, the federal government incurs costs to incarcerate criminal aliens in federal prisons and to reimburse states and localities for incarcerating SCAAP criminal aliens.[55] From fiscal years 2010 through 2015, these estimated annual total costs decreased 9 percent from about $1.56 billion to about $1.42 billion, as shown in figure 13.[56]

[55]As stated previously, SCAAP criminal aliens represent a portion of the total population of criminal aliens incarcerated in state prisons and local jails.

[56]During this period, costs decreased at an average rate of 1.8 percent per year. Costs associated with incarcerating criminal aliens in federal prisons were estimated based on the average of the 12 monthly population snapshots for each type of BOP institution, and BOP per capita costs. We used the average of the 12 monthly snapshots to account for possible differences in incarceration numbers month to month for each fiscal year. Costs to reimburse states and localities are based on actual costs each year. For data in fiscal year 2016 dollars, see appendix VII.

Figure 13: Federal Costs to Incarcerate Criminal Aliens from Fiscal Years 2010 through 2015



Source: GAO analysis of Bureau of Prisons and Bureau of Justice Assistance data. | GAO-18-433

Note: Costs to reimburse states and localities are based on actual SCAAP reimbursements each year. Costs associated with incarcerating criminal aliens in federal prisons were estimated based on the average of the 12 monthly population snapshot data for each type of Bureau of Prisons institution and Bureau of Prisons per capita costs.

Most of the costs to the federal government were associated with incarcerating criminal aliens in federal prisons, which accounted for 83 to 89 percent of total costs from fiscal years 2010 through 2015. The estimated cost associated with incarcerating criminal aliens in federal prisons increased from fiscal years 2010 through 2012, and then decreased each year from fiscal years 2012 through 2015. These changes in costs correspond with the changes in the number of criminal aliens incarcerated in federal prison—which also increased from fiscal years 2010 through 2012 and decreased each year thereafter through

2015—while the average daily cost to incarcerate inmates in a federal prison increased each year, as reported by BOP.[57]

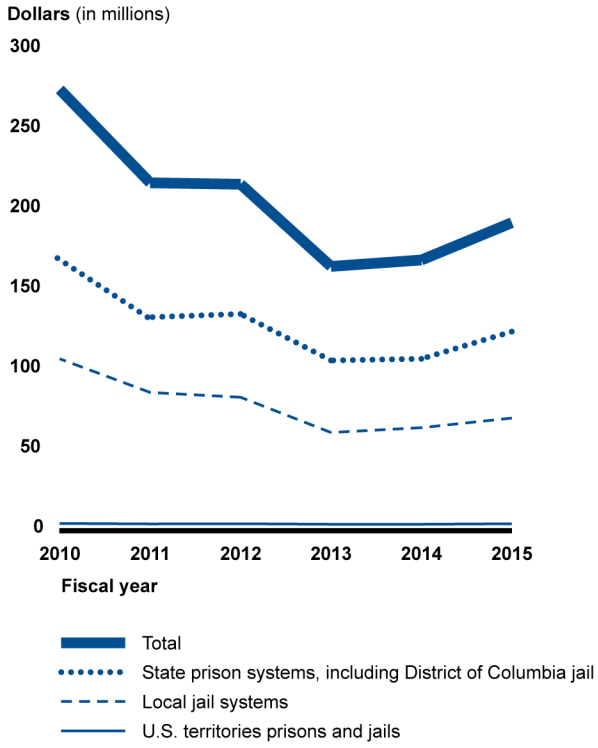
As shown in figure 14, the cost to the federal government to reimburse states and localities for incarcerating SCAAP criminal aliens decreased by 31 percent from fiscal years 2010 through 2015, from about $272 million to about $189 million. This decrease reflects lower yearly congressional appropriations.[58] SCAAP reimbursements associated with incarcerating SCAAP criminal aliens in state prisons comprised over 60 percent of SCAAP reimbursements from fiscal years 2010 through 2015, while reimbursements to local jail systems and U.S. territories' prisons and jails comprised the remainder.[59]

[57]The average daily cost to incarcerate inmates in federal prison increased 13 percent, from $77.49 in fiscal year 2010 to $87.61 in fiscal year 2015. The average daily cost varies by federal prison facility type. As we reported previously, the number of criminal aliens incarcerated in federal prison increased from fiscal years 2011 to 2012 and then decreased each year since fiscal year 2013.

[58]While the cost to the federal government to reimburse states and localities for incarcerating SCAAP criminal aliens decreased between fiscal years 2010 and 2015, the change in cost varied from year to year. For example, costs decreased by 41 percent from fiscal years 2010 through 2013 before increasing by 17 percent from fiscal years 2013 through 2015. The amount that states and localities were reimbursed is lower than the SCAAP appropriation amount in each fiscal year because some funds were allocated for management and administration, peer review, or other authorized purposes.

[59]For costs in fiscal year 2016 dollars, see appendix VII. The following state prison systems did not receive SCAAP reimbursement: West Virginia in fiscal year 2010; West Virginia and the District of Columbia in fiscal years 2011 and 2012; Missouri, Tennessee, Wyoming, West Virginia, and the District of Columbia in fiscal year 2013; West Virginia and the District of Columbia in fiscal year 2014; and Arkansas, West Virginia, Vermont, and the District of Columbia in fiscal year 2015.

Figure 14: State Criminal Alien Assistance Program (SCAAP) Reimbursements to States and Localities from Fiscal Years 2010 through 2015



Source: GAO analysis of Bureau of Justice Assistance data. | GAO-18-433

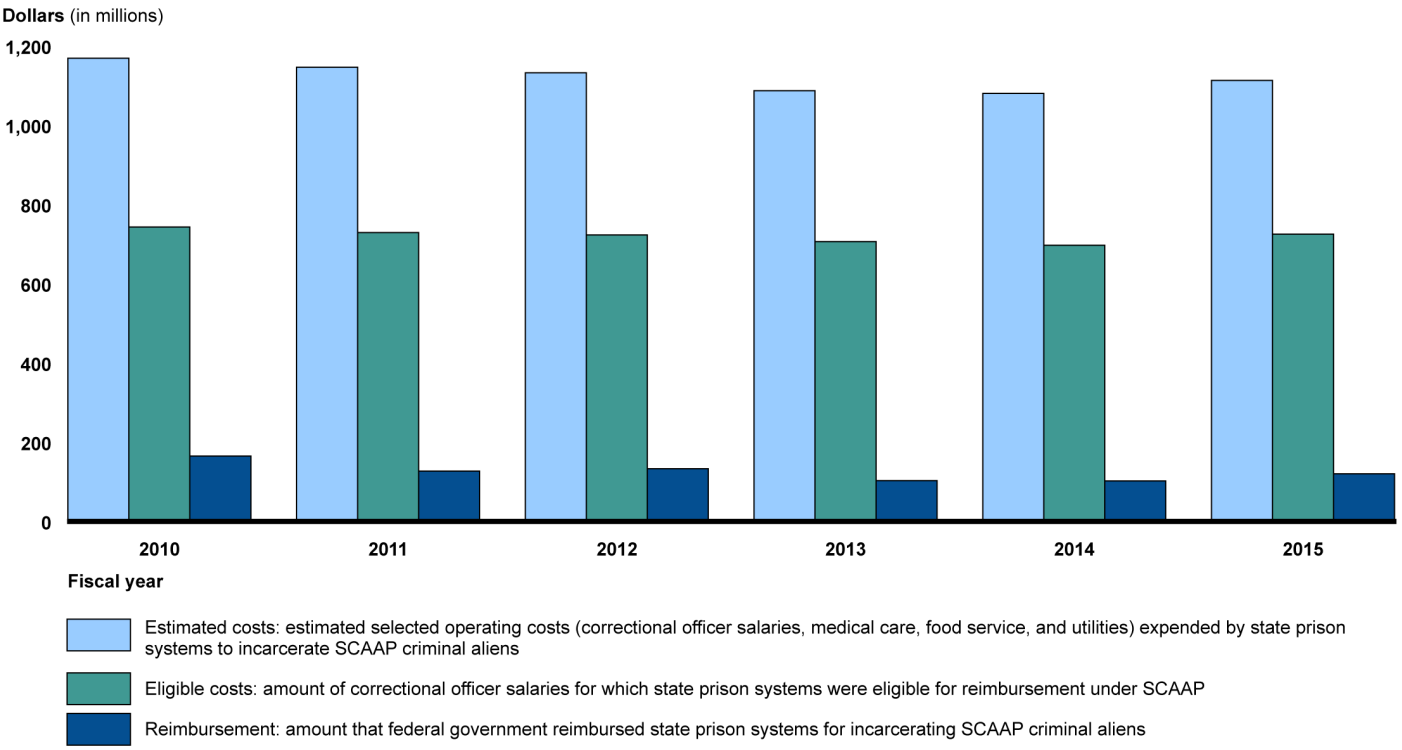
Estimated State Selected Operating Costs to Incarcerate SCAAP Criminal Aliens Decreased from Fiscal Years 2010 through 2015; the Federal Government Reimbursed a Portion of These Costs

We estimated that selected annual estimated operating costs—correctional officer salaries, medical care, food service, and utilities—of state prison systems to incarcerate SCAAP criminal aliens decreased 5 percent from fiscal years 2010 through 2015, from about $1.17 billion to about $1.11 billion, as shown in figure 15.[60] These changes in costs correspond with a general decrease in the number of SCAAP criminal alien inmate days each year, even though the estimated selected operating costs per inmate generally increased each year.[61]

[60]Medical, food and utility expenditures are estimated by using Bureau of Justice Statistics 2001 state prison expenditures by category and adjusting them using the annual Personal Consumption Expenditures Price Index (PCEPI) for each category and the total number of criminal aliens in a given year; per capita expenditures are assumed to grow at the rate of the PCEPI. Correctional officer salaries are based on SCAAP data. While the estimates provide insight into state expenditures to incarcerate SCAAP criminal aliens and make use of actual data on the number of SCAAP criminal aliens and actual 2001 expenditures by state for the selected categories, estimated operating costs might not represent actual expenditures. For instance if per capita prison expenditures are growing at a different rate than the PCEPI, either because of changes in the prison population in the amount consumed or changes in the composition of the services utilized within a category, these costs are not captured by the growth of the PCEPI. For example, based on data we reported in 2017, from fiscal years 2014 to 2015 per capita BOP obligations for health care increased by 9 percent, more than the national medical costs per capita of 5 percent. This is also more than the increase of .6 percent of the PCEPI for medical expenditures during the same period. BOP officials noted that various factors affected the inmate health care costs, including inmates entering with poorer health, aging inmates, rising pharmaceutical prices and outside medical services. All of these factors might not apply to the criminal alien prison population; however it points to the fact that there are various factors affecting medical expenditures in prisons that might not be captured by our estimates. See GAO, *Bureau of Prisons: Better Planning and Evaluation Needed to Understand and Control Rising Inmate Health Care Costs*, GAO-17-379 (Washington, D.C.: June 29, 2017).

[61]We estimated—based on annual selected operating costs—that the average daily costs per inmate for state prison systems that received SCAAP reimbursements increased 9 percent, from $43.93 in fiscal year 2010 to $47.69 in fiscal year 2015. These operating costs vary from state to state. The total number of inmate days associated with SCAAP criminal alien incarcerations in state prisons decreased 16 percent, from about 23.7 million in fiscal year 2010 to 19.9 million in fiscal year 2015.

Figure 15: Estimated Selected Operating Costs to Incarcerate State Criminal Alien Assistance Program (SCAAP) Criminal Aliens in All 50 State Prison Systems from Fiscal Years 2010 through 2015



Source: GAO analysis of Bureau of Justice Statistics and Bureau of Justice Assistance data. | GAO-18-433

Note: SCAAP reimbursement figures may not equal the actual SCAAP awarded amount due to rounding. Our analysis includes those state prison systems—including the District of Columbia jail—that received SCAAP reimbursement in the associated fiscal year the SCAAP criminal aliens were incarcerated. Not all 50 state prison systems received reimbursement each fiscal year and as a result, not all state prison systems may be included in our estimates for each fiscal year.

We also estimated that the total amount that state prison systems expended totaled about $6.7 billion over the 6 years.[62] Of this approximately $6.7 billion, state prison systems were eligible to be reimbursed for about $4.3 billion in correctional officer salaries under SCAAP—the only costs eligible for reimbursement under SCAAP. Based

[62]These selected estimated operating costs might not represent actual costs of incarceration. Our estimates do not incorporate other expenditures and actual data from selected state prison systems indicated that their costs tended to be higher than our estimated costs using selected operating costs. For costs in fiscal year 2016 dollars, see appendix VII.

on available appropriations for SCAAP, the amount that the federal government reimbursed state prison systems for incarcerating SCAAP criminal aliens was about $750 million of the approximately $4.3 billion they were eligible to receive, or 17 percent from fiscal years 2010 through 2015. During the same time, we estimated that the federal government's reimbursement, which is for a portion of correctional officer salaries, accounted for 9 percent to 14 percent of these state prison systems' estimated selected operating costs. These selected operating costs might not represent the actual cost of incarceration because our estimates do not incorporate other expenditures beyond the four operating costs. For example, our average daily cost data from selected state prison systems indicate that overall state costs could be higher. See appendix VIII for the estimated costs—based on these average daily costs—and federal reimbursements to selected state prison and local jail systems in fiscal year 2015.

Certain Criminal Aliens in Federal Prison Had an Order of Removal or Were Previously Removed from the United States and the Majority Were Removed after Their Incarceration

At the Time of Their Incarceration in Federal Prison, Most Criminal Aliens Who ICE Reviewed Had an Order of Removal or Had Been Previously Removed

To determine the potential removability from the United States of criminal aliens at the time of their incarceration in federal prison, we focused our analysis on those criminal aliens for whom ICE reviewed potential removability using its ACRIMe system within 60 days of the date the alien entered federal prison.[63] According to ICE officials, their response to these inquiries provides a good indication of an individual's potential removability from the United States at a specific point in time. However, as previously noted, ICE's response may not indicate an individual's immigration status with certainty and an individual's immigration status

[63]As previously discussed, ICE specialists use its ACRIMe system to respond to law enforcement partner inquiries by searching various criminal, customs, and immigration databases to determine what is known about an individual's identity and potential removability from the United States. We used ACRIMe data for this analysis because it provided readily available information about a criminal alien's potential removability as of a particular date. Although ACRIMe is used as a mechanism to share information across agencies, ICE and BOP coordinate in various ways to manage criminal aliens in federal prison. For example, according to BOP officials, an ICE liaison has been working with BOP on a daily basis since November 2016 to assist with identifying foreign-born aliens in BOP custody; processing aliens for removal; transferring aliens who are removable from the custody of BOP to ICE, pursuant to an immigration detainer; and ensuring the Institutional Hearing Program is functioning effectively and efficiently. As previously stated, ICE initiates removal proceedings before an immigration judge, through the Institutional Hearing Program, which may allow immigration removal cases to be adjudicated prior to an individual's release from federal prison.

and removability from the United States can change over time.[64] Of the approximately 198,000 criminal aliens incarcerated in federal prison from fiscal years 2011 through 2016, ICE reviewed the potential removability of about 72,600 criminal aliens using its ACRIMe system within 60 days of their incarceration in response to an inquiry from a law enforcement partner.[65] The results of ICE inquiries related to these 72,600 criminal aliens are as follows:

- **Order of removal or previously removed.** About 55,700, or 77 percent, appeared to have a pending order of removal or were previously removed by ICE with no subsequent record of a legal reentry, as indicated by ICE's review of records.[66]
- **In removal proceedings.** About 5,000, or 7 percent, were in removal proceedings at the time of their incarceration, as indicated by ICE's review of records. In other words, they appeared to have a removal case in process in immigration court.[67]
- **Subject to removal.** About 11,800, or 16 percent, may have been subject to removal at the time of their incarceration, as indicated by ICE's review of records. For those aliens who may have been subject to removal:
    - About 7,100 criminal aliens may have had some lawful presence or status in the United States, such as being granted a visitor visa, permanent residence, temporary protected status, a border

[64]In some cases, ICE generated multiple ACRIMe responses with different potential removability determinations for the same criminal alien on the same day. ICE officials stated that there are a variety of reasons that ICE specialists might make different potential removability determinations for the same individual on the same day. For instance, analysts are to use the totality of information available in the databases they search, and different analysts may come to different conclusions about the same underlying data. Additionally, available information about an individual's removability from the United States might change, even within the same day.

[65]We excluded about 300 records for which ICE specialists made multiple, different potential removability determinations on the same day within 60 days of the date the alien entered federal prison from this analysis.

[66]See 8 C.F.R. § 1241.8 (stating that "[a]n alien who illegally reenters the United States after having been removed, or having departed voluntarily, while under an order of . . . removal shall be removed from the United States by reinstating the prior order.").

[67]ICE's review of records may indicate that a criminal alien is in removal proceedings. However, ICE does not oversee immigration court proceedings and, as such, may not have complete information about the status of an alien whose case is pending in immigration court.

crossing card, or other such authorization to be present in or remain in the United States. If convicted of a felony offense or otherwise in violation of the conditions of their admission, these criminal aliens may be subject to removal from the United States for violating immigration law.

  - About 4,700 criminal aliens did not have a record of admission or a record of other authorized presence in the United States.

- ICE did not have enough information to make an assessment for about 100, or less than 1 percent of the 72,600 criminal aliens it reviewed.[68]

Ninety-Five Percent of Criminal Aliens Were Removed by ICE after Their Incarceration in Federal Prison

Of the 198,000 criminal aliens incarcerated in federal prison from fiscal years 2011 through 2016, approximately 165,700 individuals completed a term of incarceration in federal prison from fiscal years 2011 through 2016.[69] We determined that the approximately 165,700 criminal aliens who completed a term of incarceration in federal prison from fiscal years 2011 through 2016 may have experienced one or more of the following:[70]

[68]In these cases, either ICE's records did not have enough information to make an assessment of the identity and potential removability of these criminal aliens or ICE could not find a match for these criminal aliens in the databases searched.

[69]Criminal aliens that did not complete a term of incarceration, as of the end of fiscal year 2016, remained in federal prison and are not included in our analyses. Approximately 280 criminal aliens died while incarcerated in federal prison. These aliens are also not included in our analyses of alien experiences after incarceration in federal prison. Further, approximately 260 criminal aliens who completed a term of incarceration in federal prison from fiscal years 2011 through 2016 either (1) did not have FBI or alien numbers in BOP's records or (2) had duplicate alien numbers in BOP's records. These criminal aliens are also excluded from our analyses of alien experiences after incarceration in federal prison because we could not match their identifiers with data from other agencies.

[70]These outcomes are not mutually exclusive since criminal aliens could have experienced some, none, or all of these after their incarceration in federal prison. For example, an alien could have been removed by ICE after their incarceration in federal prison, then reentered the United States and subsequently become reincarcerated in either federal or state prison or local jail. We matched BOP data on criminal aliens who completed a term of incarceration in federal prison with data from ICE, BJA, and USCIS to determine if these criminal aliens (1) were removed by ICE, (2) were reincarcerated in federal prison or a state prison system or local jail that participated in SCAAP, and/or (3) became naturalized U.S. citizens after their term of incarceration in federal prison. Some criminal aliens may not have had any subsequent encounters with law enforcement after they completed a term of incarceration in federal prison; as a result, there would be no data on these criminal aliens' experiences after their federal prison incarceration.

ICE removal. ICE removed about 157,400 of the approximately 165,700 criminal aliens who completed a term of incarceration in federal prison—or 95 percent—at least once after their incarceration in federal prison, as of June 2017.[71] ICE data indicate that the remaining 5 percent of criminal aliens were not removed by ICE after they completed their term of incarceration in federal prison. For the criminal aliens that ICE did not remove, some did not have an order of removal, some had an order of removal but were not removed by ICE, and some were released from ICE custody, among other potential outcomes, according to ICE data as of June 2017.[72]

The approximately 157,400 criminal aliens ICE removed after their federal prison incarcerations represent a portion of the approximately 1.1 million ICE criminal alien removals from fiscal years 2011 through 2016.[73] ICE's criminal alien removals also include criminal aliens removed after incarcerations in state prisons or local jails, criminal aliens apprehended at or near the border by U.S. Customs and Border Protection and transferred to ICE for removal, and other criminal aliens that ICE apprehends and removes.

We also found that about 3,100 of the approximately 157,400 criminal aliens removed from the United States by ICE after their incarceration in federal prison had a subsequent encounter with ICE in the United States. In other words, these individuals were removed from the United States by

[71]ICE provided the most recent removal date in its records for each criminal alien who completed a term of incarceration in federal prison from fiscal years 2011 to 2016, as of June 2017. Some aliens may have been removed multiple times between fiscal year 2011 and June 2017, and an alien removed multiple times would only appear in the data with their most recent removal date. ICE matched on BOP data using FBI numbers and/or alien numbers as unique identifiers.

[72]A criminal alien may be released from ICE custody if there is no significant likelihood that they could be removed in the reasonably foreseeable future—for example, some countries will not accept the repatriation of criminal aliens from the United States. ICE has limited authority to indefinitely detain a criminal alien who has a final order of removal. See *Zadvydas v. Davis*, 533 U.S. 678 (2001); but see *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018). Data are available for those criminal aliens ICE encountered after their federal prison incarceration.

[73]For more information about ICE removals from fiscal years 2011 through 2016, see appendix IX. ICE defines a criminal alien as an alien convicted of a crime, either within or outside of the United States. The 1.1 million ICE criminal alien removals from fiscal years 2011 through 2016 are those aliens who meet ICE's definition of a criminal alien. In all other places in this report, a criminal alien is defined as an alien convicted of a crime while in the United States.

ICE after their federal prison incarceration, reentered the United States, and had a subsequent encounter with ICE, as of June 2017.[74]

Federal reincarceration. About 19,300 of the approximately 165,700 criminal aliens (12 percent) who completed a term of incarceration in federal prison from fiscal years 2011 through 2016 were subsequently incarcerated in federal prison at least once, as of the end of fiscal year 2016, as shown in table 4.

Table 4: Federal Prison Reincarcerations of Criminal Aliens, Fiscal Years 2011 through 2016

Number of federal prison reincarcerations	Number of criminal aliens	Percent
0	146,500	88.4
1	16,700	10.1
2	2,200	1.3
3	300	0.2
4 or more	<100	<0.1
Total[a]	**165,700**	**100**

Source: GAO analysis of Bureau of Prisons data. | GAO-18-433

[a]Numbers may not sum to totals due to rounding. Percentages may not add to 100 due to rounding.

The remaining 88 percent of criminal aliens who completed a term of incarceration in federal prison from fiscal years 2011 through 2016 were not reincarcerated in federal prison, as of the end of fiscal year 2016.

State or local reincarceration. We identified about 5,500 of the approximately 165,700 criminal aliens who completed a term of incarceration in federal prison from fiscal years 2011 through 2016 who were subsequently incarcerated in a state prison or local jail system that participated in SCAAP.[75] We did not identify any of the remaining

[74]Subsequent encounters with ICE include ICE arrests, ICE releases, and admissions to ICE detention facilities, also known as book-ins. ICE provided the most recent date in its records for each type of encounter for each criminal alien who completed a term of incarceration in federal prison, as of June 2017. Some aliens may have had more than one ICE arrest, book-in, removal, or release. As a result, the available data does not allow us to report on the sequence of all criminal alien encounters with ICE after their incarceration in federal prison.

[75]This number only includes criminal aliens who were subsequently incarcerated (on the same day as or after the day they completed their term of incarceration in federal prison) in a state prison or local jail that applied for SCAAP reimbursement from fiscal years 2010 through 2015.

approximately 160,200 criminal aliens who completed a term of incarceration in federal prison in the SCAAP data we reviewed through fiscal year 2015.[76]

Naturalization. We identified 16 of the about 165,700 criminal aliens who completed a term of incarceration in federal prison from fiscal years 2011 through 2016 who subsequently became naturalized U.S. citizens, as of June 2017.[77] To be eligible for naturalization, an applicant must generally have 5 years of continuous residence after being lawfully admitted as a permanent resident. Additionally, for the 5 years immediately preceding the application for naturalization, an applicant cannot have been incarcerated for more than 180 days, have been convicted of one or more crimes involving moral turpitude, or have been convicted of a number of other crimes. Certain crimes are permanent bars to naturalization.[78] Of the 16 individuals we identified who became naturalized citizens after their incarceration in federal prison, 7 had been convicted of drug offenses. The remaining 9 individuals had various primary conviction offenses, including: burglary/larceny (3 individuals), fraud/bribery/extortion (2 individuals), immigration (2 individuals), counterfeit/embezzlement (1 individual), and court/corrections (1 individual).

U.S. Citizenship and Immigration Services (USCIS), a component agency within DHS, determined that all 16 of the individuals we identified who received naturalized citizenship after their incarceration in federal prison (1) demonstrated good moral character for the statutory period, (2) completed and resolved all background checks with appropriate law

[76]This analysis includes those criminal aliens for whom we were able to confirm a subsequent incarceration in a state prison or local jail that requested SCAAP reimbursement after their federal prison incarceration. Approximately 533,000 SCAAP-eligible unique inmate-level records we analyzed contained an FBI number, which we used to match SCAAP data with BOP's data on criminal aliens. Due to data limitations, we could not match to the remaining SCAAP records or to incarceration records for jurisdictions that did not receive SCAAP reimbursement.

[77]To identify these aliens, we matched BOP and USCIS data using multiple identifiers—alien number, name, and date of birth. We determined that these 16 aliens matched on all identifiers we analyzed. The 16 aliens that we matched represent a minimum number of those who naturalized after their federal prison incarceration during this time period.

[78]Certain convictions, such as convictions for offenses entered on or after November 29, 1990, that fall under the definition of aggravated felony under 8 U.S.C. § 1101(a)(43), act as a permanent bar to good moral character and, as a result, naturalization, regardless of when the conviction occurred.

enforcement agencies, and (3) did not demonstrate national security concerns, public safety concerns, or other grounds of inadmissibility.

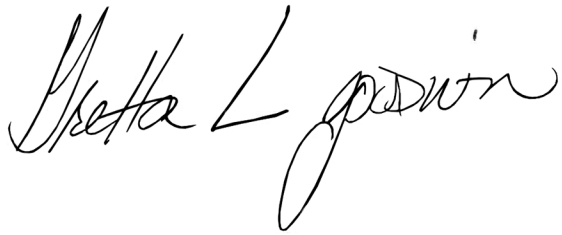
Agency Comments and Third-Party Views

We provided a draft of this report to DHS and DOJ for their review and comment. We also provided a draft of relevant portions of this report to the U.S. Sentencing Commission, Arizona Department of Corrections, California Department of Corrections and Rehabilitation, Florida Department of Corrections, New York State Department of Corrections and Community Supervision, Texas Department of Criminal Justice, Essex County Department of Corrections, Los Angeles County Sheriff's Department, Maricopa County Sheriff's Office, Orange County Sheriff's Department, New York City Mayor's Office of Criminal Justice, and Harris County Sheriff's Office for their review and comment. In its comments, which are reprinted in Appendix X, DOJ noted that we appropriately qualify the data presented on SCAAP, but expressed concern that the SCAAP data may be misinterpreted or misunderstood by readers of our report. We believe that throughout the report, we have appropriately caveated the data we present on SCAAP and the costs associated with the program and therefore have made no changes based on DOJ's comments in their letter. DHS, DOJ, the U.S. Sentencing Commission, Texas Department of Criminal Justice, California Department of Corrections and Rehabilitation, and New York City Mayor's Office of Criminal Justice also provided technical comments, which we incorporated, as appropriate. Arizona Department of Corrections, Florida Department of Corrections, New York State Department of Corrections and Community Supervision, Essex County Department of Corrections, Los Angeles County Sheriff's Department, Maricopa County Sheriff's Office, Orange County Sheriff's Department, and Harris County Sheriff's Office did not have comments.

As agreed with your offices, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from the report date. At that time, we will send copies to the appropriate congressional committees, the Attorney General, the Secretary of

Homeland Security, and interested parties. In addition, the report will be available at no charge on the GAO website at http://www.gao.gov.

If you or your staff have any questions about this report, please contact me at (202) 512-8777 or goodwing@gao.gov. Contact points for our Office of Congressional Relations and Public Affairs may be found on the last page of this report. Key contributors to this report are listed in appendix XI.



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Appendix I: Objectives, Scope, and Methodology

This appendix provides additional details on our objectives, scope, and methodology. Specifically, our objectives were to provide information on the following:

- the number and nationality of criminal aliens incarcerated in federal and state prisons and local jails in the United States over the last 6 years;
- criminal alien arrests and convictions;
- the costs of incarcerating criminal aliens in the United States; and
- the removability from the United States of criminal aliens incarcerated in federal prison and experiences of criminal aliens after incarceration in federal prison.

In general, we analyzed data separately for criminal aliens incarcerated in federal prisons and State Criminal Alien Assistance Program (SCAAP) criminal aliens incarcerated in state prisons and local jails—which we refer to as our two study populations.[1] The time periods we analyzed varied for our federal study population compared to our state and local study population because they reflect updates since we last reported on these issues in 2011 and because we used the most recent data available at the time of our analysis.[2] Our federal study population generally includes criminal aliens incarcerated in federal prisons from fiscal years 2011 through 2016.[3] For our federal study population, we used both snapshot (point in time) and inmate-level data from the Department of Justice's (DOJ) Bureau of Prisons (BOP) to conduct our analyses, as described throughout this report. The BOP inmate-level data included about 198,000 criminal aliens incarcerated in federal prisons from 2011 through 2016.[4] Our state and local study population includes SCAAP criminal aliens incarcerated in state prisons and local jails from fiscal years 2010 through 2015. For our state and local study population,

[1]For our analyses, "state prisons and local jails" include those in U.S. territories, unless otherwise noted.

[2]GAO, *Criminal Alien Statistics: Information on Incarcerations, Arrests, and Costs,* GAO-11-187 (Washington, D.C.: Mar. 24, 2011).

[3]However, when analyzing federal costs to incarcerate criminal aliens in federal prisons, we used BOP snapshot data from fiscal years 2010 through 2015, as this ensured there were no reporting gaps from our prior report and these were the most recent data available on federal costs for reimbursing states and localities.

[4]For some of our analyses, we use a smaller subset of the BOP inmate-level data as explained throughout the report.

we used DOJ Bureau of Justice Assistance (BJA) SCAAP jurisdiction-level and inmate-level data to conduct our analyses, as described throughout this report.[5] For the SCAAP inmate-level data, we were not able to determine how many unique SCAAP criminal aliens were in the data set, since a SCAAP criminal alien could have more than one incarceration in the same fiscal year. As a result, when reporting on these data for certain analyses, we refer to SCAAP criminal alien incarcerations rather than SCAAP criminal aliens. However, we were able to determine that approximately 533,000 SCAAP inmate-level records that had a unique Federal Bureau of Investigation (FBI) number, which we used for certain analyses. Overall, our findings are not generalizable to criminal aliens not included in our federal and state and local study populations. However, they provide valuable insights into the criminal aliens incarcerated in the United States. For example, we used SCAAP data because there are no reliable population data on all criminal aliens incarcerated in every U.S. state prison and local jail.[6] SCAAP provides reliable data on certain criminal aliens incarcerated in state prisons and local jails but does not include (a) aliens incarcerated in states or localities that did not apply for and receive federal reimbursement for costs of incarceration and (b) aliens with lawful immigration status who were not the subject of removal proceedings at the time they were taken into custody. Further, to be eligible for reimbursement, the aliens must meet the definition of "undocumented criminal alien" under the SCAAP statute and the following criteria: (1) had at least one felony or two misdemeanor convictions for violations of state or local law and (2) were incarcerated for at least 4 consecutive days during the reporting period.[7] Thus, our state and local criminal alien data represent only a portion of the total population of criminal aliens incarcerated at the state and local level.

[5]For some of our analyses, we used a smaller subset of the SCAAP inmate-level data as explained throughout the report.

[6]In addition to SCAAP data, DOJ's Bureau of Justice Statistics collects data on noncitizens incarcerated in state prisons but these data do not include all states. For example, in 2016, the Bureau of Justice Statistics reported that certain states—including California, which has the highest number of SCAAP criminal aliens—did not report or were unable to report data on the number of noncitizens. U.S. Department of Justice, Bureau of Justice Statistics, *Prisoners in 2015*, (Washington, D.C., Dec. 2016).

[7]See 8 U.S.C. § 1231(i)(3)(B).

Number and Nationality of Criminal Aliens

To determine the number and nationalities—based on country of citizenship or country of birth data—of incarcerated criminal aliens, we analyzed BOP data on criminal aliens incarcerated in federal prisons from fiscal years 2011 through 2016 and SCAAP data on SCAAP criminal alien incarcerations in state prisons and local jails from fiscal years 2010 through 2015.[8] Specifically, we analyzed BOP snapshot and inmate-level data from BOP's inmate tracking database, the SENTRY Inmate Management System. To estimate the number and proportion of aliens incarcerated in federal prisons compared to the total inmate population at a point in time each fiscal year, we analyzed BOP data and calculated the average of its 12 monthly population snapshots.[9] In addition, we analyzed BOP inmate-level data to determine the number of unique criminal aliens that were incarcerated in federal prisons during this time frame and the country of citizenship of these aliens.[10] BOP obtains country of citizenship data from presentence investigation reports, which may be based on documentation or be self-reported.[11]

For state prisons and local jails, we analyzed SCAAP jurisdiction-level data from SCAAP for fiscal years 2011 through 2016—which includes inmates incarcerated from fiscal years 2010 through 2015—to determine

[8]We did not examine the extent to which policy changes may have affected the number of individuals incarcerated in prisons and jails. Each year's SCAAP program is based on SCAAP criminal aliens incarcerated during the prior fiscal year, July 1 through June 30. For example, the fiscal year 2016 SCAAP program will include SCAAP criminal aliens that were incarcerated in state prisons and local jails from July 1, 2014 to June 30, 2015. According to DOJ officials, private facilities are not eligible for SCAAP reimbursement, and states and localities are not eligible to apply on their behalf.

[9]We determined the average of 12 monthly snapshots to account for possible differences in incarceration numbers month to month for each fiscal year. BOP snapshot data do not include inmates in the witness security program and unsentenced inmates. Snapshot data represent a point in time and may not include all inmates that were incarcerated in each month.

[10]BOP data do not include inmates in the witness security program and unsentenced inmates.

[11]A federal probation officer completes a presentence investigation report after conducting a presentence interview as well as an independent investigation of the offense and the defendant's background. See 18 U.S.C. § 3552. BOP officials stated that BOP's citizenship data could be updated over time as BOP obtains additional information from other sources, such as information from DHS. We did not independently verify citizenship data.

the number of SCAAP criminal alien incarcerations.[12] We compared the number of SCAAP inmate days to the number of total inmate days in these state prisons and local jails to determine the proportion of inmate days that were attributed to SCAAP criminal aliens. In addition, we analyzed SCAAP inmate-level records to determine the country of birth of SCAAP criminal aliens for the most recent fiscal year in which data were available—2015. SCAAP country of birth data are provided to DOJ by states and localities that participate in SCAAP.[13]

Criminal Alien Arrests and Convictions

To determine the number and types of offenses for which criminal aliens were arrested and convicted, we analyzed various federal, state, and local data.[14] Specifically, for arrests, we selected a generalizable random sample of 500 criminal aliens from our federal study population of about 197,000 criminal aliens and a generalizable random sample of 500 SCAAP criminal aliens from the state and local study population of about 533,000 SCAAP criminal aliens. We then matched these 1,000 selected criminal aliens to DOJ's FBI Next Generation Identification (NGI) database.[15] The NGI database maintains data from reporting law enforcement agencies across the nation.[16] The FBI record we obtained

[12]SCAAP data represent the number of incarcerations, rather than number of SCAAP criminal aliens, since these aliens could have multiple SCAAP incarcerations in the same fiscal year.

[13]We did not independently verify country of birth of SCAAP criminal aliens.

[14]We did not examine the extent to which policy changes may have affected the number of individuals arrested or convicted of crimes.

[15]For this analysis, we only included criminal aliens from each study population if they had an FBI number available. This is a unique identifier used by the FBI, as this was needed to match data across databases. As such, the study populations that we projected to for these analyses were smaller than the originating study populations. For example, our federal study population started with approximately 198,000 criminal aliens and about 197,000 had FBI numbers. For this analysis, we included approximately 197,000 criminal aliens in our federal study population. For our state and local study population, there were approximately 533,000 SCAAP records that had a unique FBI number in the SCAAP data set that were included in our study population. Some of the records in our samples of 500 criminal aliens from our federal study population and 500 SCAAP criminal aliens from the state and local study population had to be excluded for various reasons, including invalid FBI numbers. As a result, we analyzed data for 496 criminal aliens in our federal study population and 487 SCCAP criminal aliens in our state and local study population.

[16]The FBI replaced its Integrated Automated Fingerprint Identification System—a national, computerized system for storing, comparing, and exchanging fingerprint data in a digital format –with NGI. NGI is to include fingerprint data from Integrated Automated Fingerprint Identification System and biographic data, and is to also provide new functionality and improve existing capabilities by incorporating advancements in biometrics.

for each criminal alien contained the FBI number, name, dates of arrest, the arresting agency, location of the arrest, and a description of each arrest offense.[17] To ensure the data were appropriate for our purposes we, among other things, categorized arresting agencies into federal arresting agencies, such as U.S. Immigration and Customs Enforcement (ICE); state and local arresting agencies, such as state police departments; and non-arresting agencies, such as prisons and jails. While the samples we selected for our analyses allowed us to estimate and provide valuable insights about the arrest history of the approximately 197,000 criminal aliens in our federal study population and the approximately 533,000 SCAAP criminal aliens in our state and local study population, our analyses are not generalizable to the arrest history of criminal aliens not in these study populations.

We subsequently used these data to estimate the number and types of offenses for which criminal aliens in our study populations were arrested/transferred. We defined an arrest/transfer as one of these actions occurring on the same day by the same arresting agency. Because the data did not allow us to distinguish a new arrest from a transfer between one arresting agency and another, we refer to these collectively as "arrests/transfers." We analyzed FBI records for both our samples to estimate the following for our federal and state and local study populations: (a) number of arrests/transfers and (b) number and types of arrest offenses. Because law enforcement entities send arrest information to the FBI on a voluntary basis, FBI data on arrest history may not include all arrests. In the month of December 2017, the FBI reported that approximately 23,300 local, state, tribal, federal, and international partners submitted criminal and/or civil electronic submissions to NGI. The criminal aliens in our samples had arrests/transfers that ranged from 1964 through 2017.[18] We categorized arrest offenses—which includes attempts or conspiracies to commit each of the respective offenses—as shown in table 5.

[17]We took steps to ensure that the matches made using the FBI number generally resulted in quality matches of the same individuals across data systems. For example, we reviewed name matches across the records.

[18]FBI officials provided all available records on the criminal aliens in our study populations in August and September 2017. Therefore, any additional arrest/transfer data that were added to these records through the end of the calendar year 2017 would not be included in our analysis.

Table 5: Arrest Offense Categories, Attempted and Committed

Offense category	Category includes
Arson	Arson, reckless burning, and possession of arson materials
Assault	Assault, battery, assault with a deadly weapon, endangerment, and threats
Burglary	Breaking and entering, burglary, and possession of burglary tools
Disorderly Conduct	Disturbing the peace, fighting, intoxication, public nuisance, and disorderly conduct
Drugs	Use/under the influence, possession, possession with intent to distribute, sales, manufacturing, transporting, and possession of drug paraphernalia
Fraud, forgery, and counterfeiting	Deceptive practices or identification, fraud, giving false information, altering or forging documents, and counterfeiting or possession of counterfeit materials or tools
Homicide	Murder, manslaughter, and homicide
Immigration	Illegal entry, illegal reentry, false claim to U.S. citizenship, alien smuggling, and removal proceedings; offenses include both criminal offenses and civil immigration violations
Kidnapping	False imprisonment, kidnapping, and taking hostages
Larceny/theft	Grand and petty larceny and theft, shoplifting, embezzlement, and money laundering
Motor vehicle theft	Auto theft, carjacking, and taking a vehicle without consent
Obstruction of justice	Escaping, evading, being a fugitive of justice, failing to appear, failing to register as a sex offender, resisting arrest, and interfering with or obstructing an officer or justice proceedings
Property damage	Destruction of property, vandalism, and criminal or malicious mischief
Robbery	Armed robbery, robbery of a dwelling, robbery of a bank, and unarmed robbery
Sex offenses	Lewd and lascivious acts, rape, sexual assault, indecent exposure, prostitution, and molestation
Stolen Property	Buying, selling, receiving, or possessing stolen property
Terrorism	Terrorism-related offenses
Traffic violations	Driving under the influence, hit and run, no proof of insurance, no driver's license, and moving violations such as speeding and failure to stop
Weapons violations	Possession of a weapon, discharging a weapon, altering a weapon, and carrying a concealed weapon
Miscellaneous	Any other offense not listed above, which may include trespassing, gang participation, child cruelty, and alcohol-related offenses, as well as offenses for which not enough information were available (i.e., "arrest by a law enforcement officer")

Source: GAO. | GAO-18-433

Note: Offenses include an attempt or conspiracy to commit the respective offense. We developed the criminal offense categories based on our prior work that used the FBI's classification for offense codes as our guidance. See GAO-11-187.

Because our estimates regarding criminal alien arrests/transfers and offenses are based on a random sample, each estimate we report has a

measurable margin of error due to sampling. For this report, the margins of error are calculated based on a 95 percent confidence level.[19] All percentage estimates presented in this report for these analyses have a margin of error of plus or minus 7 percentage points or fewer. All estimates of the number of arrests/transfers or offenses have a relative error of plus or minus 14 percent of the estimate or less. The 7 percentage point margin of error and 14 percent relative error represent upper bounds for the estimates included in this report.

Since an arrest does not necessarily result in prosecution or a conviction of all, or any, of the offenses for which an individual is arrested, we also analyzed conviction data. To determine the primary offenses for which the approximately 198,000 criminal aliens in our federal study population were convicted and incarcerated, we analyzed BOP inmate-level data on convictions from BOP's SENTRY database for all criminal aliens incarcerated in federal prisons from fiscal years 2011 through 2016. Table 6 describes the BOP primary offense categories for convictions.

[19]The margin of error surrounding an estimate is expressed as (1) a number of percentage points higher or lower than the percentage estimate, (2) a percent higher or lower than the estimated number, or (3) the entire range the margin of error covers, which is referred to as a confidence interval. Margins of error are calculated based on a certain confidence level.

Table 6: Bureau of Prisons Primary Offense Categories, Attempted and Committed

Primary offense category	Category includes
Burglary/larceny	Burglary; violations of certain customs laws; racketeering; theft; theft of government property and funds; motor vehicle theft; robbery; Interstate Commerce Act violations; stalking; theft involving intellectual property
Continuing criminal enterprise	Continuing criminal enterprise
Counterfeit/embezzlement	Counterfeiting money, postage, and similar offenses; embezzlement; violations of anti-trust laws; violations of certain elections laws; violations of certain banking and insurances laws
Court/corrections	Escaping; bail/bond jumping; criminal contempt; mutiny/riot in a federal penal facility; contraband in prison; perjury; obstructing justice
Drugs	Simple possession of a controlled substance; manufacturing, distributing, or possessing with intent to manufacture or distribute a controlled substance; importing narcotics; obtaining a controlled substance by fraud; distribution to a minor; investment of illicit drug profits; maintaining drug-involved premises
Fraud/bribery/extortion	Bribery; extortion; forgery; various types of fraud offenses, including tax fraud
Homicide/aggravated assault	Homicide; death or injury caused by explosives; assault; assaulting a federal officer; kidnapping; threats against the President; terrorism; domestic violence; drive-by shooting; violence against maritime navigation and similar offenses; criminal street gangs
Immigration	Illegal reentry; illegal entry; alien smuggling; impersonation; passport fraud
National security	War crimes; espionage; sedition; treason; biological weapons; desertion; impersonating foreign diplomats, consuls, or officers
Robbery	Robbery offenses, including bank robbery
Sex offenses	Child sexual abuse; mailing obscene matter; sexual abuse; rape; prostitution; incest; failure to register as a sex offender; sexual abuse resulting in death; possession of child pornography
Weapons/explosives	Carrying a deadly weapon; arson; participation in nuclear and weapons of mass destruction threats to the United States; engaging in the business of importing, manufacturing or dealing in explosives without a license and related offenses; firearms offenses
Miscellaneous	Discharging pollution; destruction of energy facilities; liquor law violations; disorderly conduct; vagrancy; damage to religious property and similar offenses; violations of food and drug laws; violations of fishing and gaming laws

Source: GAO analysis of Bureau of Prisons data. | GAO-18-433

Note: Offenses include an attempt or conspiracy to commit the respective offense.

In addition, we analyzed aggregated U.S. Sentencing Commission data on the approximately 201,300 federal convictions of criminal aliens from fiscal years 2011 through 2016.[20] These criminal aliens may have also been included in our federal study population if they were convicted in federal court and sentenced in fiscal years 2011 through 2016 and also incarcerated between these same fiscal years. Table 7 describes the primary offense categories for federal convictions used by the U.S. Sentencing Commission, which we combined into 15 larger categories for our purposes.[21]

[20]The U.S. Sentencing Commission data are limited to felony and Class A misdemeanor cases for offenders who are convicted and sentenced in the federal court system. These data do not include state cases, federal petty offenses, federal cases which result in all charges being dismissed or acquitted, federal death penalty cases, federal juvenile cases, or federal witness protection cases. They also do not include convicted offenders for whom no sentences were yet issued, offenders sentenced but for whom no sentencing documents were submitted to the Commission, and offenders sentenced prior to the enactment of the Sentencing Reform Act of 1984. See Pub. L. No. 98-473, ch. II, 98 Stat. 1837, 1987-2001 (1984). According to U.S. Sentencing Commission officials, data do include a small number of individuals that may have been fined or given probation instead of a federal prison sentence. Convictions that did not have information on offender's citizenship status were excluded. From fiscal years 2011 through 2016, 2 percent of the nearly 456,000 convictions were excluded for this reason. Information on the citizenship status of offenders is obtained from their presentence investigation report.

[21]For our reporting purposes, we consolidated certain U.S. Sentencing Commission categories into the following categories: Drugs includes drugs - trafficking, drugs - communication facility, and drugs - simple possession; Economic crimes includes larceny, fraud, embezzlement, forgery/counterfeiting, tax, and antitrust; Sex offenses includes sexual abuse and child pornography; Money laundering/ racketeering/ extortion includes money laundering and racketeering/extortion; Homicide includes murder and manslaughter; and the "other" category includes bribery, gambling/lottery, civil rights, prison offenses, environmental/wildlife, national defense, food and drug, and other miscellaneous offenses.

Table 7: Primary Offense Categories, as Reported by the U.S. Sentencing Commission

Primary offense category	Category includes
Administration of Justice offenses	Commission of offense while on release, bribery of a witness, failure to appear by offender, contempt, failure to appear by material witness, obstruction of justice, payment of witness, perjury or subornation of perjury, misprision of a felony, and accessory after the fact
Antitrust	Bid-rigging, price-fixing, and market allocation agreement
Arson	Arson, including damage by explosives
Assault	Attempt to commit murder, assault with intent to murder, threatening communication, aggravated assault, conspiracy with attempt to murder, obstructing or impeding officers, minor assault, and conspiracy that includes assault with attempt to murder
Auto theft	Auto theft (including parts), receipt/possession of stolen auto or parts, and altered identification numbers/trafficking in altered (auto)
Bribery	Payment to obtain office, bribe involving officials, bribery - bank loan/commercial, loan or gratuity to bank examiner, etc., gratuity involving officials, and bribe or gratuity affecting employee plan
Burglary/breaking & entering	Post office burglary, burglary of [Drug Enforcement Administration] DEA premises (pharmacy), burglary of other structure, bank burglary, and burglary of a residence
Child pornography	The sale, distribution, transportation, shipment, receipt, or possession of materials involving the sexual exploitation of minors
Civil rights	Interference with rights under color of law; force or threats to deny benefits or rights; obstructing an election or registration; manufacture, etc. - eavesdropping device; other deprivations/discrimination; obstructing correspondence; peonage, servitude, and slave trade; intercept communication or eavesdropping; and conspiracy to deprive individual of civil rights
Drugs—communication facility	Use of a communication facility in a drug trafficking offense
Drugs—simple possession	Distribution of a small amount of marijuana and simple possession
Drugs—trafficking	Drug distribution/manufacture; drug distribution/manufacture - conspiracy, continuing criminal enterprise, drug distribution; employee under 21, drug distribution near school; drug import/export; drug distribution to person under 21;establish/rent drug operation, and distributing, importing; exporting listed chemicals
Environmental/wildlife	Waste discharge, specially protected fish, wildlife, and plants
Embezzlement	Embezzlement - property, embezzlement from labor unions, embezzlement - mail/post office, embezzlement from benefit plans, and bank embezzlement
Firearms	Unlawful possession/transportation of firearms or ammunition; possession of guns/explosives on aircraft; unlawful trafficking, etc., in explosives; possession of guns/explosives in federal facility/schools; use of fire or explosives to commit felony; and use of firearms or ammunition during crime
Food and drug	False information or tampering with products, tampering to injure business, tampering with risk of death or injury, and violation of regulations involving food, drugs, etc.
Fraud	Odometer laws and regulations, insider trading, and fraud and deceit
Forgery/counterfeiting	Counterfeit bearer obligations and forgery/counterfeit (non-bearer obligations)
Gambling/lottery	Engaging in a gambling business, transmission of wagering information, obstruction to facilitate gambling, and interstate transportation of wagering paraphernalia

Primary offense category	Category includes
Immigration	Trafficking in U.S. passports; trafficking in entry documents; failure to surrender naturalization certificate; fraudulently acquiring U.S. passports; smuggling, etc.; unlawful alien; fraudulently acquiring entry documents; and unlawfully entering the United States
Kidnapping/hostage taking	Ransom taking and hostage/kidnapping
Larceny	Bank larceny, theft from benefit plans, other theft - mail/post office, receipt/possession of stolen property (not auto), other theft - property, larceny/theft/mail/post office, larceny/theft roperty (not auto), and theft from labor union
Manslaughter	Involuntary and voluntary manslaughter
Money laundering	Laundering of monetary instruments, monetary transaction from unlawful activity, failure to file currency report, and failure to report monetary transactions
Murder	First degree murder, felony with death resulting, second degree murder, conspiracy to murder (with death resulting)
National defense	Evasion of export controls and exportation of arms, etc., without license
Prison offenses	Contraband in prisons, riots in federal facilities, and escape
Racketeering/extortion	Extortionate extension of credit, blackmail, extortion by force or threat, Hobbs Act extortion, travel in aid of racketeering, crime relating to racketeering, and violent crimes in aid of racketeering
Robbery	Bank robbery, aggravated bank robbery, Hobbs Act robbery, mail robbery, other robbery, and carjacking
Sexual abuse	Sexual abuse of a minor; transportation of minor for sex; sexual abuse of a ward; criminal sexual abuse; abusive sexual contact
Tax	Receipt/trafficking in smuggled property, aid, etc., in tax fraud; fraud - tax returns, statements, etc.; fraud, false statement - perjury; failure to file or pay; tax evasion; evading import duties (smuggling); failure to collect or account for taxes; regulatory offenses - taxes; failure to deposit taxes in trust account; non-payment of taxes; conspiracy to avoid taxes; and offenses relating to withholding statements
Other miscellaneous offenses	Illegal use of regulatory number - drugs; illegal transfer of drugs; illegal regulatory number to get drugs; drug paraphernalia; forgery/fraud for drugs; dangerous devices to protect drugs; manufacture drugs against quota; endangering life while manufacturing drugs; operate carrier under drugs; endangerment from hazardous/toxic substances; mishandling substances, records, etc.; threat of tampering with public water system; hazardous devices on federal lands; mishandling other pollutants, records, etc.; improper storage of explosives; recordkeeping violation - explosives; possession of other weapon - on aircraft, in federal facility; failure to report theft of explosives; feloniously mailing injurious articles; transport of hazardous material in commerce; interference with flight crew, other offense - aboard aircraft; criminal infringement of copyright/trademark; conflict of interest; unauthorized payment; non-drug forfeiture; impersonation; false statement to Employee Act; reporting offenses - labor related; criminal infringement of trademark; unlawful conduct relating to control/cigarettes; trespass; destruction of property; destruction of mail; aircraft piracy; conspiracy to murder (no death, assault, or attempt); conspiracy to commit murder; and all other miscellaneous offenses not previously listed in any of the other categories

Source: U.S. Sentencing Commission. | GAO-18-433

Note: The U.S. Sentencing Commission categorizes offenses into the major categories above. For our reporting purposes, we consolidated certain U.S. Sentencing Commission categories into the following categories: Drugs includes drugs - trafficking, drugs - communication facility, and drugs - simple possession; Economic crimes includes larceny, fraud, embezzlement, forgery/counterfeiting, tax, and antitrust; Sex offenses includes sexual abuse and child pornography; Money laundering/

racketeering/ extortion includes money laundering and racketeering/extortion; Homicide includes murder and manslaughter; and the "other" category includes bribery, gambling/lottery, civil rights, prison offenses, environmental/wildlife, national defense, food and drug, and other miscellaneous offenses.

In addition, to determine the types of primary offenses for which SCAAP criminal aliens were convicted, we analyzed conviction data from five state prison systems—Arizona, California, Florida, New York, and Texas—for the most recent fiscal year in which data were available (2015). We selected these five state prison systems because they had the most SCAAP criminal alien incarcerations in state prisons in fiscal year 2015. Collectively, these five state prison systems accounted for 64 percent of the SCAAP criminal alien incarcerations in state prisons during fiscal year 2015.[22] They are also the same prison systems that we analyzed in our 2011 report on criminal aliens.[23] The information obtained from the selected state prison systems is not generalizable to all state prison systems, but provides useful insights about why SCAAP criminal aliens were incarcerated.[24] For these state prison systems, we analyzed the conviction data for the SCAAP criminal aliens incarcerated in fiscal year 2015.[25] Table 8 describes the primary offense categories for state convictions.[26]

[22]Our analysis included state prison systems that participated in SCAAP and did not include U.S. territories. State prison systems in Arkansas, West Virginia, Vermont, and the District of Columbia did not receive reimbursement for SCAAP criminal aliens incarcerated in fiscal year 2015.

[23]GAO-11-187.

[24]We did not examine the extent to which state policies may have affected the number of individuals convicted of crimes in each state. Further, because policies may vary by state, we presented data on each state separately.

[25]Each state's definition of a primary offense for which an individual could be convicted is detailed later in this report.

[26]Each state categorized the primary offenses according to the categories, except for New York. We categorized New York's offenses and obtained their concurrence on our categorization.

Table 8: State Primary Offense Categories, Attempted and Committed

Primary offense category	Category includes
Arson	Arson, reckless burning, and possession of arson materials
Assault	Assault, battery, assault with a deadly weapon, endangerment, and threats
Burglary	Breaking and entering, burglary, and possession of burglary tools
Disorderly Conduct	Disturbing the peace, fighting, intoxication, public nuisance, and disorderly conduct
Drugs	Use/under the influence, possession, possession with intent to distribute, sales, manufacturing, transporting, and possession of drug paraphernalia
Fraud, forgery, and counterfeiting	Deceptive practices or identification, fraud, giving false information, altering or forging documents, and counterfeiting or possession of counterfeit materials or tools
Homicide	Murder, manslaughter, and homicide
Immigration	Illegal entry, illegal reentry, false claim to U.S. citizenship, alien smuggling, and removal proceedings
Kidnapping	False imprisonment, kidnapping, and taking hostages
Larceny/theft	Grand and petty larceny and theft, shoplifting, embezzlement, and money laundering
Motor vehicle theft	Auto theft, carjacking, and taking a vehicle without consent
Obstruction of justice	Escaping, evading, being a fugitive of justice, failing to appear, failing to register as a sex offender, resisting arrest, and interfering with or obstructing an officer or justice proceedings
Property damage	Destruction of property, vandalism, and criminal or malicious mischief
Robbery	Armed robbery, robbery of a dwelling, robbery of a bank, and unarmed robbery
Sex offenses	Lewd and lascivious acts, rape, sexual assault, indecent exposure, prostitution, and molestation
Stolen Property	Buying, selling, receiving, or possessing stolen property
Terrorism	Terrorism-related offenses
Traffic violations	Driving under the influence, hit and run, no proof of insurance, no driver's license, and moving violations such as speeding and failure to stop
Weapons violations	Possession of a weapon, discharging a weapon, altering a weapon, and carrying a concealed weapon
Miscellaneous	Any other offense not listed above, as determined by each state

Source: GAO. | GAO-18-433

Note: Offenses include an attempt or conspiracy to commit the respective offense. We developed the criminal offense categories based on our prior work that used the FBI's classification for offense codes as our guidance.

Finally, to determine what is known about certain individuals with international terrorism-related convictions, we analyzed Department of Homeland Security (DHS), DOJ, and U.S. Sentencing Commission data on individuals on the DOJ's National Security Division (NSD) list of individuals with public and unsealed federal convictions resulting from international terrorism-related investigations from March 19, 2010 through December 31, 2016.[27] We report on this analysis in appendix V. We collected data on alienage or citizenship status, country of birth, naturalization date, and extradition status, as available, from BOP, U.S. Sentencing Commission, U.S. Citizenship and Immigration Services (USCIS), and ICE, using identifiers that we matched across agencies.[28] For example, USCIS records would not typically contain information about the citizenship status of individuals who are U.S. citizens and were born in the United States, but would contain information about naturalized citizens or aliens who had applied for a benefit with USCIS. We considered the totality of data available from BOP's SENTRY database, the U.S. Sentencing Commission, USCIS's Central Index System, and ICE's Enforcement Integrated Database to determine (a) the alienage or citizenship status of individuals at the time of their conviction and (b) the country of birth for each individual on the NSD list with a conviction from March 19, 2010 through 2016 for whom data was available.[29] Specifically:

[27]Specifically, we analyzed all convictions resulting from international terrorism investigations after March 18, 2010—the last date we analyzed for our 2011 report—through December 31, 2016—the most recent data available for our audit.

[28]The NSD list includes names of individuals convicted as a result of international terrorism-related investigations and does not include additional identifiers for these individuals. We obtained and matched identifiers iteratively across BOP, U.S. Sentencing Commission, USCIS, and ICE data using the names on the NSD list as a starting point. The identifiers that we matched on included: name, date of birth, country of birth, FBI number, and/or alien registration number.

[29]According to USCIS, the Central Index System contains information on the status of applicants/petitioners seeking immigration benefits, to include: lawful permanent residents, naturalized citizens, U.S. border crossers, aliens who have been issued employment authorization documents, individuals who petitioned for benefits on behalf of family members, and other individuals subject to the provisions of the Immigration and Nationality Act. According to ICE, the Enforcement Integrated Database maintains information related to the investigation, arrest, booking, detention, and removal of persons encountered during immigration and criminal law enforcement investigations and operations conducted by certain Department of Homeland Security components, namely ICE and U.S. Customs and Border Protection.

- We identified those individuals that the U.S. Sentencing Commission indicated were aliens that had been extradited to the United States for prosecution as extradited aliens.
- We identified those individuals for whom USCIS provided a date of naturalization as naturalized citizens, and compared their date of naturalization with the date that they were charged with an international terrorism-related crime to determine if they naturalized before being charged. We used USCIS data to identify the country of birth for these individuals.
- We determined that those other individuals for whom USCIS and ICE had a record that indicated they were citizens of a country other than the United States were aliens and used USCIS and U.S. Sentencing Commission data to identify their country of birth.
- We reviewed the data for the remaining individuals and determined that those individuals U.S. Sentencing Commission and/or BOP identified as U.S.-born or as U.S. citizens were U.S. citizens.
- We identified individuals for whom we could not determine a country of birth or country of citizenship using the totality of information available as unknown.

According to DOJ, the list includes both individuals convicted of crimes that DOJ considers to be directly related to international terrorism and individuals convicted of a variety of other crimes where the investigation, at the time of charging, appeared to involve an identified link to international terrorism. We did not independently verify these individuals' links to terrorism.

Criminal Alien Incarceration Costs

To determine the costs associated with incarcerating the criminal aliens in the United States, we obtained and analyzed cost and inmate data from BOP, data on SCAAP reimbursements for incarcerating SCAAP criminal aliens, and cost and inmate data from states and localities. Specifically, we analyzed costs to (1) the federal government, (2) state prison systems, and (3) selected states and localities. We calculated the total annual cost to the federal government, for fiscal years 2010 through 2015, to incarcerate criminal aliens, by combining: (1) the estimated costs to incarcerate criminal aliens in federal prisons and (2) the costs to reimburse states and localities for incarcerating SCAAP criminal aliens. Specifically, we used the average of the BOP's 12 monthly snapshot population data from SENTRY for each type of BOP institution for each fiscal year, and multiplied these population data by BOP per capita costs for each facility type to determine the total federal cost to incarcerate

criminal aliens in federal prisons. In addition, we used SCAAP reimbursement data for SCAAP fiscal years 2011 through 2016 to determine the cost to the federal government to reimburse states and localities for incarcerating SCAAP criminal aliens in state prisons and local jails.[30]

For all 50 state prison systems, we estimated selected operating costs associated with incarcerating SCAAP criminal aliens from fiscal years 2010 through 2015 using Bureau of Justice Statistics and SCAAP reimbursement data as well as inflation factors.[31] These selected operating costs include correctional officer salaries, medical care, food service, and utilities. The salaries for correctional officers were obtained for each year from SCAAP data. The other three categories were calculated using Bureau of Justice Statistics' 2001 state prison expenditure data, the total number of inmate days in a given year by state as reported through SCAAP, and annual IHS Global Insight price deflators for the corresponding categories.[32] We multiplied the estimated selected operating costs per inmate by the number of SCAAP inmate days to determine the total costs for incarcerating SCAAP criminal aliens for each state prison system. While our estimates provide insight into state expenditures to incarcerate SCAAP criminal aliens, our estimates may not represent actual costs if per capita prison expenditures for incarcerating criminal aliens grew at a different rate than the inflation factors that we used for each category. In addition to using estimated operating costs for medical care, food service, and utilities, we also used data on correctional officer salaries from SCAAP. Further, our estimation may not include all related incarceration costs and therefore may not reflect actual costs. For example, using actual average daily cost data for a selected set of state prison systems, we found that in 2015 costs using these average daily costs were higher than the estimated costs using

[30]Each year's SCAAP program is based on SCAAP criminal aliens incarcerated during the prior fiscal year, July 1 through June 30. For example, the fiscal year 2016 SCAAP program will include SCAAP criminal aliens that were incarcerated in state prisons and local jails between July 1, 2014 and June 30, 2015.

[31]Bureau of Justice Statistics data was obtained from a Bureau of Justice Statistics study that estimated state prison expenditures for medical care, food service, and utilities for all 50 state prison systems in 2001. Bureau of Justice Statistics, *State Prison Expenditures*, 2001 (Washington, D.C.: June 2004). These were the most recent cost data available for our purposes. Data were not available on local jail systems.

[32]IHS Global Insight is a firm that provides comprehensive economic and financial information on countries, regions, and industries.

inflation factors.[33] Our analysis includes those state prison systems that received SCAAP reimbursement in the associated fiscal year. As a result, not all 50 state prison systems may be included in each fiscal year.[34] Our analysis also includes the District of Columbia. Moreover, we used the GDP deflator to present criminal alien costs in fiscal year 2016 dollars.

To estimate the costs associated with incarcerating SCAAP criminal aliens in selected state prison and local jail systems, we obtained and analyzed cost and inmate data from five state prison systems (Arizona, California, Florida, New York, and Texas) and five local jail systems (Maricopa County, Arizona; Orange County, California; Los Angeles County, California; Essex County, New Jersey; and Harris County, Texas)—those with the highest number of SCAAP criminal alien incarcerations. Specifically, we estimated the amount that each of these state prison and local jail systems expended to incarcerate SCAAP criminal aliens based on average daily cost data and the number of SCAAP criminal alien inmate days.[35] For fiscal year 2015 these five state prison systems and the six local jail systems accounted for 64 percent and 19 percent of SCAAP criminal alien incarcerations in state prisons and local jails, respectively. However, we did not include cost estimates for one of the top six local jail systems, New York City, New York. Officials from this locality stated that they no longer apply for SCAAP funds, and they did not provide us an average daily cost per inmate. These state prison and local jail systems are the same, with the exception of Essex County, New Jersey, as those we selected in our April 2005 and March 2011 reports.[36] While our analysis provides insights into the costs associated with incarcerating SCAAP criminal aliens in these state prison

[33]In addition to the costs for incarcerating criminal aliens, there are other costs associated with criminal aliens, such as the costs necessary to identify, apprehend, detain, process through immigration court, and remove an individual from the country.

[34]The following state prison systems did not receive SCAAP reimbursement: West Virginia in fiscal year 2010; West Virginia and the District of Columbia in fiscal years 2011 and 2012; Missouri, Tennessee, Wyoming, West Virginia, and the District of Columbia in fiscal year 2013; West Virginia and the District of Columbia in fiscal year 2014; and Arkansas, West Virginia, Vermont, and the District of Columbia in fiscal year 2015.

[35]Since, the costs from state prison and local jail systems correspond to each jurisdiction's unique fiscal year, which is different than the federal fiscal year (October 1 through September 30) we used a weighted average cost. Therefore, state and local fiscal year costs were weighted by the number of months that overlapped with the federal fiscal year.

[36]GAO-11-187 and GAO, *Information on Criminal Aliens Incarcerated in Federal and State Prisons and Local Jails*, GAO-05-337R (Washington, D.C.: Apr. 7, 2005).

and local jail systems and we are able to use the actual average daily costs provided by each entity, along with actual SCAAP criminal alien prison population data, the results of this analysis are not generalizable to other state prison and local jail systems. Also, given that these estimated costs are based on average daily cost for the general prison population, they may not represent actual costs if expenditures on the criminal alien prison population differ from the average daily costs; moreover, state prison and local jail systems might not include all prison expenditures in the provided average daily costs and what is included might differ across state prison and local systems.

Criminal Alien Removability from the United States and Experiences of Aliens after Incarceration in Federal Prison

To determine what is known about the removability from the United States of criminal aliens incarcerated in federal prison and the experiences of criminal aliens after their incarceration in federal prison, we matched data from criminal aliens incarcerated in federal prison with other available data sources using various identifiers, including alien numbers and FBI numbers. We reviewed the quality of the matches using date of birth and/or name data, where available. We also reviewed ICE's Enforcement and Removal Operations reports from fiscal years 2015 and 2016, which included information about the number of ICE removals of aliens in the United States from fiscal years 2011 through 2016, and the proportion of such removals that were criminal aliens compared to non-criminal aliens. We report on this analysis in appendix IX.

Specifically, to analyze the potential removability from the United States of criminal aliens at the time they were incarcerated in federal prison, we matched BOP data on criminal aliens incarcerated from fiscal years 2011 through 2016 with data from ICE's Alien Criminal Response Information Management System (ACRIMe). ICE specialists use ACRIMe to provide an indication of an individual's identity and potential removability to law enforcement partners, at the request of the law enforcement partner. We used FBI numbers and/or alien numbers as unique identifiers to match these data. We then verified that the matches appeared reasonable by comparing names and dates of birth of those individuals who matched using the unique identifiers. To determine each criminal alien's potential removability from the United States at the time they entered federal prison, we identified the ACRIMe record for each criminal alien, as available, that was created closest to the date the criminal alien first entered federal prison and used this record for our analysis. We restricted our analysis to those ACRIMe records that were generated within 60 days of the date the criminal alien entered federal prison because a criminal

alien's removability from the United States can change over time, including while the alien is incarcerated.

To determine what is known about the experience of criminal aliens after their incarceration in federal prison, we matched data from those criminal aliens who completed a term of incarceration in federal prison from fiscal years 2011 through 2016 with DHS and DOJ data. We used this information to determine if these criminal aliens were subsequently removed from the United States, reincarcerated, and/or received naturalized citizenship. We compared criminal aliens' federal incarceration completion date with the dates of federal government and/or law enforcement agency encounters to determine if those encounters took place after the alien's completion of their term of incarceration in federal prison. Specifically, we matched FBI and/or alien numbers, as available, of criminal aliens who completed a term of incarceration in federal prison from fiscal years 2011 through 2016 with:

- ICE Enforcement Integrated Database data from fiscal year 2011 through June 2017 to determine if the alien was removed by ICE after completion of their term of incarceration in federal prison;[37]
- BOP SENTRY data from fiscal years 2011 through 2016 to determine if a criminal alien was reincarcerated in federal prison after completion of their term of incarceration in federal prison;
- BJA SCAAP data from fiscal years 2010 through 2015, to determine if a criminal alien was subsequently incarcerated in a state prison or local jail system participating in SCAAP after completion of their term of incarceration in federal prison; and
- USCIS Central Index System data from fiscal year 2011 through July 2017 to determine if a criminal alien received naturalized citizenship after completion of their term of incarceration in federal prison.

We determined that the data used in each of our analyses were sufficiently reliable for the purposes of this report by analyzing available documentation, such as related data dictionaries; interviewing officials knowledgeable about the data; conducting electronic tests to identify

[37]ICE provided the most recent removal date in its records for each criminal alien, as of June 2017. Some aliens may have been removed multiple times between fiscal year 2011 and June 2017. An alien removed multiple times would only appear in the data with their most recent removal date.

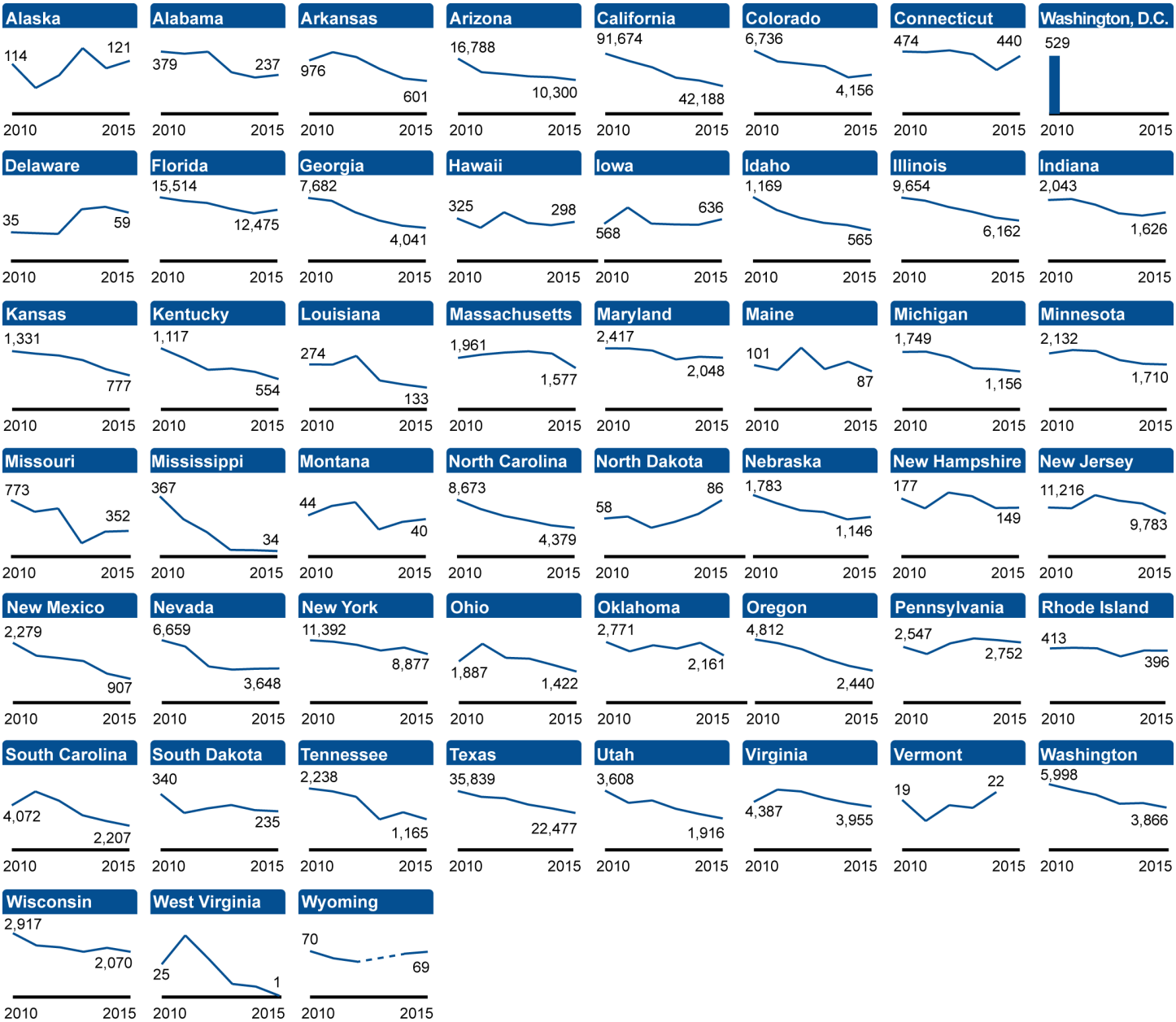
missing data and anomalies; and following up with officials, as appropriate.

We conducted this performance audit from August 2016 to July 2018 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Appendix II: State Criminal Alien Assistance Program Criminal Alien Incarcerations in State Prisons and Local Jails

Figure 16 shows the number of State Criminal Alien Assistance Program (SCAAP) criminal alien incarcerations in state prisons and local jails in each of the 50 states and District of Columbia from fiscal years 2010 through 2015. Criminal alien incarcerations are included in the figure below if the state or locality received SCAAP reimbursement. Therefore, these data represent only a portion of all criminal alien incarcerations in state prisons and local jails.

Figure 16: Number of State Criminal Alien Assistance Program (SCAAP) Criminal Alien Incarcerations by State from Fiscal Years 2010 through 2015



Source: GAO analysis of Bureau of Justice Assistance data. | GAO-18-433

Note: The above figure includes SCAAP criminal alien incarcerations in state prisons and local jails in each of the 50 states and District of Columbia. Because of differences in the number of incarcerations by state, each state may be on a different scale. The following states did not have a state or locality that applied for SCAAP in certain fiscal years: District of Columbia (2011 through 2015), Vermont

(2015), and Wyoming (2013). In addition, U.S. territories that received SCAAP reimbursements are not included in the above figure. SCAAP data represent the number of incarcerations, rather than number of SCAAP criminal aliens since these aliens could have multiple SCAAP incarcerations in the same fiscal year. As stated previously, SCAAP criminal aliens represent a portion of the total population of criminal aliens incarcerated in state prisons and local jails.

Appendix III: Arrests/Transfers of Criminal Aliens by Type of Arresting Agency

This appendix provides additional details on arrests/transfers of criminal aliens in our federal study population and State Criminal Alien Assistance Program (SCAAP) criminal aliens in our state and local study population. The data did not allow us to determine the difference between a new arrest and a transfer from one arresting agency to another; as a result, we refer to these collectively as "arrests/transfers". To determine the arrest history of criminal aliens incarcerated in federal and state prisons and local jails, we pulled a random sample of 500 criminal aliens from our federal study population and 500 SCAAP criminal aliens from our state and local study population, and, using data from the Federal Bureau of Investigation (FBI), estimated arrest data for each of our study populations.[1] Specifically, we break down the estimated number of arrests/transfer and estimated number of arrest offenses by those made by (1) federal arresting agencies and (2) state and local arresting agencies. While the samples we selected for our analyses allowed us to estimate and provide valuable insights about the arrest history of the approximately 197,000 criminal aliens in our federal study population and the approximately 533,000 SCAAP criminal aliens in our state and local study population, our analyses are not generalizable to the arrest history of criminal aliens not in these study populations.

Federal criminal alien population. Based on our random sample of criminal aliens incarcerated in federal prisons during fiscal years 2011 through 2016, we estimated that our federal study population of about 197,000 criminal aliens accounted for about 761,300 arrests/transfers by federal arresting agencies. This same population accounted for about 589,800 arrests/transfers state or local arresting agencies from 1974

[1]For these analyses, we only included criminal aliens in the study population if they had an FBI number available, as this was needed to match data across databases. As a result, the study populations that we projected to for these analyses were smaller than the originating study populations. For example, our federal study population started with approximately 198,000 criminal aliens and about 197,000 had FBI numbers. Therefore, for this analysis, we included approximately 197,000 criminal aliens in our federal study population.

through 2017.[2] We estimated that 91 percent of the arrests/transfers by federal arresting agencies and 67 percent of the arrests/transfers by state and local arresting agencies occurred from 2000 through 2017.

We estimated that the approximately 197,000 criminal aliens in our federal study population were arrested/transferred by federal arresting agencies for a total of about 1 million offenses.[3] A single arrest can be for multiple offenses, and being arrested for one or more offenses does not necessarily result in prosecution or a conviction of all, or any, of the offenses for which an individual was arrested. Of the approximately 1 million offenses, we estimated that 81 percent were related to immigration, as shown below in table 9.[4] Each offense category in the table may include an attempt or conspiracy to commit the respective offense.

[2]These dates, 1974 through 2017, represent the dates of the oldest and newest records in our FBI dataset. Law enforcement entities send arrest information to the FBI on a voluntary basis; as a result, FBI data on arrest history may not include all arrests. Because our sample populations are separate for our federal criminal alien population and SCAAP criminal alien population, results cannot be compared to the results we presented in our 2011 report. See GAO, *Criminal Alien Statistics: Information on Incarcerations, Arrests, and Costs,* GAO-11-187 (Washington, D.C.: Mar. 24, 2011). All percentage estimates presented in this report have a margin of error of plus or minus 7 percentage points or fewer. All estimates of the number of arrests/transfers or offenses have a relative error of plus or minus 14 percent of the estimate or less. See appendix I for more details on the margin of error for these estimates.

[3]For our analysis, (a) multiple counts of the same offense were counted once, (b) duplicate offenses on the same day may be counted more than once if the person was transferred to another agency on the same day and that agency submitted the same offense to the FBI, and (c) duplicate offenses on the same day submitted by the same agency may be counted more than once if there was not enough information to determine that two offenses were the same. Because we selected samples from both our federal study population and our state and local study population, results cannot be compared to the results we presented in our 2011 report, see GAO-11-187.

[4]See appendix I for a complete description of each of the offense categories.

Table 9: Estimated Number and Percent of Attempted or Committed Offenses for Which Criminal Aliens Incarcerated in Federal Prisons from Fiscal Years 2011 through 2016 who had an FBI Number Were Arrested/Transferred by Federal Arresting Agencies from 1974 through 2017

Arrest offense	Estimated number	Estimated percent
Immigration[a]	863,700	81.0
Drugs	133,400	12.5
Obstruction of justice	25,400	2.4
Fraud, forgery, and counterfeiting	12,300	1.2
Weapons violations	7,500	0.7
Miscellaneous	6,400	0.6
Larceny/theft	4,000	0.4
Traffic violations	4,000	0.4
Assault	3,200	0.3
Robbery	2,000	0.2
Kidnapping	1,200	0.1
Motor vehicle theft	1,200	0.1
Sex offenses	1,200	0.1
Burglary	800	0.1
Property damage	800	0.1
Terrorism	400	< 0.1
Arson	--	--
Disorderly Conduct	--	--
Homicide	--	--
Stolen Property	--	--
Total[b]	**1,067,400**	**100**

Legend:-- = no estimated offenses

Source: GAO analysis of Federal Bureau of Investigation (FBI) data. | GAO-18-433

Note: Offenses may include an attempt or conspiracy to commit the respective offense. While our analyses allowed us to estimate and provide valuable insights about the arrest history of our study population, which consisted of about 197,000 criminal aliens incarcerated in federal prisons from fiscal years 2011 through 2016 with an FBI number, our analyses are not intended to infer conclusions about the arrest history of criminal aliens not in this study population. Law enforcement entities send arrest information to the FBI on a voluntary basis; as a result, FBI data on arrest history may not include all arrests. The numbers in the table above represent the number of offenses we estimated that criminal aliens were arrested or transferred for; they do not represent the number of times that criminal aliens were arrested or transferred for each offense. All estimates in this table have a margin of error of +/- 3 percentage points or fewer.

[a]Offenses included in our immigration category include both criminal immigration offenses and civil immigration violations— administrative grounds of removability.

[b]Numbers may not sum to totals because of rounding. Percentages may not sum to 100 due to rounding.

We estimated that the approximately 197,000 criminal aliens in our federal study population were arrested/transferred by state and local arresting agencies for a total of about 996,700 offenses. Of these offenses, we estimated that 41 percent were related to drugs or traffic violations, as shown below in table 10. Each offense category in the table may include an attempt or conspiracy to commit the respective offense.

Table 10: Estimated Number and Percent of Attempted or Committed Offenses for Which Criminal Aliens Incarcerated in Federal Prisons from Fiscal Years 2011 through 2016 who had an FBI Number Were Arrested/Transferred by State and Local Arresting Agencies from 1979 through 2017

Arrest offense	Estimated number	Estimated percent
Drugs	203,200	20.4
Traffic violations	200,500	20.1
Obstruction of justice	115,900	11.6
Assault	105,200	10.6
Miscellaneous	67,900	6.8
Larceny/theft	66,300	6.7
Fraud, forgery, and counterfeiting	50,000	5.0
Burglary	44,100	4.4
Weapons violations	37,000	3.7
Motor vehicle theft	18,300	1.8
Property damage	16,700	1.7
Stolen property	14,300	1.4
Disorderly Conduct	12,300	1.2
Sex offenses	12,300	1.2
Robbery	11,500	1.2
Immigration[a]	10,700	1.1
Homicide	6,000	0.6
Kidnapping	4,400	< 0.1
Arson	400	< 0.1
Terrorism	--	--
Total[b]	**996,700**	**100**

Legend: -- = no estimated offenses
Source: GAO analysis of Federal Bureau of Investigation (FBI) data. | GAO-18-433

Note: Offenses may include an attempt or conspiracy to commit the respective offense. While our analyses allowed us to estimate and provide valuable insights about the arrest history of our study population, which consisted of about 197,000 criminal aliens incarcerated in federal prisons from fiscal years 2011 through 2016 with an FBI number, our analyses are not intended to infer conclusions about the arrest history of criminal aliens not in this study population. Law enforcement entities send arrest information to the FBI on a voluntary basis; as a result, FBI data on arrest history may not include all arrests. The numbers in the table above represent the number of offenses we estimated that criminal aliens were arrested or transferred for; they do not represent the number of

times that criminal aliens were arrested or transferred for each offense. All estimates in this table have a margin of error of +/- 4 percentage points or fewer.

[a]Offenses included in our immigration category include both criminal immigration offenses and civil immigration violations— administrative grounds of removability.

[b]Numbers may not sum to totals because of rounding. Percentages may not sum to 100 due to rounding.

SCAAP criminal alien population. Based on our random sample of SCAAP criminal aliens incarcerated in state prisons and local jails during fiscal years 2010 through 2015, we estimated that our state and local study population of about 533,000 SCAAP criminal aliens accounted for about 760,100 arrests/transfers by federal arresting agencies. This same population accounted for about 2.7 million arrests/transfers by state or local arresting agencies from 1964 through 2017.[5] We estimated that 92 percent of the arrests/transfers by federal arresting agencies and 83 percent of the arrests/transfers by state and local arresting agencies occurred from 2000 through 2017.

We estimated that the approximately 533,000 SCAAP criminal aliens in our state and local study population were arrested/transferred by federal arresting agencies for a total of about 904,500 offenses, attempted or committed. [6] A single arrest can be for multiple offenses and being arrested for one or more offenses does not necessarily result in prosecution or a conviction of all, or any, of the offenses for which an individual was arrested. Of the approximately 904,500 offenses, we estimated that about 94 percent were related to immigration offenses, as

[5]These dates, 1964 through 2017, represent the dates of the oldest and newest records in our FBI dataset. Law enforcement entities send arrest information to the FBI on a voluntary basis; as a result, FBI data on arrest history may not include all arrests. We were unable to determine the difference between a new arrest and a transfer from one arresting agency to another; as such, we are reporting on arrests and transfers. Because our sample populations are separate for our federal criminal alien population and SCAAP criminal alien population, results cannot be compared to the results we presented in our 2011 report, see GAO-11-187. See appendix I for more details on the margin of error for these estimates. As stated previously, SCAAP criminal aliens represent a portion of the total population of criminal aliens incarcerated in state prisons and local jails.

[6]For our analysis, (a) multiple counts of the same offense were counted once, (b) duplicate offenses on the same day may be counted more than once if the person was transferred to another agency on the same day and that agency submitted the same offense to the FBI, and (c) duplicate offenses on the same day submitted by the same agency may be counted more than once if there was not enough information to determine that two offenses were the same.

shown below in table 11.[7] Each offense category in the table may include an attempt or conspiracy to commit the respective offense.

Table 11: Estimated Number and Percent of Attempted or Committed Offenses for Which State Criminal Alien Assistance Program (SCAAP) Criminal Aliens Incarcerated in State Prisons and Local Jails from Fiscal Years 2010 through 2015 who had an FBI Number Were Arrested/Transferred by Federal Arresting Agencies from 1972 through 2017

Arrest offense	Estimated number	Estimated percent
Immigration[a]	846,500	93.6
Drugs	27,300	3.0
Fraud, forgery, and counterfeiting	9,800	1.1
Obstruction of justice	6,600	0.7
Homicide	3,300	0.4
Miscellaneous	3,300	0.4
Assault	2,200	0.2
Weapons violations	2,200	0.2
Kidnapping	1,100	0.1
Sex offenses	1,100	0.1
Traffic violations	1,100	0.1
Arson	--	--
Burglary	--	--
Disorderly Conduct	--	--
Larceny/theft	--	--
Motor vehicle theft	--	--
Property damage	--	--
Robbery	--	--
Terrorism	--	--
Total[b]	**904,500**	**100**

Legend:-- = no estimated offenses

Source: GAO analysis of Federal Bureau of Investigation (FBI) data. | GAO-18-433

Note: Offenses may include an attempt or conspiracy to commit the respective offense. While our analyses allowed us to estimate and provide valuable insights about the arrest history of our study population, which consisted of about 533,000 SCAAP criminal aliens incarcerated in state prisons and local jails from fiscal years 2010 through 2015 with an FBI number, our analyses are not intended to infer conclusions about the arrest history of criminal aliens not in this study population. Law enforcement entities send arrest information to the FBI on a voluntary basis; as a result, FBI data on arrest history may not include all arrests. The numbers in the table above represent the number of offenses we estimated that SCAAP criminal aliens were arrested or transferred for; they do not represent the number of times that SCAAP criminal aliens were arrested or transferred for each offense. All estimates in this table have a margin of error of +/- 3 percentage points or fewer.

[7]See appendix I for a complete description of each of the offense categories.

[a]Offenses included in our immigration category include both criminal immigration offenses and civil immigration violations— administrative grounds of removability.

[b]Numbers may not sum to totals because of rounding. Percentages may not sum to 100 due to rounding.

We estimated that the approximately 533,000 SCAAP criminal aliens in our state and local study population were arrested/transferred by state and local arresting agencies for a total of about 4.6 million offenses. Of these offenses, we estimated that 43 percent were related to traffic violations or to drug offenses, as shown below in table 12. Each offense category in the table may include an attempt or conspiracy to commit the respective offense.

Table 12: Estimated Number and Percent of Attempted or Committed Offenses for Which State Criminal Alien Assistance Program (SCAAP) Criminal Aliens Incarcerated in State Prisons and Local Jails from Fiscal Years 2010 through 2015 who had an FBI Number Were Arrested/Transferred by State and Local Arresting Agencies from 1972 through 2017

Arrest offense	Estimated number	Estimated percent
Traffic violations	1,224,900	26.9
Drugs	733,800	16.1
Obstruction of justice	658,400	14.4
Assault	394,800	8.7
Larceny/theft	276,700	6.1
Miscellaneous	253,700	5.6
Fraud, forgery, and counterfeiting	190,300	4.2
Burglary	175,000	3.8
Weapons violations	122,500	2.7
Sex offenses	119,200	2.6
Disorderly Conduct	91,000	2.0
Motor vehicle theft	90,800	2.0
Stolen property	75,500	1.7
Robbery	54,700	1.2
Property damage	50,300	1.1
Homicide	24,100	0.5
Kidnapping	17,500	0.4
Immigration[a]	5,500	0.1
Arson	3,300	0.1
Terrorism	1,100	< 0.1
Total[b]	**4,562,700**	**100**

Source: GAO analysis of Federal Bureau of Investigation (FBI) data. | GAO-18-433

Note: Offenses may include an attempt or conspiracy to commit the respective offense While our analyses allowed us to estimate and provide valuable insights about the arrest history of our study population, which consisted of about 533,000 SCAAP criminal aliens incarcerated in state prisons

and local jails from fiscal years 2010 through 2015 with an FBI number, our analyses are not intended to infer conclusions about the arrest history of criminal aliens not in this study population. Law enforcement entities send arrest information to the FBI on a voluntary basis; as a result, FBI data on arrest history may not include all arrests. The numbers in the table above represent the number of offenses we estimated that SCAAP criminal aliens were arrested or transferred for; they do not represent the number of times that SCAAP criminal aliens were arrested or transferred for each offense. All estimates in this table have a margin of error of +/- 4 percentage points or fewer.

[a]Offenses included in our immigration category include both criminal immigration offenses and civil immigration violations— administrative grounds of removability.

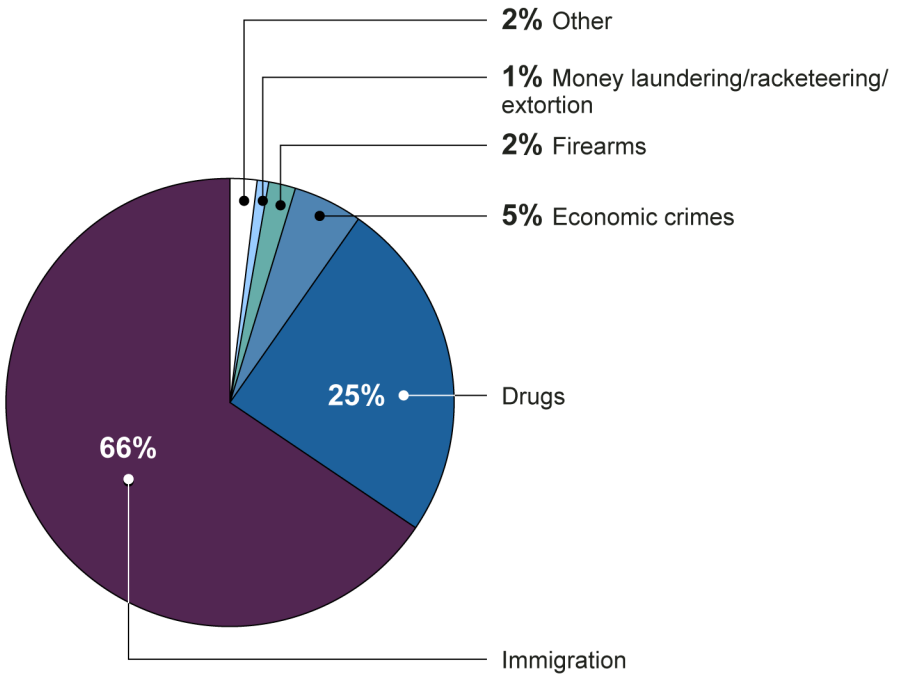
[b]Numbers may not sum to totals because of rounding. Percentages may not sum to 100 due to rounding.

Appendix IV: Federal Convictions, Fiscal Years 2011 through 2016

This appendix provides additional details on federal convictions of U.S. citizens and criminal aliens. In fiscal year 2016, immigration (66 percent) or drug offenses (25 percent) accounted for 91 percent of the approximately 28,000 primary offenses for which criminal aliens were convicted and sentenced, based upon U.S. Sentencing Commission data, as shown in figure 17.[1] These data are consistent with trends from fiscal years 2011 through 2016. These criminal aliens may also be in our study population of criminal aliens incarcerated in federal prisons if they were convicted in federal court and sentenced during fiscal years 2011 through 2016, and were also incarcerated in a federal prison during this same time period.

[1]These were the most recent data available for our review. The U.S. Sentencing Commission is an independent agency in the judicial branch of government. The Commission's data are limited to felony and Class A misdemeanor cases for offenders who are convicted and sentenced in the federal court system. These data do not include state cases, federal petty offenses, federal cases which result in all charges being dismissed or acquitted, federal death penalty cases, federal juvenile cases, or federal witness protection cases. They also do not include convicted offenders for whom no sentences were yet issued, offenders sentenced but for whom no sentencing documents were submitted to the Commission, and offenders sentenced prior to the enactment of the Sentencing Reform Act of 1984. See Pub. L. No. 98-473, ch. II, 98 Stat. 1837, 1987-2001 (1984). According to U.S. Sentencing Commission officials, data do include a small number of individuals that may have been fined or given probation instead of a federal prison sentence. Convictions that did not have information on offender's citizenship status were excluded. Information on the citizenship status of offenders is obtained from their presentence investigation report. The U.S. Sentencing Commission data on non-U.S. citizens includes data on "resident aliens", "illegal aliens", "extradited aliens" and "non-U.S. citizens, alien status unknown". For the purposes of this report, we refer to these individuals as criminal aliens. Data on primary offenses for which individuals may be convicted include attempts, conspiracies, and intents to commit crimes. For example, the U.S. Sentencing Commission's offense category of assault includes attempt to commit murder and assault with intent to murder; while the murder offense category includes a conspiracy to murder when there is a resulting death. See appendix I for a complete description of each of the offense categories.

Figure 17: Primary Offense Category for Which Criminal Aliens Were Convicted in Federal Court and Sentenced in Fiscal Year 2016



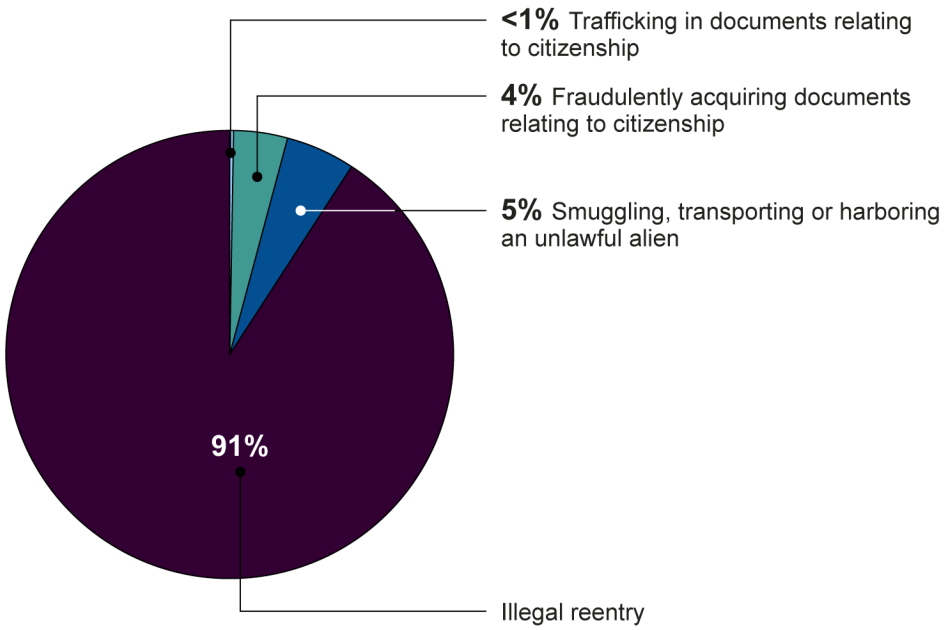
Source: GAO analysis of U.S Sentencing Commission data. | GAO-18-433

Note: "Other" includes administration of justice offenses, sex offenses, assault, robbery, homicide, auto theft, kidnapping/hostage taking, arson, burglary, and other miscellaneous offenses.

Of selected immigration offenses for which convicted criminal aliens were sentenced in fiscal year 2016, 91 percent were for illegal reentry, as shown in Figure 18.[2]

[2]These selected immigration offenses accounted for 95 percent of all immigration offenses for which criminal aliens were convicted of in fiscal year 2016. According to the U.S. Sentencing Commission, subsequent entries, reentry after removal, and remaining in the United States after being ordered removed are felonies covered by U.S. Sentencing Guidelines and as such would be included in these data. Further, conviction for a first offense of illegal entry is a misdemeanor and would not be covered by U.S. Sentencing Guidelines in these data. See 8 U.S.C. §§ 1325(a), 1326, and 1253.

Figure 18: Selected Immigration Primary Offenses for Which Convicted Criminal Alien Federal Offenders Were Sentenced in Fiscal Year 2016



Source: GAO analysis of U.S Sentencing Commission data. | GAO-18-433

Note: These selected immigration offenses accounted for 95 percent of all immigration offenses for which criminal aliens were convicted in federal court and sentenced in fiscal year 2016.

For the primary offenses for which all individuals—U.S. citizens and criminal aliens—were convicted and sentenced in fiscal years 2011 through 2016, criminal aliens made up between 0 and 94 percent of all convictions for each primary offense, based upon U.S. Sentencing Commission data, as shown in table 13.

Table 13: Number of Each Primary Offense for Federal Convictions, by Citizenship, Fiscal Years 2011 through 2016

Primary offense	Total, all convictions	Total, U.S. citizen	Percentage of all convictions that were for U.S. citizens	Total, criminal aliens	Percentage of all convictions that were for criminal aliens
Drugs	143,899	98,582	68.5	45,317	31.5
Immigration	143,448	8,739	6.1	134,709	93.9
Economic crimes	62,063	51,026	82.2	11,037	17.8
Firearms	46,198	42,712	92.5	3,486	7.5
Sex offenses	14,488	13,897	95.9	591	4.1
Money laundering/ racketeering/extortion	10,011	7,819	78.1	2,192	21.9
Administration of justice offenses	7,183	6,217	86.6	966	13.4
Robbery	4,867	4,708	96.7	159	3.3
Assault	4,235	3,827	90.4	408	9.6
Homicide	811	739	91.1	72	8.9
Auto theft	423	369	87.2	54	12.8
Arson	330	315	95.5	15	4.5
Kidnapping/hostage taking	290	167	57.6	123	42.4
Burglary/breaking and entering	227	227	100.0	0	0.0
Other	16,977	14,776	87.0	2,201	13.0
Total	**455,450**	**254,120**	**n/a**	**201,330**	**n/a**

Legend: n/a = not applicable

Source: GAO Analysis of U.S. Sentencing Commission data. | GAO-18-433

Note: U.S. Sentencing Commission data are limited to felony and Class A misdemeanor cases for offenders who are convicted and sentenced in the federal court system. These data do not include state cases, federal petty offenses, federal cases which result in all charges being dismissed or acquitted, federal death penalty cases, federal juvenile cases, or federal witness protection cases. They also do not include convicted offenders for whom no sentences were yet issued, offenders sentenced but for whom no sentencing documents were submitted to the Commission, and offenders sentenced prior to the enactment of the Sentencing Reform Act of 1984. See Pub. L. No. 98-473, ch. II, 98 Stat. 1837, 1987-2001 (1984). According to U.S. Sentencing Commission officials, data do include a small number of individuals that may have been fined or given probation instead of a federal prison sentence. Convictions that did not have information on offender's citizenship status were excluded. Information on the citizenship status of offenders is obtained from their presentence investigation report. The U.S. Sentencing Commission data on non-U.S. citizens includes data on "resident aliens", "illegal aliens", "extradited aliens" and "non-U.S. citizens, alien status unknown". For the purposes of this report, we refer to these individuals as criminal aliens. Data on primary offenses for which individuals may be convicted include attempts, conspiracies, and intents to commit crimes. For example, the U.S. Sentencing Commission's offense category of assault includes attempt to commit murder and assault with intent to murder; while the murder offense category includes a conspiracy to murder when there is a resulting death. The "other" category includes bribery, gambling/lottery, civil rights, prison offenses, environmental/wildlife, national defense, food and drug, and other miscellaneous offenses.

Table 14 details the total number of primary offenses for which U.S. citizens and criminal aliens were convicted and sentenced in each fiscal year from 2011 through 2016.

Table 14: Number of Each Primary Offense for Federal Convictions, by Citizenship, Fiscal Years 2011 through 2016

	2011	2012	2013	2014	2015	2016	5-year change
U.S. citizens							
Primary offense							
Drugs	17,616	17,589	16,840	16,568	15,562	14,407	-18
Immigration	1,579	1,283	1,300	1,381	1,517	1,679	6
Economic crimes	8,873	8,974	8,612	9,029	8,076	7,462	-16
Firearms	7,041	7,371	7,420	7,380	6,627	6,873	-2
Sex offenses	2,179	2,358	2,238	2,352	2,325	2,445	12
Money laundering/racketeering/extortion	1,162	1,318	1,306	1,374	1,375	1,284	10
Administration of justice offenses	951	1,105	1,187	1,058	1,005	911	-4
Robbery	914	824	809	759	723	679	-26
Assault	568	585	597	684	672	721	27
Homicide	131	108	142	113	126	119	-9
Auto theft	71	50	83	72	51	42	-41
Arson	53	46	66	50	55	45	-15
Kidnapping/hostage taking	25	25	28	30	22	37	48
Burglary/breaking and entering	52	42	37	37	36	23	-56
Other offenses	2,338	2,183	2,311	2,592	2,887	2,465	5
Total	**43,553**	**43,861**	**42,976**	**43,479**	**41,059**	**39,192**	**-10**
Criminal aliens							
Primary offense							
Drugs	7,823	8,518	7,782	7,347	6,923	6,924	-11
Immigration	27,912	24,879	23,496	20,823	19,240	18,359	-34
Economic crimes	2,498	2,187	1,900	1,550	1,575	1,327	-47
Firearms	783	706	618	532	421	426	-46
Sex offenses	70	83	105	118	105	110	57
Money laundering/racketeering/extortion	396	400	384	370	288	354	-11
Administration of justice offenses	185	177	164	171	157	112	-39
Robbery	41	25	32	23	15	23	-44
Assault	58	71	79	69	62	69	19
Homicide	8	6	8	11	17	22	175
Auto theft	13	10	3	14	11	3	-77

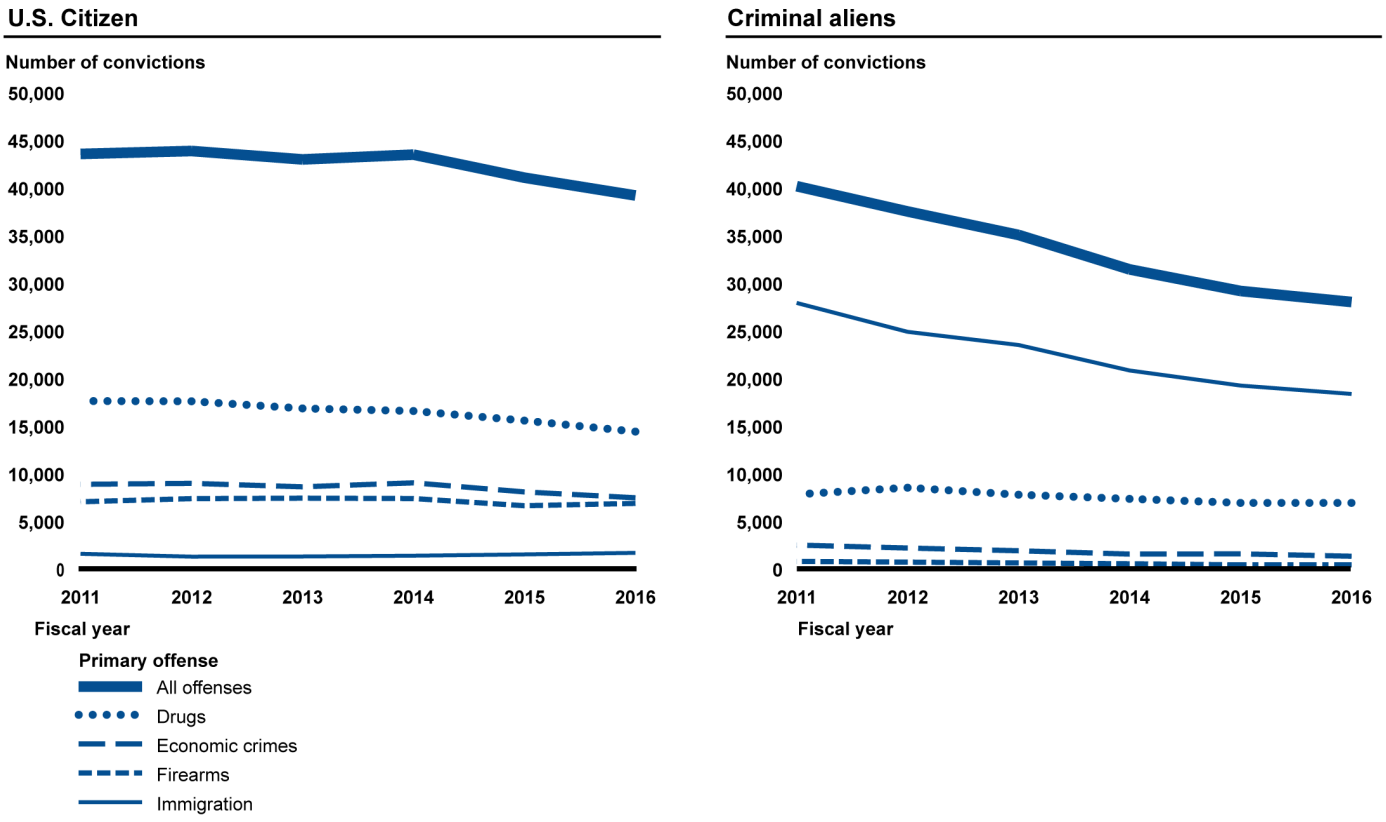
	2011	2012	2013	2014	2015	2016	5-year change
Arson	1	2	3	4	4	1	0
Kidnapping/hostage taking	44	24	12	20	21	2	-95
Burglary/breaking and entering	0	0	0	0	0	0	0
Other	332	424	460	380	327	278	-16
Total	**40,164**	**37,512**	**35,046**	**31,432**	**29,166**	**28,010**	**-30**

Source: GAO Analysis of U.S. Sentencing Commission data. | GAO-18-433

Note: U.S. Sentencing Commission data are limited to felony and Class A misdemeanor cases for offenders who are convicted and sentenced in the federal court system. These data do not include state cases, federal petty offenses, federal cases which result in all charges being dismissed or acquitted, federal death penalty cases, federal juvenile cases, or federal witness protection cases. They also do not include convicted offenders for whom no sentences were yet issued, offenders sentenced but for whom no sentencing documents were submitted to the Commission, and offenders sentenced prior to the enactment of the Sentencing Reform Act of 1984. See Pub. L. No. 98-473, ch. II, 98 Stat. 1837, 1987-2001 (1984). According to U.S. Sentencing Commission officials, data do include a small number of individuals that may have been fined or given probation instead of a federal prison sentence. Convictions that did not have information on offender's citizenship status were excluded. Information on the citizenship status of offenders is obtained from their presentence investigation report. The U.S. Sentencing Commission data on non-U.S. citizens includes data on "resident aliens", "illegal aliens", "extradited aliens" and "non-U.S. citizens, alien status unknown". For the purposes of this report, we refer to these individuals as criminal aliens. Data on primary offenses for which individuals may be convicted include attempts, conspiracies, and intents to commit crimes. For example, the U.S. Sentencing Commission's offense category of assault includes attempt to commit murder and assault with intent to murder; while the murder offense category includes a conspiracy to murder when there is a resulting death. The "other" category includes bribery, gambling/lottery, civil rights, prison offenses, environmental/wildlife, national defense, food and drug, and other miscellaneous offenses.

Primary offenses related to drugs, immigration, economic crimes, and firearms accounted for 87 percent of all federal convictions of individuals that were sentenced in fiscal year 2011 through fiscal year 2016. Figure 19 shows the trends for each of these primary offenses.

Figure 19: Primary Offenses for Which Individuals Were Convicted, for Offense Categories with the Greatest Number of Federal Convictions, by Citizenship, from Fiscal Years 2011 through 2016



Source: GAO analysis of U.S Sentencing Commission data. | GAO-18-433

Note: U.S. Sentencing Commission data are limited to felony and Class A misdemeanor cases for offenders who are convicted and sentenced in the federal court system. These data do not include state cases, federal petty offenses, federal cases which result in all charges being dismissed or acquitted, federal death penalty cases, federal juvenile cases, or federal witness protection cases. They also do not include convicted offenders for whom no sentences were yet issued, offenders sentenced but for whom no sentencing documents were submitted to the Commission, and offenders sentenced prior to the enactment of the Sentencing Reform Act of 1984. See Pub. L. No. 98-473, ch. II, 98 Stat. 1837, 1987-2001 (1984). According to U.S. Sentencing Commission officials, data do include a small number of individuals that may have been fined or given probation instead of a federal prison sentence. Convictions that did not have information on offender's citizenship status were excluded. Information on the citizenship status of offenders is obtained from their presentence investigation report. The U.S. Sentencing Commission data on non-U.S. citizens includes data on "resident aliens", "illegal aliens", "extradited aliens" and "non-U.S. citizens, alien status unknown". For the purposes of this report, we refer to these individuals as criminal aliens.

Appendix V: Individuals Convicted as a Result of International Terrorism-related Investigations

The Department of Justice's (DOJ) National Security Division (NSD) maintains a list of individuals with public and unsealed federal convictions resulting from international terrorism-related investigations conducted since September 11, 2001.[1] According to DOJ, the list includes both individuals convicted of crimes that DOJ considers to be directly related to international terrorism and individuals convicted of a variety of other crimes where the investigation, at the time of charging, appeared to involve an identified link to international terrorism.[2] According to the U.S. Attorney's Manual, U.S. Attorneys are to coordinate with the NSD on all investigations involving an identified link to international terrorism. According to DOJ officials, when such investigations result in a public and unsealed criminal conviction, the defendant's name and information about the charged crime and conviction, among other information, is added to the NSD list. According to DOJ, the NSD list does not include convictions related solely to domestic terrorism. We did not verify the connections to terrorism for individuals on the NSD list.

There are 250 individuals on the NSD list with convictions from March 19, 2010 through December 2016.[3] Of these, 196 individuals (or 78 percent)

[1]DOJ, *National Security Division Chart of Public/Unsealed Terrorism and Terrorism-Related Convictions, 9/11/01-12/31/16.* (Washington, D.C.: February 10, 2017). For the purposes of this report, we refer to this chart as the NSD list. According to the NSD, these investigations include investigations of terrorist acts planned or committed outside the territorial jurisdiction of the United States over which Federal criminal jurisdiction exists and investigations of terrorist acts planned or committed within the United States involving international terrorists and terrorist groups. Individuals whose convictions arose from the nationwide investigation conducted after the September 11, 2001 investigation were included on the list at that time, regardless of whether investigators developed or identified evidence that they had any connection to international terrorism. Since then, the NSD has added individuals to this list only if, at the time of charging, they appeared to have a connection to international terrorism, even if they were not charged with a terrorism offense. The decision to add defendants to the list is made on a case-by-case basis by career prosecutors in the NSD's Counterterrorism Section, whose primary responsibility is investigating and prosecuting international and domestic terrorism cases to prevent and disrupt acts of terrorism anywhere in the world that impact on significant United States interests and persons. According to the NSD, its list is distinct from statistics maintained by the Bureau of Prisons to track inmates with terrorist connections.

[2]In January 2018, DOJ and the Department of Homeland Security issued a report that included information about some individuals on the NSD list. Department of Homeland Security and Department of Justice, *Executive Order 13780: Protecting the Nation From Foreign Terrorist Entry Into the United States Initial Section 11 Report* (January 2018).

[3]In 2011, we reported information on the 399 individuals on the NSD list with convictions between September 2001 and March 18, 2010. See GAO*, Criminal Alien Statistics: Information on Incarcerations, Arrests, and Costs,* GAO-11-187 (Washington, D.C.: Mar. 24, 2011).

were convicted under statutes NSD considers directly related to international terrorism—regardless of the offense for which they were charged.[4] For example, some individuals on the NSD list were convicted of providing material support to designated terrorist organizations, which are designated by the Secretary of State and include, among others, Boko Haram, Hamas, al Qaeda, and the Revolutionary Armed Forces of Colombia.[5] We used data from the Bureau of Prisons, U.S. Sentencing Commission, U.S. Citizenship and Immigration Services, and U.S. Immigration and Customs Enforcement to determine the citizenship status of individuals convicted under statutes NSD considers directly related to international terrorism from March 2010 through December 2016 at the time of their conviction, as shown in table 15.[6]

[4]As defined by DOJ's NSD, criminal cases arising from international terrorism investigations are divided into two categories. The first category includes cases with charged violations of federal statutes that are directly related to international terrorism, regardless of the offense of conviction. These statutes prohibit terrorist acts abroad against U.S. nationals and providing material support to terrorists, among others. The second category includes cases charged with a variety of other statutes where the investigation involved an identified link to international terrorism. These include offenses such as those involving fraud, immigration, firearms, drugs, and perjury, among others.

[5]The Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General, has the authority to designate a foreign organization as a foreign terrorist organization. Designation allows the United States to impose legal consequences on the foreign terrorist organization or on individuals who support the foreign terrorist organization. See GAO, *Combating Terrorism: Foreign Terrorist Organization Designation Process and U.S. Agency Enforcement Actions,* GAO-15-629 (Washington, D.C.: June 25, 2015).

[6]We relied on the U.S. Sentencing Commission data to identify those aliens who were extradited to the United States for prosecution. We relied on U.S. Citizenship and Immigration Services data to identify naturalized citizens. We determined the citizenship status of the remaining individuals on the list using the totality of available data from these agencies.

Table 15: Citizenship Status of Individuals Convicted Under Statutes Directly Related to International Terrorism, March 2010 through December 2016

Citizenship status	Number of individuals convicted under statute directly related to terrorism	Percent
Alien	95	48
Extradited alien[a]	*31*	--
Other alien	*64*	--
U.S. citizen[b]	97	49
Naturalized U.S. citizen[c]	*24*	--
U.S. citizen, not naturalized	*73*	--
Unknown	4	2
Total[d]	**196**	**100**

Legend: -- = percent for sub-categories not provided

Source: GAO analysis of Bureau of Prisons, U.S. Sentencing Commission, U.S. Citizenship and Immigration Services (USCIS), and U.S. Immigration and Customs Enforcement data. | GAO-18-433

[a]We relied on U.S. Sentencing Commission data to identify aliens who were brought to the United States for prosecution.

[b]This category includes U.S. citizens who were born in the United States, derived U.S. citizenship, or were naturalized.

[c]We relied on USCIS data to identify naturalized citizens. All individuals identified as naturalized citizens in this table became U.S. citizens before they were charged with a crime related to international terrorism.

[d]Percentages may not add to 100 due to rounding.

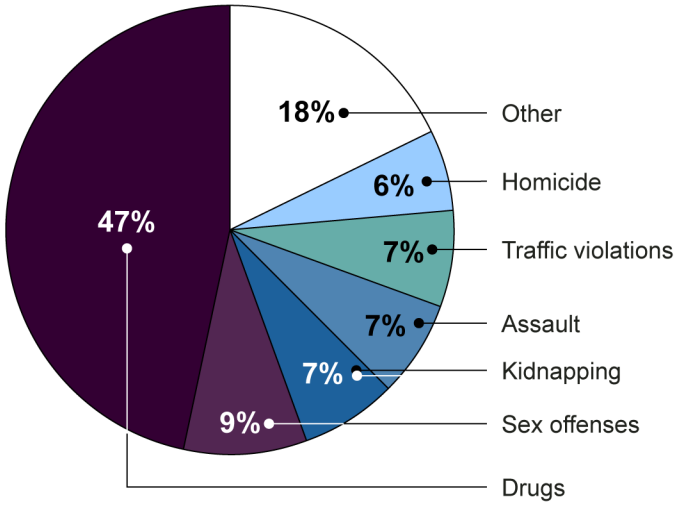
Of those 196 individuals with convictions directly related to international terrorism, 95 were aliens, including 31 aliens that were brought to the United States for prosecution. Of the individuals born outside of the United States—including aliens, extradited aliens, U.S. citizens, and individuals whose citizenship status is unknown but whose country of birth is known—convicted of statutes directly related to international terrorism, the highest number of convictions were from individuals born in Somalia (19 convictions), Pakistan (14 convictions), and Colombia (12 convictions).[7] No other country of birth outside of the United States had more than five individuals with convictions directly related to international terrorism.

[7]Some individuals born in these countries were extradited to the United States for prosecution, including those born in Somalia (3 individuals), Pakistan (4 individuals), and Colombia (10 individuals).

Appendix VI: Primary Offenses for Which Criminal Aliens Incarcerated in Selected State Prison Systems Were Convicted

Since there are no reliable data on criminal aliens incarcerated in all state prisons and local jails, we analyzed conviction data from the five state prison systems that had the largest number of State Criminal Alien Assistance Program (SCAAP) criminal alien incarcerations in fiscal year 2015.[1] Primary offenses for which SCAAP criminal aliens incarcerated in fiscal year 2015 were convicted varied across these selected state prison systems, as shown in figures 20 through 24.

Figure 20: Primary Offenses, Attempted or Committed, for Which State Criminal Alien Assistance Program (SCAAP) Criminal Aliens Incarcerated in Arizona's State Prison System in Fiscal Year 2015 Were Convicted

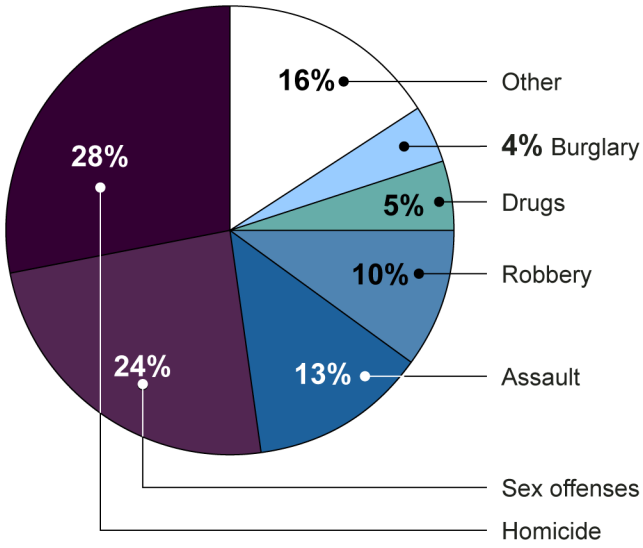


Source: GAO analysis of Arizona Department of Corrections data. | GAO-18-433

Note: Our analysis is of the primary offense per SCAAP criminal alien incarceration in fiscal year 2015; convictions may have occurred prior to this time period. The figure above includes over 6,300 primary offenses. "Other" includes primary offenses for robbery; burglary; fraud, forgery, and counterfeiting; larceny and theft; motor vehicle theft; obstruction of justice; immigration; stolen property; disorderly conduct; arson; property damage; and miscellaneous offenses. Each of these primary "other" offenses make up between 4.1 percent and .1 percent of all the offenses for which these aliens were convicted. Arizona Department of Corrections determined the primary offense by the sentence which has the controlling release date. Offenses for which individuals are convicted may include an attempt or conspiracy to commit the respective offense. We did not examine the extent to which state policies may have affected the number of individuals convicted of crimes.

[1]These data were the most recent data available. Collectively, these five state prison systems accounted for 64 percent of the SCAAP criminal alien incarcerations in state prisons during fiscal year 2015. This analysis included state prison systems that participated in SCAAP and did not include U.S. territories. State prison systems in Arkansas, West Virginia, Vermont, and the District of Columbia did not receive reimbursement for SCAAP criminal aliens incarcerated in fiscal year 2015.

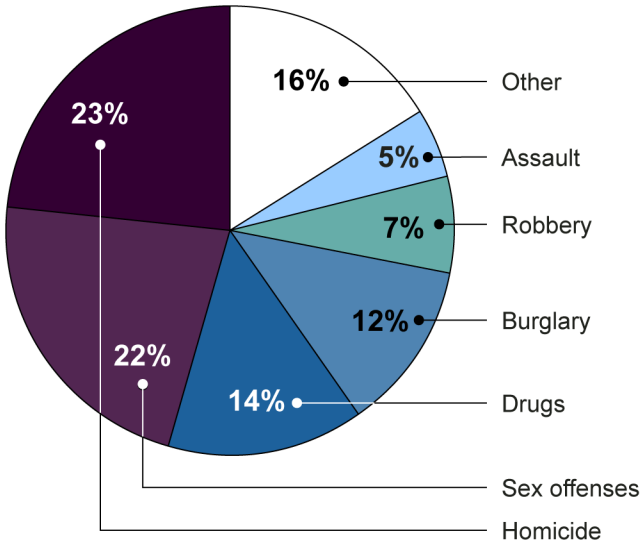
Figure 21: Primary Offenses, Attempted or Committed, for Which State Criminal Alien Assistance Program (SCAAP) Criminal Aliens Incarcerated in California's State Prison System in Fiscal Year 2015 Were Convicted



Source: GAO analysis of California Department of Corrections and Rehabilitation data. | GAO-18-433

Note: Our analysis is of the primary offense per SCAAP criminal alien incarceration in fiscal year 2015; these convictions may have occurred prior to this time period. The figure above includes over 18,600 primary offenses. "Other" includes primary offenses for larceny and theft; traffic violations; fraud, forgery, and counterfeiting; weapons violations; motor vehicle theft; obstruction of justice; stolen property; arson; property damage; and miscellaneous offenses. Each of these primary "other" offenses make up between 2.8 percent and .2 percent of all the offenses for which these aliens were convicted California Department of Corrections and Rehabilitation determines a primary offense based on the longest maximum sentence and/or offense severity. Offenses for which individuals are convicted may include an attempt or conspiracy to commit the respective offense. We did not examine the extent to which state policies may have affected the number of individuals convicted of crimes.

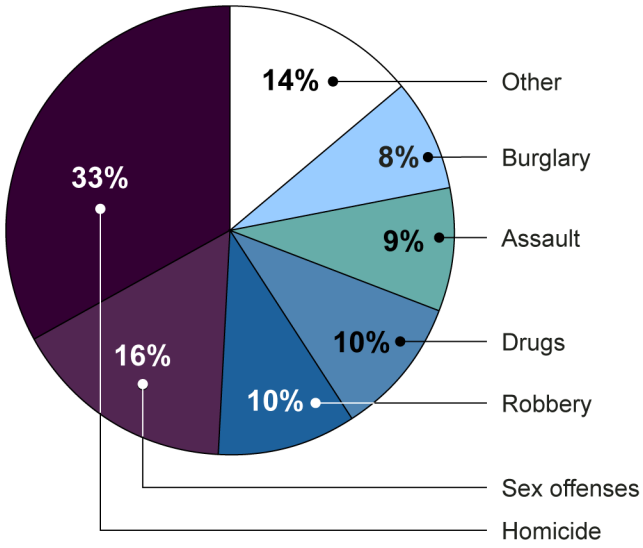
Figure 22: Primary Offenses, Attempted or Committed, for Which State Criminal Alien Assistance Program (SCAAP) Criminal Aliens Incarcerated in Florida's State Prison System in Fiscal Year 2015 Were Convicted



Source: GAO analysis of Florida Department of Corrections data. | GAO-18-433

Note: Our analysis is of the primary offense per SCAAP criminal alien incarceration in fiscal year 2015; these convictions may have occurred prior to this time period. The figure above includes nearly 6,300 primary offenses. "Other" includes primary offenses for motor vehicle theft; traffic violations; obstruction of justice; kidnapping; weapons violations; larceny and theft; property damage; fraud, forgery, and counterfeiting; stolen property; arson; and miscellaneous offenses. Each of these primary "other" offenses make up between 3.6 percent and .05 percent of all the offenses for which these aliens were convicted. Florida Department of Corrections defines a primary offense as the offense with the highest felony degree. If there multiple offenses with the same felony degree, the primary offense is the one with the longest sentence. If there are multiple offenses with the same felony degree and sentence length, the first offense listed on the commitment papers is the primary offense. Offenses for which individuals are convicted may include an attempt or conspiracy to commit the respective offense. We did not examine the extent to which state policies may have affected the number of individuals convicted of crimes.

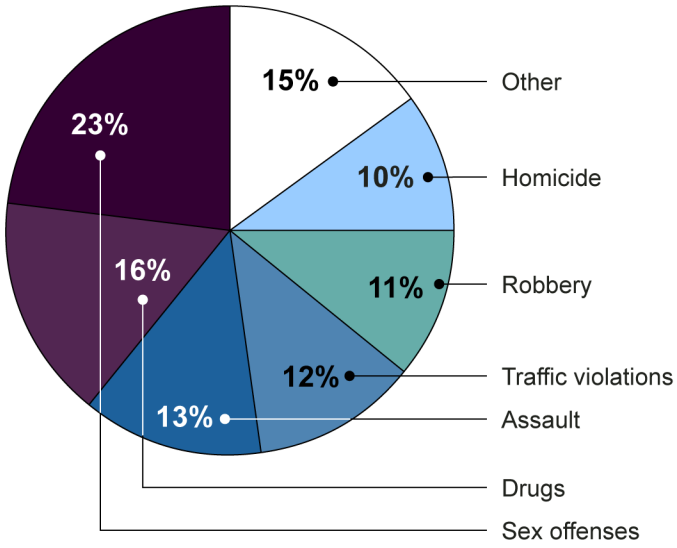
Figure 23: Primary Offenses, Attempted or Committed, for Which State Criminal Alien Assistance Program (SCAAP) Criminal Aliens Incarcerated in New York's State Prison System in Fiscal Year 2015 Were Convicted



Source: GAO analysis of New York State Department of Corrections and Community Supervision data. | GAO-18-433

Note: Our analysis is of the primary offense per SCAAP criminal alien incarceration in fiscal year 2015; these convictions may have occurred prior to this time period. The figure above includes nearly 3,400 primary offenses. "Other" includes primary offenses for weapons violations; kidnapping; larceny and theft; traffic violations; fraud, forgery, and counterfeiting; arson; stolen property; obstruction of justice; and miscellaneous offenses. Each of these primary "other" offenses make up between 4.2 percent and .2 percent of all the offenses for which these aliens were convicted. New York State Department of Corrections and Community Supervision defines a primary offense in almost all instances as the offense with the longest sentence. In some cases, a violent felony may become the primary offense even if the sentence for that crime is not the longest. Offenses for which individuals are convicted may include an attempt or conspiracy to commit the respective offense. We did not examine the extent to which state policies may have affected the number of individuals convicted of crimes.

Figure 24: Primary Offenses, Attempted or Committed, for Which State Criminal Alien Assistance Program (SCAAP) Criminal Aliens Incarcerated in Texas's State Prison System in Fiscal Year 2015 Were Convicted



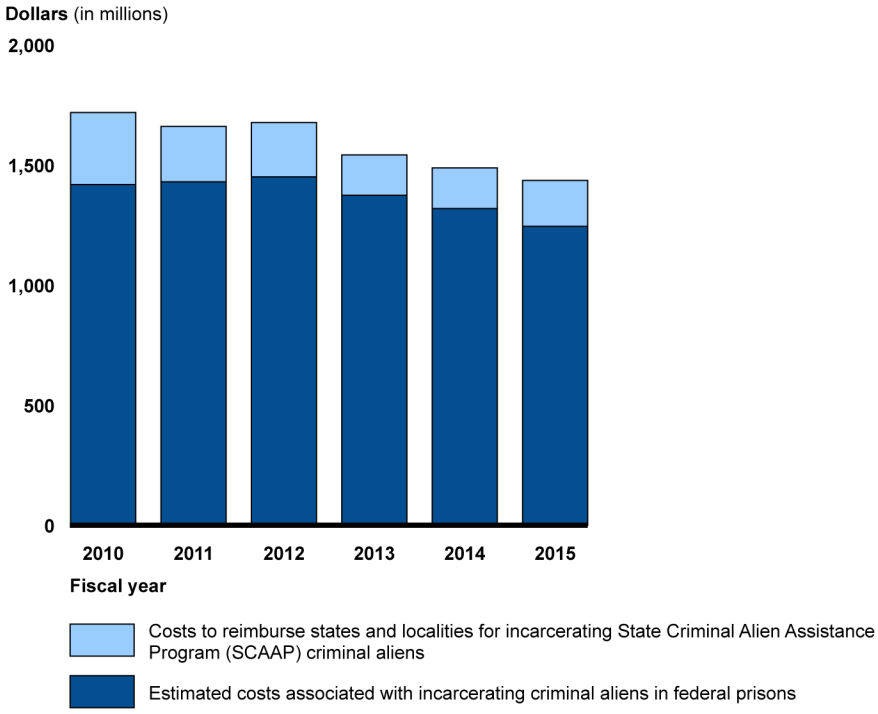
Source: GAO analysis of Texas Department of Criminal Justice data. | GAO-18-433

Note: Our analysis is of the primary offense per SCAAP criminal alien incarceration in fiscal year 2015; these convictions may have occurred prior to this time period. The figure above includes nearly 9,600 primary offenses. "Other" includes primary offenses for burglary; obstruction of justice; kidnapping; larceny and theft; fraud, forgery, and counterfeiting; weapons violations; motor vehicle theft; arson; property damage; stolen property; disorderly conduct; and miscellaneous offenses. Each of these primary "other" offenses make up between 5 percent and .01 percent of all the offenses for which these aliens were convicted. Texas Department of Criminal Justice defines the primary offense as the offense that keeps the offender incarcerated the longest if there is more than one current offense. Offenses for which individuals are convicted may include an attempt or conspiracy to commit the respective offense. We did not examine the extent to which state policies may have affected the number of individuals convicted of crimes.

Appendix VII: Estimated Costs to Incarcerate Criminal Aliens in Fiscal Year 2016 Dollars

This appendix provides cost data for the following: (1) estimated federal costs to incarcerate criminal aliens; (2) SCAAP reimbursements to states and localities, and (3) estimated selected operating costs to incarcerate state SCAAP criminal aliens in all 50 state prison systems from fiscal years 2010 through 2015. These cost data are presented in fiscal year 2016 dollars, as shown in figures 25 through 27.

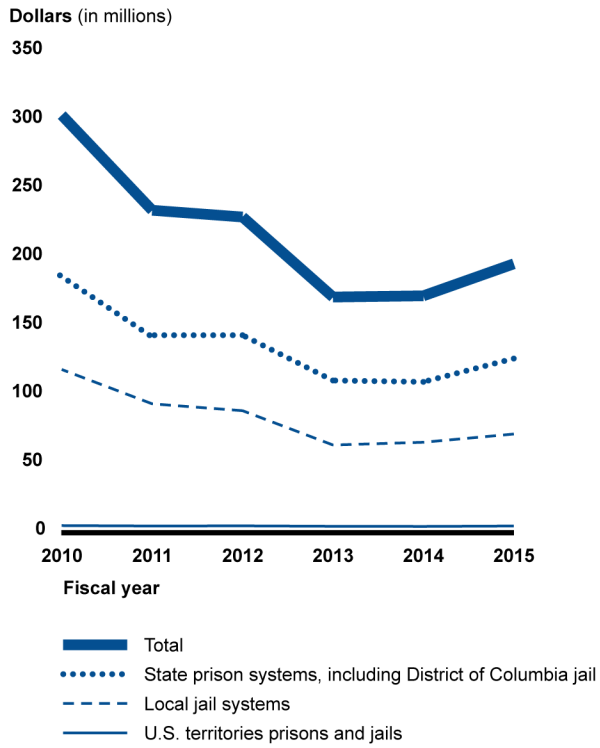
Figure 25: Estimated Federal Costs to Incarcerate Criminal Aliens from Fiscal Years 2010 through 2015 in Fiscal Year 2016 Dollars



Source: GAO analysis of Bureau of Prisons and Bureau of Justice Assistance data. | GAO-18-433

Note: Costs to reimburse states and localities are based on actual SCAAP reimbursements each year. Costs associated with incarcerating criminal aliens in federal prisons were estimated based on snapshot data representing an average of the 12 monthly population snapshots for each type of Bureau of Prisons institution, and Bureau of Prisons per capita costs.

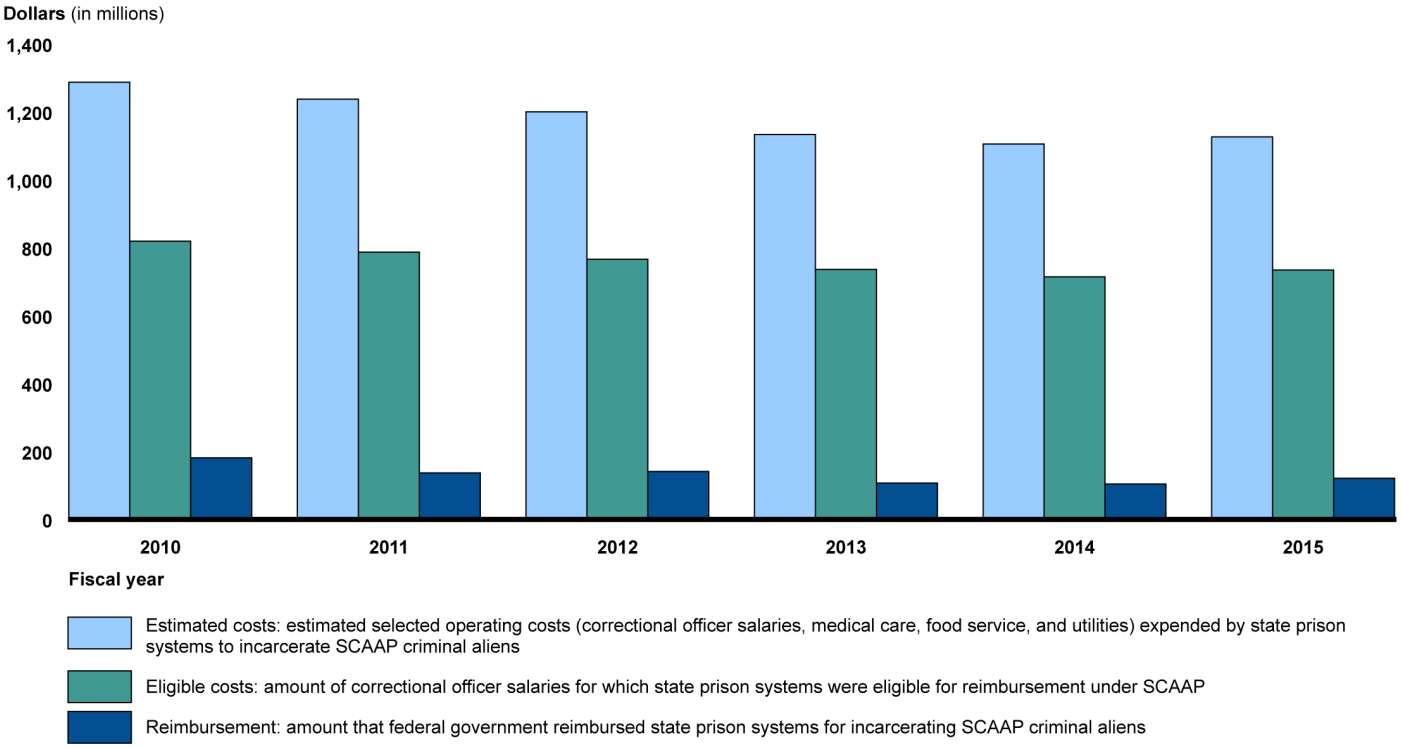
Figure 26: State Criminal Alien Assistance Program (SCAAP) Reimbursements to States and Localities from Fiscal Years 2010 through 2015 in Fiscal Year 2016 Dollars



Source: GAO analysis of Bureau of Justice Assistance data. | GAO-18-433

Note: Forty-seven state prison systems and four U.S. territories received SCAAP reimbursement in fiscal year 2015 compared to fifty state prison systems, including the District of Columbia, and four U.S. territories in fiscal year 2010. 760 local jail systems received reimbursement in fiscal year 2015 compared to 875 local jail systems in fiscal year 2010.

Figure 27: Estimated Selected Operating Costs to Incarcerate State Criminal Alien Assistance Program (SCAAP) Criminal Aliens in All 50 State Prison Systems from Fiscal Years 2010 through 2015 in Fiscal Year 2016 Dollars



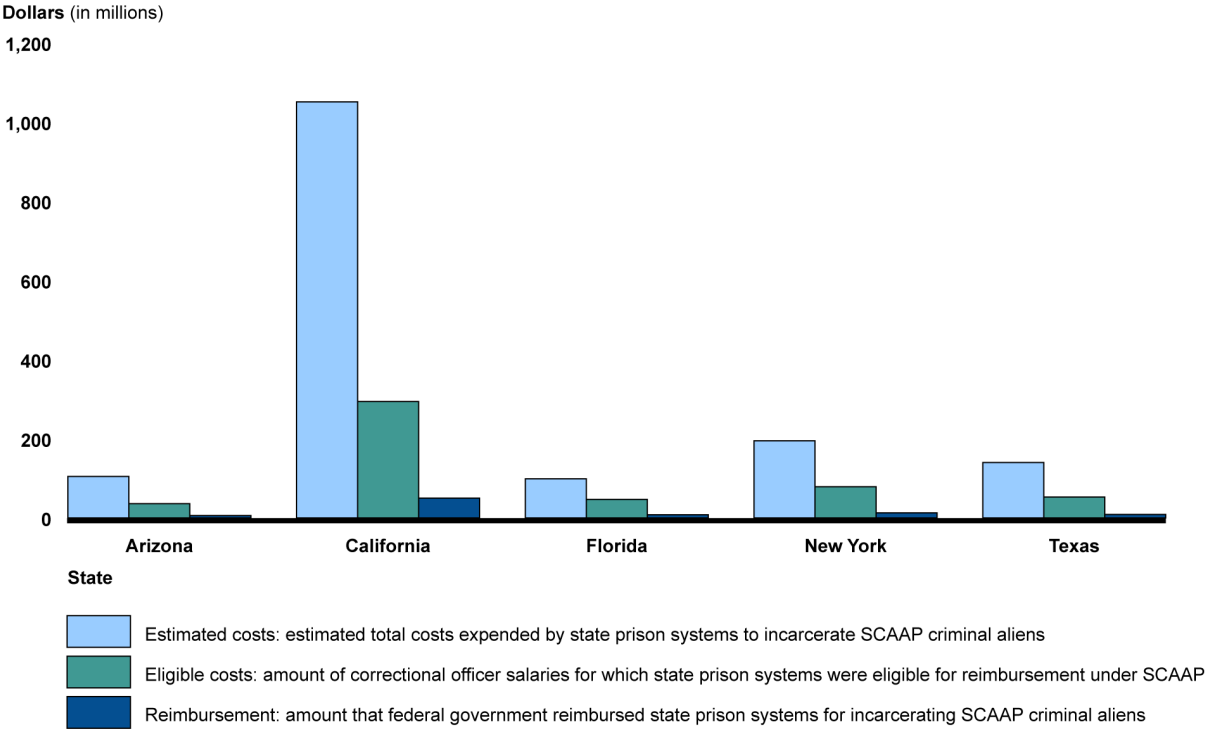
Source: GAO analysis of Bureau of Justice Statistics and Bureau of Justice Assistance data. | GAO-18-433

Note: SCAAP reimbursement figures may not equal appropriation due to rounding. Our analysis includes those state prison systems—including the District of Columbia jail— that received SCAAP reimbursement in the associated fiscal year. As a result, not all 50 state prison systems may be included in these estimates for each fiscal year.

Appendix VIII: Estimated Costs and Federal Reimbursements to Incarcerate Criminal Aliens in Selected States and Localities

Based on average daily cost data, we estimated the total costs expended by five selected state prion systems to incarcerate State Criminal Alien Assistance Program (SCAAP) criminal aliens in fiscal year 2015. Specifically, as shown in figure 28, the federal government reimbursed the state prison systems with the largest number of SCAAP criminal alien incarcerations—Arizona, California, Florida, New York, and Texas—only a portion of their estimated costs to incarcerate SCAAP criminal aliens in state prisons.[1]

Figure 28: Selected State Prison Systems' Estimated Costs and Federal Reimbursements to Incarcerate State Criminal Alien Assistance Program (SCAAP) Criminal Aliens in Fiscal Year 2015



Source: GAO analysis of Bureau of Justice Assistance data and Arizona Department of Corrections, California Department of Corrections and Rehabilitation, Florida Department of Corrections, New York State Department of Corrections and Community Supervision, and Texas Department of Criminal Justice data. | GAO-18-433

[1]We selected the five state prison systems with the highest number of SCAAP criminal alien incarcerations. Collectively, these state prison systems accounted for 64 percent of the SCAAP criminal alien incarcerations in state prisons during fiscal year 2015. These same state prison systems were selected in our April 2005 and March 2011 report. See GAO, *Criminal Alien Statistics: Information on Incarcerations, Arrests, and Costs,* GAO-11-187 (Washington, D.C.: Mar. 24, 2011); *Information on Criminal Aliens Incarcerated in Federal and State Prisons and Local Jails*, GAO-05-337R (Washington, D.C.: Apr. 7, 2005).

Note: SCAAP reimbursement figures may not equal the actual SCAAP awarded amount due to rounding.

Specifically, for these selected state prison systems, the federal government's reimbursement, which is only for a portion of correctional officer salaries, accounted for between 5 and 8 percent of the estimated costs associated with incarcerating SCAAP criminal aliens in fiscal year 2015.[2] We estimated the total costs that each of the five state prison systems expended to incarcerate SCAAP criminal aliens—based on their average daily costs—totaled about $1.6 billion in 2015, with California accounting for 66 percent of these costs. Of the estimated $1.6 billion, these five state prison systems were eligible to be reimbursed for about $509 million in correctional officer salaries under SCAAP. Based on available appropriations for SCAAP for fiscal year 2015, which reimbursed states and localities for 17 percent of eligible costs, the federal government reimbursed these state prison systems about $86.5 million of the approximately $509 million they were eligible to receive.

Based on average daily cost data, we estimated the total costs expended by five selected local jail systems to incarcerate SCAAP criminal aliens in fiscal year 2015. Specifically, as shown in figure 29, the federal government also reimbursed the local jail systems with the largest number of SCAAP criminal alien incarcerations—Maricopa County, Arizona; Orange County, California; Los Angeles County, California; Essex County, New Jersey; and Harris County, Texas—only a portion of their estimated expenditures to incarcerate SCAAP criminal aliens in local jails.[3]

[2]Our estimates of the total costs for incarcerating SCAAP criminal aliens in state prisons are based on each jurisdiction's average daily cost data and number of inmate days attributed to SCAAP criminal aliens. These average daily costs might not represent actual expenditures if expenditures on undocumented prisoners differ from expenditures in the average prison population.

[3]We selected the six local jail systems with the highest number of SCAAP criminal alien incarcerations. Collectively, these local jail systems accounted for 19 percent of the SCAAP criminal alien incarcerations in local jails during fiscal year 2015. These local jail systems were the same as the ones we selected in our April 2005 and March 2011 report with the exception of Essex County, New Jersey. Additionally, although New York City, New York was in the top six, we could not estimate total costs for this locality. Officials from this locality stated that they no longer apply for SCAAP funds, and they did not provide us an average daily cost per inmate.

Figure 29: Selected Local Jail Systems' Estimated Costs and Federal Reimbursements for Incarcerating State Criminal Alien Assistance Program (SCAAP) Criminal Aliens in Fiscal Year 2015

Source: GAO analysis of Bureau of Justice Assistance data and Essex County, New Jersey Department of Corrections, Los Angeles County, California, Sheriff's Department; Maricopa County, Arizona Sheriff's Office; Orange County, California Sheriff's Department; and Harris County, Texas Sheriff's Office data. | GAO-18-433

Note: SCAAP reimbursement figures may not equal the actual SCAAP awarded amount due to rounding.

Specifically, for these selected local jail systems, the federal government's reimbursement, which is only for a portion of correctional officer salaries, accounted for between 4 and 7 percent of the estimated costs associated with incarcerating SCAAP criminal aliens in fiscal year 2015.[4] We estimated the total costs that each of the five local jail systems expended to incarcerate SCAAP criminal aliens—based on their average daily costs—totaled about $198 million in fiscal year 2015, with Los

[4]Our estimates of the total costs for incarcerating SCAAP criminal aliens in local jails are based on each local jail system's average daily cost data and number of inmate days attributed to SCAAP criminal aliens. These average daily costs might not represent actual expenditures if expenditures on undocumented prisoners differ from expenditures in the average prison population.

Angeles, California accounting for 44 percent of these costs. Of the estimated $198 million, these five local jail systems were eligible to be reimbursed for about $66 million in correctional officer salaries under SCAAP. Based on available appropriations for SCAAP for fiscal year 2015 which reimbursed states and localities for 17 percent of eligible costs, the federal government reimbursed these local jail systems about $11.2 million of the approximately $66 million they were eligible to receive.

Appendix IX: Removals from the United States of Aliens Convicted of a Crime, Fiscal Years 2011 through 2016

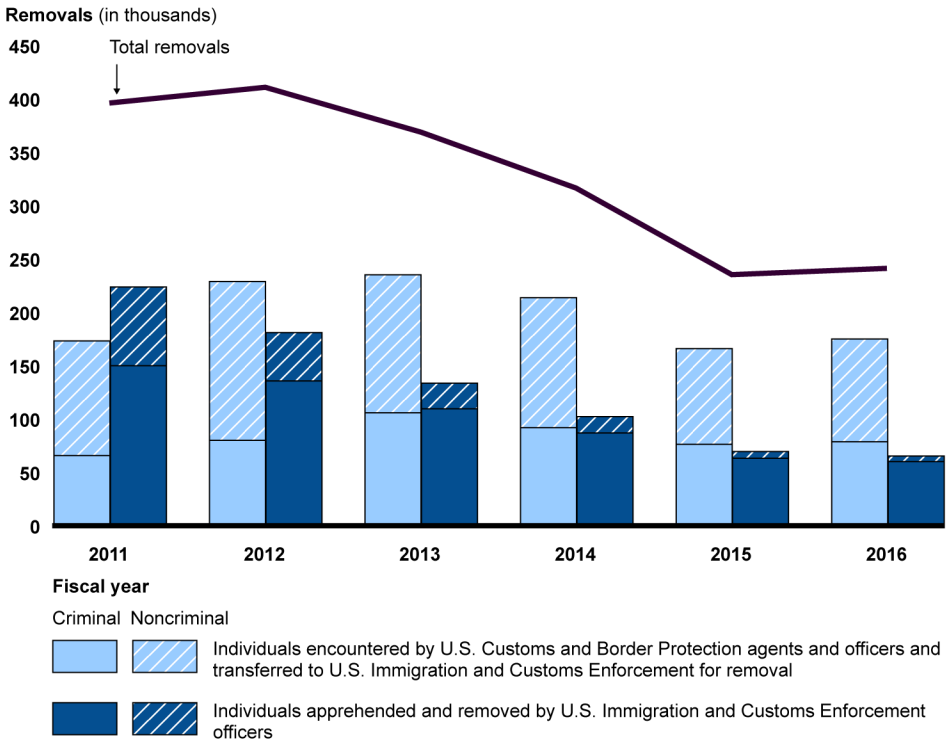
As of May 2016, U.S. Immigration and Customs Enforcement (ICE) reported that there were about 950,100 aliens with final orders of removal on ICE's docket, of which about 182,200, or 19 percent, were criminals.[1] ICE's removals of aliens include individuals apprehended by ICE officers and individuals encountered by U.S. Customs and Border Protection agents and officers that are transferred to ICE for removal from the United States. According to ICE data, between 53 and 59 percent of all aliens ICE removed each year from fiscal years 2011 through 2016 were criminal aliens.[2] The total number of criminal aliens ICE removed from the United States decreased in recent years–from about 216,000 in fiscal year 2011 to about 139,000 in fiscal year 2016. As illustrated in figure 30, the subset of these criminal aliens who were apprehended by ICE also decreased from fiscal years 2011 through 2016, from about 150,000 to about 60,000 removals. Of all aliens apprehended by ICE who were subsequently removed from the United States, the proportion of those

[1]ICE defines a criminal alien as an alien convicted of a crime, either within or outside of the United States. According to ICE, these figures include individuals who could not lawfully be removed due to certain protections afforded under the Immigration and Nationality Act, such as temporary protective status or withholding of removal; individuals who may be lawfully removed but who are no longer enforcement priorities; individuals who are enforcement priorities but who have been released under conditions (e.g., electronic monitoring, regular reporting requirements, bond) due to case-specific circumstances; and individuals who are enforcement priorities and are targeted for removal through ICE's increased at-large operations, such as fugitives with criminal convictions. These figures also include aliens whose removal ICE is coordinating and aliens whose departure ICE has been unable to confirm. Additionally, there are some countries that do not cooperate with the U.S. government in accepting the return of their citizens who have final removal orders from the United States. Thomas Homan, Enforcement and Removal Operations, U.S. Immigration and Customs Enforcement, response to questions for the record from the Senate Committee on the Judiciary, Subcommittee on Immigration and the National Interest regarding the hearing, *Declining Deportations and Increasing Criminal Alien Releases–The Lawless Immigration Policies of the Obama Administration*, 114th Cong., 2nd sess., May 19, 2016.

[2]These data are reported by ICE in its annual *ICE Enforcement and Removal Operations Report* and includes removals administered by ICE. ICE's removal data differs from the removal data reported by DHS's Office of Immigration Statistics in its *Yearbook of Immigration Statistics* and *Annual Report on Immigration Enforcement Actions* because the DHS reports include removals administered by U.S. Customs and Border Protection. In addition, according to DHS, the removal and return numbers in these reports are estimates, largely because U.S. Customs and Border Protection records indicate which aliens the agency intends to remove and do not have explicit records of its removals. DHS's *Annual Report on Immigration Enforcement Actions* reported approximately 340,100 total removals for fiscal year 2016. Of those, ICE removed approximately 228,200 individuals, U.S. Border Patrol removed approximately 85,000 individuals, and U.S. Customs and Border Protection Office of Field Operations removed approximately 26,100 individuals.

aliens who were criminal aliens increased each year, from 67 percent in 2011 to 92 percent in 2016.

Figure 30: U.S. Immigration and Customs Enforcement's Removals from the United States, Fiscal Years 2011 through 2016



Source: GAO analysis of U.S. Immigration and Customs Enforcement data. | GAO-18-433

Note: ICE defines a criminal alien as an alien convicted of a crime, either within or outside of the United States.

Appendix X: Comments from the Department of Justice

U.S. Department of Justice

Washington, D.C. 20530

July 12, 2018

Gretta L. Goodwin, Ph.D.
Director, Justice and Law Enforcement Issues
Homeland Security and Justice Team
U.S. Government Accountability Office
441 G Street N.W.
Washington, DC 20548

Dear Dr. Goodwin:

Thank you for the opportunity to review and comment on your draft report titled "*Criminal Alien Statistics: Information on Incarcerations, Arrests, Convictions, Costs, and Removals* (GAO-18-433). In this report, the Government Accountability Office (GAO) presented a number of statistics regarding the apprehension, arrest, prosecution, and incarceration of aliens who committed crimes.

The Department of Justice (DOJ) appreciates the GAO's work to provide additional information on incarcerations, arrests, convictions, costs, and removals of criminal aliens. However, we explain, below, why some of the statistics cited could be misinterpreted or misunderstood by those who read the report.

Although the use of data from the State Criminal Alien Assistance Program (SCAAP) provides some insight into the level of criminality of aliens at the state and local level, as the draft report we reviewed indicates in a few locations, SCAAP information is generally not a reliable indicator of the total criminality levels of aliens at the state and local level. Our concern is that the draft report—while appropriately qualifying data throughout—does not highlight early enough in the report the limitations on using SCAAP information to avoid misinterpretation or misunderstanding by recipients of the report.

For one, the very definitional provisions of covered aliens employed in the SCAAP program leave out large numbers of criminal aliens. *See* 8 U.S.C. § 1231(i)(3)(B) (defining a covered alien as one who "has been convicted of a felony or two or more misdemeanors" and who either entered the United States unlawfully, was subject to ongoing immigration proceedings when taken into state or local custody, or who was admitted on a nonimmigrant visa but failed to maintain or comply with the conditions of their admission). Further, as GAO noted in the report, SCAAP data "does not include (a) aliens incarcerated in states or localities that did not apply for and receive federal reimbursement for costs of incarceration and (b) aliens with lawful immigration status who were not eligible for removal proceedings at the time they were taken into custody." U.S. Government Accountability Office, GAO-18-433, Criminal Alien Statistics: Information on Incarcerations, Arrests, Convictions, Costs, and Removals at 14 (2018). It is

clear that this definition excludes potential large numbers of crimes committed by aliens at the state and local level—such as an alien who has been convicted of one serious misdemeanor such as Driving Under the Influence.

Similarly, citations to reduced costs associated with the program on an annual basis, or to declines in the total SCAAP population, do not accurately reflect the total criminality level of aliens at the state and local level. The draft report we reviewed contained appropriate qualifications—such as footnote 43 on page 14—but such qualifications would be more appropriately highlighted in a different manner to ensure that an individual reading the report does not misinterpret or misunderstand the data.

Conclusion

Thank you again for the opportunity to review and comment on this report. We look forward to working with the GAO and continuing to build on our successful relationship. Furthermore, we encourage the GAO to make the effort to explain accurately to others the inferences that might be drawn from this report regarding the numbers of criminal aliens in the law enforcement system.

Sincerely,

Michael H. Allen

for Lee J. Lofthus
Assistant Attorney general
for Administration

Appendix XI: GAO Contact and Staff Acknowledgments

GAO Contact

Gretta L. Goodwin, (202) 512-8777 or goodwing@gao.gov

Staff Acknowledgments

In addition to the contact named above, Meg Ullengren (Assistant Director), Tracey Cross (Analyst-in-Charge), Brian Lipman, Mary Pitts, Cindy Ayers, April Yeaney, Adam Vogt, Jan Montgomery, Heidi Nielson, Hiwotte Amare, Pamela Davidson, Lilia Chaidez, Jim Ashley, Khristi Wilkins, and Eric Hauswirth made key contributions to this work.

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U.S. Department of Justice
Office of Information Policy
441 G Street, NW
Sixth Floor
Washington, DC 20530

Telephone: (202) 514-3642

April 1, 2021

Austin Evers
American Oversight
1030 15th Street, NW
Suite B255
Washington, DC 20005
FOIA@americanoversight.org

Re: DOJ-2018-006172
18-cv-2846 (D.D.C.)
VRB:TAZ:JMS

Dear Austin Evers:

This is an interim response to your Freedom of Information Act (FOIA) request, dated and received in this Office on June 20, 2018, in which you requested email records containing specified search terms and search combinations, dating from March 6, 2017. This response is made on behalf of the Offices of the Attorney General (OAG) and Legal Policy (OLP).

As we previously advised, a search has been conducted on behalf of OAG and OLP. By letters dated May 31 and June 30, 2020, we advised that we processed potentially responsive material, that the material initially found to be responsive was sent out on consultation, and that we would respond to you after the consultation process was complete. For your information, the consultation process to which we referred in those responses is now complete. As a result, I have determined that 239 pages are appropriate for release with certain information withheld pursuant to Exemption 5 of the FOIA, 5 U.S.C. §552(b)(5), and copies are enclosed. Additionally, 353 pages containing records responsive to your request are being withheld in full pursuant to Exemption 5 of the FOIA, 5 U.S.C. §552(b)(5). Exemption 5 pertains to certain inter- and intra-agency communications protected by civil discovery privileges. Please note that pages 230-237 of the attached consist of a transcript of a hearing before the Senate Committee on the Judiciary. In an attempt to be helpful, we have provided only portions of the transcript relevant to your request. To the extent that you wish to view the entire hearing, it is publicly available at: https://www.judiciary.senate.gov/meetings/10/18/2017/oversight-of-the-us-department-of-justice .

Additionally, we advised you by letters dated July 31, August 31, September 30, and October 31, 2020, that we processed potentially responsive material, that material initially found to be responsive was sent out on consultation, and that we would respond to you after the consultation process was complete. For your information, the consultation process to which we referred in those responses is still ongoing. Consistent with the February 5, 2021 Joint Status Report, see ECF No. 42, we will provide responses as the consultation process for each outstanding batch is complete.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c) (2018). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

If you have any questions regarding this response, please contact Kristin Brudy-Everett of the United States Attorney's Office for the District of Columbia, at (202) 252-2536.

Sincerely,

Vanessa R. Brinkmann
Senior Counsel

Enclosures

Refugee Council USA

1628 16th Street, NW
Washington, DC 20009
tel: 202.319.2102
fax: 202.319.2104
www.rcusa.org

June 28, 2017

The Honorable John F. Kelly
Secretary of Homeland Security
Office of the Secretary
Washington, DC 20528

The Honorable Rex Tillerson
Secretary of State
Office of the Secretary
Washington, DC 20520

Dear Secretary Kelly and Secretary Tillerson:

On behalf of Refugee Council USA (RCUSA), a coalition dedicated to refugee protection and welcome, representing the interests of hundreds of thousands of refugees and millions of supporters and volunteers across the country, I write to share our collective recommendations in response to this week's Supreme Court announcement regarding the implementation of Executive Order 13780 (*Realignment of the U.S. Refugee Admissions Program for Fiscal Year 2017*).

The Court granted a partial stay on the injunctions that had placed key parts of the Administration's travel ban on hold. Because the Court's decision is narrow in its application -- applying only to foreign nationals who cannot claim a "bona fide relationship with a person or entity in the United States" -- we trust that the Administration's implementation efforts will reflect the significant "bona fide relationships" that already exist for refugees waiting to come to the United States.

The Supreme Court Order provided guidance as to the meaning of a "bona fide relationship" with a person, noting that this would include relatives such as a mother-in-law, extending beyond the nuclear family. The Order stated that a bona fide relationship with an entity should be "formal, documented, and formed in the ordinary course, rather than for the purpose of evading EO–2."

By the time they have been assigned case numbers by the U.S. Refugee Admissions Program (USRAP), each refugee has established a "bona fide relationship" with a U.S. Refugee Admissions Program Resettlement Support Center (RSC). Such relationship may be entered into only after the applicant has established that he or she has ties to the United States. The USRAP is "by invitation only" based on ties to United States interests. Under the Supreme Court Order, refugee applicants who qualify for a processing priority should continue to have access to refugee resettlement.

For most refugees, these "bona fide relationships" run even deeper than the ties to the RSC. They may include ties to U.S.-based voluntary resettlement agencies, faith-based groups and other communities that have committed to co-sponsor refugees, as well as U.S.-based attorneys or legal assistance organizations. The majority of refugee applicants have family links to the United States as well, links which are included in their case file.

Additional examples of refugee applicants in the U.S. Refugee Admissions Program who have even deeper "bona fide" relationships with people and/or entities in the United States, include:

- By definition, all P3, 1-730, and Visa 93 refugee applicants are eligible to apply to the USRAP due to their relationship with family members in the United States.

- P2 groups like the Direct Access Program (DAP) eligibility for Iraqis includes 6 categories establishing ties to the United States based on work for the US government or a US-based entity or family connections with individuals in the United States. DAP eligibility for Syrians includes Syrian nationals with an approved I-130 petition. Religious minorities from the former Soviet bloc and Iran must have "anchors" in the United States to apply for the program, and children from Central America must have lawfully present parents in the United States

While the Court's decision should allow refugees to continue to arrive, we also call on the Departments of State and Homeland Security to implement the Executive Order's case-by-case waiver provisions. The Administration should ensure that there is a clear interagency procedure in place to make use of these exemptions in order to protect vulnerable refugees who may need them.

In addition, we request a blanket waiver be made for unaccompanied refugee minors, apart from any pre-existing relationship with an individual or entity, such as foster care parents. This population of extraordinarily vulnerable refugee children, who have lost or been separated from their parents, often have no other options. As a result, they should not be left in harm's way.

Finally, we urge you to conduct your review of security vetting in refugee processing with two overarching goals in mind: maintaining a robust refugee admissions program and keeping the U.S. safe. We encourage the Administration to evaluate existing security procedures immediately, and to conclude a review as swiftly as possible to prevent further uncertainty and hardship for refugee families waiting overseas. We urge that any inefficiencies in the security vetting process be addressed, and that processes be improved to allow applicants a meaningful opportunity to identify and correct erroneous security information that unjustly bars refugees from the program. We also ask that any review include civil society and refugee service organizations with expertise in refugee processing. We believe it is vital to utilize the full expertise of the existing resettlement program when conducting such an important evaluation.

We thank you for taking our recommendations under consideration. Naomi Steinberg, Director of RCUSA, is our point of contact for further information. Her e-mail address is: nsteinberg@rcusa.org, and her phone number is: 202-319-2103.

Sincerely,

Hans Van de Weerd
Chair, Refugee Council USA

Enclosure: RCUSA USRAP Review Principles Letter

Cc: Simon Henshaw, Acting Assistant Secretary and Principal Deputy Assistant, Population, Refugees, and Migration, U.S. Department of State

Mark Storella, Deputy Assistant Secretary, Population, Refugees, and Migration, U.S. Department of State

Larry Bartlett, Director of Refugee Admissions, U.S. Department of State

Admiral Garry E. Hall, Special Assistant to the President and Senior Director for International Organizations and Alliances, National Security Council

Zina Bash, Special Assistant to the President

Dan Coats, Director of National Intelligence

DRAFT

Ting Xue, a committed Christian, is a refugee who fled from religious persecution in his native China. He now lives in Denver with his wife, a lawful permanent resident who likewise hails from China, and their young daughter. Xue has a job, pays taxes, and is active in a local evangelical church. But if the federal government has its way, Xue will soon be separated from his young family and sent back to China. He is fighting hard for his freedom.

Ting Xue's story is a living parable that reveals a deeply-troubling truth: For years, the federal government has routinely denied claims, such as Ting Xue's, for asylum. That mean-spirited practice results from the steely determination of a cadre of immigration law judges, who wield enormous power over life and limb, to deny claims for asylum and dispatch individuals back to face the tender mercies of their countries of origin. Appointed by the Attorney General, these 300 judges across the country do so by erecting a virtually unsurmountable barrier for an asylum claimant, such as Xue, who seeks to demonstrate the pivotal requirement of a "well-founded fear of persecution" based on religion. That's the legal key that unlocks the door to freedom in the United States.

The facts in Ting Xue's case are clear and undisputed. Xue grew up in a Christian family in China, was baptized at the age of 12, and long active in an underground church in his community. As a young adult, in addition to Sunday worship services, Xue faithfully attended Friday evening fellowship gatherings, which moved from house to house in order to avoid detection. On one fateful Friday evening, however, police entered the venue du jour and arrested the attendees who were peacefully reading the Bible, singing hymns and enjoying Christian fellowship.

Along with his fellow worshipers, Xue was hauled to a local police station, interrogated by three officers, roughed up when he claimed not to know who the "leaders" of the underground church were, and then locked up in a windowless jail cell with four fellow believers for three days and four nights. The conditions were despicable one straw mattress for five prisoners, a single bucket for their toilet, and a bowl of porridge twice a day. The prisoners were mocked, particularly when they prayed together before their simple meals. Jailers taunted them with cries of "We are your God," and "pray to your Jesus to rescue you."

Before his release from police custody, Xue was forced to sign a pledge that he would never attend the underground church again. He was also warned that a second offense would carry a harsh punishment. For good measure, his jailers ordered him to show up at the police station weekly for ideological education. Xue signed the pledge, but violated it two weeks later. He returned to the underground church, but grudgingly abided by the command to appear for his weekly dose of Communist ideology: Love your country, work hard, and cease assembling in the name of Jesus.

Two months later, police again intruded into the Friday evening gathering of young adults, arrested everyone, and sent several of Xue's colleagues to prison for one-year terms. Working overtime at his job on that Friday evening, Xue was spared, but his family determined that he needed to go away. With funds raised by his uncles, Xue left China and entered the United States illegally. He was soon apprehended by U.S. immigration authorities, when he claimed the right to remain in the United States as a refugee fleeing religious persecution.

Under federal law, to remain in the country, asylum claimants must establish a "well-founded fear of persecution" on grounds of religious or political belief and practice were they deported back to their country of origin. Responding to Xue's undisputed portrayal of his own plight, an immigration law judge in Denver concluded that his story (which the judge fully credited) showed merely a restriction in his freedom, but that the conditions he likely faced upon return did not rise to the level of "persecution." As the judge saw it, all Xue needed to do to avoid running afoul of the anti-faith zealots in China was to worship in secret.

This wildly wrongheaded decision was not only upheld by the Board of Immigration Appeals, likewise appointed by the Attorney General, but by a unanimous three-judge panel of the federal appeals court sitting in Denver. As matters stand, Xue's last hope is to get relief from the Supreme Court, which will consider his petition for review early this coming fall. Many faith-community organizations have rallied around to support Xue's position as a matter of law and human decency.

For years, Xue's tragic situation has been replicated throughout America's broken asylum adjudicatory system. Time and again, asylum claimants from around the world are told to go home. All they need to do, they are informed, is to hide their faith or their politics. Stop practicing and professing in any community or public setting, even in an underground church or political setting, and you'll be fine. Just keep silent.

Time and again, federal judges have rejected this widespread bureaucratic approach to asylum claims. In a brilliant opinion a few years ago, Judge Richard Posner reminded immigration judges: "Christians living in the Roman Empire before Constantine made Christianity the empire's official religion faced little risk of being thrown to the lions if they practiced their religion in secret; it doesn't follow that Rome did not persecute Christians…" Posner went on to observe: "One aim of persecuting a religion is to drive its adherents underground in the hope that their beliefs will not infect the remaining population."

Just so. China is pre-Constantine Rome, minus the lions. But persecution is nonetheless widespread and growing. As Sarah Cook demonstrates in an impressive book, The Battle for China's Spirit, controls over religion in China have been on the rise since 2012, seeping into new areas of daily life. Xi Jinping is at the vanguard of this new wave of official repression. He makes nice with President Trump at Mar a Lago, but party minions back home fully understand his anti-liberty, militantly-secularist message about Christians. Here's what Xi Jinping said in April of last year: "Communist Party Cadres must be unyielding Marxist Atheists. We should guide and educate the religious circle and their followers."

"Guidance and education" means prison for increasing numbers of believers in China, and the courageous lawyers who represent them. Freedom House researchers have identified hundreds of cases of Chinese citizens sentenced to prison for exercising their basic human rights guaranteed by the Universal Declaration of Human Rights. Former prisoners have detailed a shocking array of cruel beatings, long-term shackling, electric baton shocks and injection with unknown drugs. That's the China of Xi Jinping.

So what is to be done here at home?

For Xue, his fate now rests in the hands of the Supreme Court. The Court can and should bring clarity to the law, particularly the meaning of the all-important term, "persecution," a word that Congress left undefined. But more broadly, this evil manifestation of the "deep state" provides the still-new

Administration with an opportunity to bring about humane and sensible reform. Start with the immigration law judges. Unlike federal judges, they are subject to the command and control of the Attorney General. Ironically, the Attorney General needs to take a page from the repressive Xi Jinping and "guide and educate" the Department's immigration judges, followed by the Board of Immigration Appeals. They all need retraining-- now. And the Justice Department's Civil Division needs to stop defending the indefensible. "Confessing error" in Ting Xue's sad case would be a good start. The Solicitor General should say, in the spirit of Fiorello LaGuardia, "When we make a mistake, it's a beaut." More generally, President Trump should not do what his predecessors, both Democrat and Republican, allowed their Attorneys General to do.

As her guiding philosophy, Margaret Thatcher was wont to say: "Keep the best, reform the rest." Reform of the administration of America's asylum laws is long overdue. It's a worthy and noble cause for Attorney General Jeff Sessions to pursue, and for the nation's Chief Executive to embrace.

State of California

Office of the Attorney General

XAVIER BECERRA
ATTORNEY GENERAL

July 21, 2017

The Honorable Donald J. Trump
President of the United States
The White House
1600 Pennsylvania Avenue, N.W.
Washington, DC 20500

RE: June 29, 2017 letter from Ken Paxton re *Texas, et al., v. United States, et al.*, Case No. 1:14-cv-00254 (S.D. Tex.)

Dear Mr. President:

We write to urge you to maintain and defend the Deferred Action for Childhood Arrivals program, or DACA, which represents a success story for the more than three-quarters of a million "Dreamers" who are currently registered for it. It has also been a boon to the communities, universities, and employers with which these Dreamers are connected, and for the American economy as a whole.

Since 2012, nearly 800,000 young immigrants who were brought to this country as children have been granted DACA after completing applications, submitting to and passing a background check, and applying for a work permit. In the case of young adults granted DACA, they are among our newest soldiers, college graduates, nurses and first responders. They are our neighbors, coworkers, students and community and church leaders. And they are boosting the economies and communities of our states every day. In fact, receiving DACA has increased recipients' hourly wages by an average of 42 percent[1] and given them the purchasing power to buy homes, cars and other goods and services, which drives economic growth for all.[2]

In addition to strengthening our states and country, DACA gives these bright, driven young people the peace of mind and stability to earn a college degree and to seek employment that matches their education and training. The protection afforded by

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DACA gives them dignity and the ability to fully pursue the American dream. For many, the United States is the only country they have ever known.

The consequences of rescinding DACA would be severe, not just for the hundreds of thousands of young people who rely on the program and for their employers, schools, universities, and families but for the country's economy as a whole. For example, in addition to lost tax revenue, American businesses would face billions in turnover costs, as employers would lose qualified workers whom they have trained and in whom they have invested.[3] And as the chief law officers of our respective states, we strongly believe that DACA has made our communities safer, enabling these young people to report crimes to police without fear of deportation.

You have repeatedly expressed your support for Dreamers. Today, we join together to urge you not to capitulate to the demands Texas and nine other states set forth in their June 29, 2017, letter to Attorney General Jeff Sessions. That letter demands, under threat of litigation, that your Administration end the DACA initiative. The arguments set forth in that letter are wrong as a matter of law and policy.

There is broad consensus that the young people who qualify for DACA should not be prioritized for deportation. DACA is consistent with a long pattern of presidential exercises of prosecutorial discretion that targeted resources in a constitutional manner. Indeed, as Justice Antonin Scalia recognized in a 1999 opinion, the Executive has a long history of "engaging in a regular practice . . . of exercising [deferred action] for humanitarian reasons or simply for its own convenience." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84 (1999). DACA sensibly guides immigration officials' exercise of their enforcement discretion and reserves limited resources to address individuals who threaten our communities, not those who contribute greatly to them.

Challenges have been brought against the original DACA program, including in the Fifth Circuit, but none have succeeded. On the other hand, in a case relating to Arizona's efforts to deny drivers' licenses to DACA recipients, the Ninth Circuit stated that it is "well settled that the [DHS] Secretary can exercise deferred action." *Ariz. Dream Act Coalition v. Brewer*, 855 F.3d 957, 967-968 (9th Cir. 2017). The court also observed that "several prior administrations have adopted programs, like DACA, to prioritize which noncitizens to remove." *Id.* at 976.[4]

As the Fifth Circuit was careful to point out in its ruling in the *Texas* case, the Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA")

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initiative that was struck down is "similar" but "not identical" to DACA. *Texas v. United States*, 809 F.3d 134, 174 (5th Cir. 2015). Indeed, as DHS Secretary Kelly pointed out in a press conference the day after his June 15 memorandum explaining that DACA would continue, DACA and DAPA are "two separate issues," appropriately noting the different populations addressed by each program. Notably, only a fraction of the 25 states which joined with Texas in the DAPA case before the Supreme Court chose to co-sign the letter threatening to challenge DACA.

Among other significant differences, DACA has been operative since 2012 while DAPA never went into effect. More than three-quarters of a million young people, and their employers, among others, have concretely benefitted from DACA, for up to five years. The interests of these young people in continuing to participate in DACA and retain the benefits that flow from DACA raise particular concerns not implicated in the pre-implementation challenge to DAPA. Further, the Fifth Circuit placed legal significance on the "economic and political magnitude" of the large number of immigrants who were affected by DAPA, *Texas*, 809 F.3d at 181; thus, it is notable that many fewer people have received DACA (about 800,000) than would have been eligible for DAPA (up to 4.3 million).

One additional, but related, issue concerns DHS's current practices regarding DACA recipients. A number of troubling incidents in recent months raise serious concerns over whether DHS agents are adhering to DACA guidelines and your repeated public assurances that DACA-eligible individuals are not targets for arrest and deportation. We urge you to ensure compliance with DACA and consistent enforcement practices towards Dreamers.

Mr. President, now is the time to affirm the commitment you made, both to the "incredible kids" who benefit from DACA and to their families and our communities, to handle this issue "with heart." You said Dreamers should "rest easy." We urge you to affirm America's values and tradition as a nation of immigrants and make clear that you will not only continue DACA, but that you will defend it. The cost of not doing so would be too high for America, the economy, and for these young people. For these reasons, we urge you to maintain and defend DACA, and we stand in support of the effort to defend DACA by all appropriate means.

Sincerely,

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Since 2012, nearly 800,000 young immigrants who were brought to this country as children have been granted DACA after completing applications, submitting to and passing a background check, and applying for a work permit. In the case of young adults granted DACA, they are among our newest soldiers, college graduates, nurses and first responders. They are our neighbors, coworkers, students and community and church leaders. And they are boosting the economies and communities of our states every day. In fact, receiving DACA has increased recipients' hourly wages by an average of 42 percent[1] and given them the purchasing power to buy homes, cars and other goods and services, which drives economic growth for all.[2]

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The consequences of rescinding DACA would be severe, not just for the hundreds of thousands of young people who rely on the program and for their employers, schools, universities, and families but for the country's economy as a whole. For example, in addition to lost tax revenue, American businesses would face billions in turnover costs, as employers would lose qualified workers whom they have trained and in whom they have invested.[3] And as the chief law officers of our respective states, we strongly believe that DACA has made our communities safer, enabling these young people to report crimes to police without fear of deportation.

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There is broad consensus that the young people who qualify for DACA should not be prioritized for deportation. DACA is consistent with a long pattern of presidential exercises of prosecutorial discretion that targeted resources in a constitutional manner. Indeed, as Justice Antonin Scalia recognized in a 1999 opinion, the Executive has a long history of "engaging in a regular practice . . . of exercising [deferred action] for humanitarian reasons or simply for its own convenience." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84 (1999). DACA sensibly guides immigration officials' exercise of their enforcement discretion and reserves limited resources to address individuals who threaten our communities, not those who contribute greatly to them.

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BOB FERGUSON
Washington State Attorney General

cc: The Honorable John F. Kelly, Secretary of Homeland Security
The Honorable Jeff Sessions, Attorney General of the United States

Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

November 20, 2014

MEMORANDUM FOR: León Rodríguez
Director
U.S. Citizenship and Immigration Services

Thomas S. Winkowski
Acting Director
U.S. Immigration and Customs Enforcement

R. Gil Kerlikowske
Commissioner
U.S. Customs and Border Protection

FROM: Jeh Charles Johnson
Secretary

SUBJECT: **Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents**

This memorandum is intended to reflect new policies for the use of deferred action. By memorandum dated June 15, 2012, Secretary Napolitano issued guidance entitled *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*. The following supplements and amends that guidance.

The Department of Homeland Security (DHS) and its immigration components are responsible for enforcing the Nation's immigration laws. Due to limited resources, DHS and its Components cannot respond to all immigration violations or remove all persons illegally in the United States. As is true of virtually every other law enforcement agency, DHS must exercise prosecutorial discretion in the enforcement of the law. Secretary Napolitano noted two years ago, when she issued her prosecutorial discretion guidance regarding children, that "[o]ur Nation's immigration laws must be enforced in a strong and sensible manner. They are not designed to be blindly enforced without consideration given to the individual circumstances of each case."

Deferred action is a long-standing administrative mechanism dating back decades, by which the Secretary of Homeland Security may defer the removal of an undocumented immigrant for a period of time.[1] A form of administrative relief similar to deferred action, known then as "indefinite voluntary departure," was originally authorized by the Reagan and Bush Administrations to defer the deportations of an estimated 1.5 million undocumented spouses and minor children who did not qualify for legalization under the *Immigration Reform and Control Act* of 1986. Known as the "Family Fairness" program, the policy was specifically implemented to promote the humane enforcement of the law and ensure family unity.

Deferred action is a form of prosecutorial discretion by which the Secretary deprioritizes an individual's case for humanitarian reasons, administrative convenience, or in the interest of the Department's overall enforcement mission. As an act of prosecutorial discretion, deferred action is legally available so long as it is granted on a case-by-case basis, and it may be terminated at any time at the agency's discretion. Deferred action does not confer any form of legal status in this country, much less citizenship; it simply means that, for a specified period of time, an individual is permitted to be lawfully present in the United States. Nor can deferred action itself lead to a green card. Although deferred action is not expressly conferred by statute, the practice is referenced and therefore endorsed by implication in several federal statutes.[2]

Historically, deferred action has been used on behalf of particular individuals, and on a case-by-case basis, for classes of unlawfully present individuals, such as the spouses and minor children of certain legalized immigrants, widows of U.S. citizens, or victims of trafficking and domestic violence.[3] Most recently, beginning in 2012, Secretary Napolitano issued guidance for case-by-case deferred action with respect to those who came to the United States as children, commonly referred to as "DACA."

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[1] Deferred action, in one form or another, dates back to at least the 1960s. "Deferred action" per se dates back at least as far as 1975. *See,* Immigration and Naturalization Service, Operation Instructions § 103.1(a)(1)(ii) (1975).

[2] INA § 204(a)(1)(D)(i)(II), (IV) *(Violence Against Women Act (VAWA) self-petitioners not in removal proceedings are "eligible for deferred action and employment authorization");* INA § 237(d)(2) *(DHS may grant stay of removal to applicants for T or U visas but that denial of a stay request "shall not preclude the alien from applying for . . . deferred action")*; REAL ID Act of 2005 § 202(c)(2)(B)(viii), Pub. L. 109-13 *(requiring states to examine documentary evidence of lawful status for driver's license eligibility purposes, including "approved deferred action status")*; National Defense Authorization Act for Fiscal Year 2004 § 1703(c) (d) Pub. L. 108-136 *(spouse, parent or child of certain U.S. citizen who died as a result of honorable service may self-petition for permanent residence and "shall be eligible for deferred action, advance parole, and work authorization").*

[3] In August 2001, the former-Immigration and Naturalization Service issued guidance providing deferred action to individuals who were eligible for the recently created U and T visas. Two years later, USCIS issued subsequent guidance, instructing its officers to use existing mechanisms like deferred action for certain U visa applicants facing potential removal. More recently, in June 2009, USCIS issued a memorandum providing deferred action to certain surviving spouses of deceased U.S. citizens and their children while Congress considered legislation to allow these individuals to qualify for permanent residence status.

By this memorandum, I am now expanding certain parameters of DACA and issuing guidance for case-by-case use of deferred action for those adults who have been in this country since January 1, 2010, are the parents of U.S. citizens or lawful permanent residents, and who are otherwise not enforcement priorities, as set forth in the November 20, 2014 Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum.

The reality is that most individuals in the categories set forth below are hard-working people who have become integrated members of American society. Provided they do not commit serious crimes or otherwise become enforcement priorities, these people are extremely unlikely to be deported given this Department's limited enforcement resources—which must continue to be focused on those who represent threats to national security, public safety, and border security. Case-by-case exercises of deferred action for children and long-standing members of American society who are not enforcement priorities are in this Nation's security and economic interests and make common sense, because they encourage these people to come out of the shadows, submit to background checks, pay fees, apply for work authorization (which by separate authority I may grant), and be counted.

A. Expanding DACA

DACA provides that those who were under the age of 31 on June 15, 2012, who entered the United States before June 15, 2007 (5 years prior) as children under the age of 16, and who meet specific educational and public safety criteria, are eligible for deferred action on a case-by-case basis. The initial DACA announcement of June 15, 2012 provided deferred action for a period of two years. On June 5, 2014, U.S. Citizenship and Immigration Services (USCIS) announced that DACA recipients could request to renew their deferred action for an additional two years.

In order to further effectuate this program, I hereby direct USCIS to expand DACA as follows:

Remove the age cap. DACA will apply to all otherwise eligible immigrants who entered the United States by the requisite adjusted entry date before the age of sixteen (16), regardless of how old they were in June 2012 or are today. The current age restriction excludes those who were older than 31 on the date of announcement (*i.e.*, those who were born before June 15, 1981). That restriction will no longer apply.

Extend DACA renewal and work authorization to three-years. The period for which DACA and the accompanying employment authorization is granted will be extended to three-year increments, rather than the current two-year increments. This change shall apply to all first-time applications as well as all applications for renewal effective November 24, 2014. Beginning on that date, USCIS should issue all work

authorization documents valid for three years, including to those individuals who have applied and are awaiting two-year work authorization documents based on the renewal of their DACA grants. USCIS should also consider means to extend those two-year renewals already issued to three years.

Adjust the date-of-entry requirement. In order to align the DACA program more closely with the other deferred action authorization outlined below, the eligibility cut-off date by which a DACA applicant must have been in the United States should be adjusted from June 15, 2007 to January 1, 2010.

USCIS should begin accepting applications under the new criteria from applicants no later than ninety (90) days from the date of this announcement.

B. Expanding Deferred Action

I hereby direct USCIS to establish a process, similar to DACA, for exercising prosecutorial discretion through the use of deferred action, on a case-by-case basis, to those individuals who:

- have, on the date of this memorandum, a son or daughter who is a U.S. citizen or lawful permanent resident;
- have continuously resided in the United States since before January 1, 2010;
- are physically present in the United States on the date of this memorandum, *and* at the time of making a request for consideration of deferred action with USCIS;
- have no lawful status on the date of this memorandum;
- are not an enforcement priority as reflected in the November 20, 2014 Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum; and
- present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate.

Applicants must file the requisite applications for deferred action pursuant to the new criteria described above. Applicants must also submit biometrics for USCIS to conduct background checks similar to the background check that is required for DACA applicants. Each person who applies for deferred action pursuant to the criteria above shall also be eligible to apply for work authorization for the period of deferred action, pursuant to my authority to grant such authorization reflected in section 274A(h)(3) of

the Immigration and Nationality Act.[4] Deferred action granted pursuant to the program shall be for a period of three years. Applicants will pay the work authorization and biometrics fees, which currently amount to $465. There will be no fee waivers and, like DACA, very limited fee exemptions.

USCIS should begin accepting applications from eligible applicants no later than one hundred and eighty (180) days after the date of this announcement. As with DACA, the above criteria are to be considered for all individuals encountered by U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), or USCIS, whether or not the individual is already in removal proceedings or subject to a final order of removal. Specifically:

- ICE and CBP are instructed to immediately begin identifying persons in their custody, as well as newly encountered individuals, who meet the above criteria and may thus be eligible for deferred action to prevent the further expenditure of enforcement resources with regard to these individuals.

- ICE is further instructed to review pending removal cases, and seek administrative closure or termination of the cases of individuals identified who meet the above criteria, and to refer such individuals to USCIS for case-by-case determinations. ICE should also establish a process to allow individuals in removal proceedings to identify themselves as candidates for deferred action.

- USCIS is instructed to implement this memorandum consistent with its existing guidance regarding the issuance of notices to appear. The USCIS process shall also be available to individuals subject to final orders of removal who otherwise meet the above criteria.

Under any of the proposals outlined above, immigration officers will be provided with specific eligibility criteria for deferred action, but the ultimate judgment as to whether an immigrant is granted deferred action will be determined on a case-by-case basis.

This memorandum confers no substantive right, immigration status or pathway to citizenship. Only an Act of Congress can confer these rights. It remains within the authority of the Executive Branch, however, to set forth policy for the exercise of prosecutorial discretion and deferred action within the framework of existing law. This memorandum is an exercise of that authority.

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[4] INA § 274A(h)(3), 8 U.S.C. § 1324a(h)(3) ("As used in this section, the term 'unauthorized alien' means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the[Secretary]."); 8 C.F.R. § 274a.12 (regulations establishing classes of aliens eligible for work authorization).

The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others

The Department of Homeland Security's proposed policy to prioritize the removal of certain aliens unlawfully present in the United States would be a permissible exercise of DHS's discretion to enforce the immigration laws.

The Department of Homeland Security's proposed deferred action program for parents of U.S. citizens and legal permanent residents would also be a permissible exercise of DHS's discretion to enforce the immigration laws.

The Department of Homeland Security's proposed deferred action program for parents of recipients of deferred action under the Deferred Action for Childhood Arrivals program would not be a permissi ble exercise of DHS's enforcement discretion.

November 19, 2014

MEMORANDUM OPINION FOR THE SECRETARY OF HOMELAND SECURITY AND THE COUNSEL TO THE PRESIDENT

You have asked two questions concerning the scope of the Department of Homeland Security's discretion to enforce the immigration laws. First, you have asked whether, in light of the limited resources available to the Department ("DHS") to remove aliens unlawfully present in the United States, it would be legally permissible for the Department to implement a policy prioritizing the removal of certain categories of aliens over others. DHS has explained that although there are approximately 11.3 million undocumented aliens in the country, it has the resources to remove fewer than 400,000 such aliens each year. DHS's proposed policy would prioritize the removal of aliens who present threats to national security, public safety, or border security. Under the proposed policy, DHS officials could remove an alien who did not fall into one of these categories provided that an Immigration and Customs Enforcement ("ICE") Field Office Director determined that "removing such an alien would serve an important federal interest." Draft Memorandum for Thomas S. Winkowski, Acting Director, ICE, et al., from Jeh Charles Johnson, Secretary of Homeland Security, *Re: Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants* at 5 (Nov. 17, 2014) ("Johnson Prioritization Memorandum").

Second, you have asked whether it would be permissible for DHS to extend deferred action, a form of temporary administrative relief from removal, to certain aliens who are the parents of children who are present in the United States. Specifically, DHS has proposed to implement a program under which an alien could apply for, and would be eligible to receive, deferred action if he or she is not a DHS removal priority under the policy described above; has continuously resided in the United States since before January 1, 2010; has a child who is either a U.S. citizen or a lawful permanent resident; is physically present in the United

States both when DHS announces its program and at the time of application for deferred action; and presents "no other factors that, in the exercise of discretion, make[] the grant of deferred action inappropriate." Draft Memorandum for Leon Rodriguez, Director, U.S. Citizenship and Immigration Services, et al., from Jeh Charles Johnson, Secretary of Homeland Security, *Re: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and Others* at 4 (Nov. 17, 2014) ("Johnson Deferred Action Memorandum"). You have also asked whether DHS could implement a similar program for parents of individuals who have received deferred action under the Deferred Action for Childhood Arrivals ("DACA") program.

As has historically been true of deferred action, these proposed deferred action programs would not "legalize" any aliens who are unlawfully present in the United States: Deferred action does not confer any lawful immigration status, nor does it provide a path to obtaining permanent residence or citizenship. Grants of deferred action under the proposed programs would, rather, represent DHS's decision not to seek an alien's removal for a prescribed period of time. *See generally Reno v. Am.-Arab Anti-Discrim. Comm.*, 525 U.S. 471, 483 84 (1999) (describing deferred action). Under decades-old regulations promulgated pursuant to authority delegated by Congress, *see* 8 U.S.C. §§ 1103(a)(3), 1324a(h)(3), aliens who are granted deferred action like certain other categories of aliens who do not have lawful immigration status, such as asylum applicants may apply for authorization to work in the United States in certain circumstances, 8 C.F.R. § 274a.12(c)(14) (providing that deferred action recipients may apply for work authorization if they can show an "economic necessity for employment"); *see also* 8 C.F.R. § 109.1(b)(7) (1982). Under DHS policy guidance, a grant of deferred action also suspends an alien's accrual of unlawful presence for purposes of 8 U.S.C. § 1182(a)(9)(B)(i) and (a)(9)(C)(i)(I), provisions that restrict the admission of aliens who have departed the United States after having been unlawfully present for specified periods of time. A grant of deferred action under the proposed programs would remain in effect for three years, subject to renewal, and could be terminated at any time at DHS's discretion. *See* Johnson Deferred Action Memorandum at 2, 5.

For the reasons discussed below, we conclude that DHS's proposed prioritization policy and its proposed deferred action program for parents of U.S. citizens and lawful permanent residents would be permissible exercises of DHS's discretion to enforce the immigration laws. We further conclude that, as it has been described to us, the proposed deferred action program for parents of DACA recipients would not be a permissible exercise of enforcement discretion.

I.

We first address DHS's authority to prioritize the removal of certain categories of aliens over others. We begin by discussing some of the sources and limits of

DHS's enforcement discretion under the immigration laws, and then analyze DHS's proposed prioritization policy in light of these considerations.

A.

DHS's authority to remove aliens from the United States rests on the Immigration and Nationality Act of 1952 ("INA"), as amended, 8 U.S.C. §§ 1101 *et seq.* In the INA, Congress established a comprehensive scheme governing immigration and naturalization. The INA specifies certain categories of aliens who are inadmissible to the United States. *See* 8 U.S.C. § 1182. It also specifies "which aliens may be removed from the United States and the procedures for doing so." *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012). "Aliens may be removed if they were inadmissible at the time of entry, have been convicted of certain crimes, or meet other criteria set by federal law." *Id.* (citing 8 U.S.C. § 1227); *see* 8 U.S.C. § 1227(a) (providing that "[a]ny alien . . . in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien" falls within one or more classes of deportable aliens); *see also* 8 U.S.C. § 1182(a) (listing classes of aliens ineligible to receive visas or be admitted to the United States). Removal proceedings ordinarily take place in federal immigration courts administered by the Executive Office for Immigration Review, a component of the Department of Justice. *See id.* § 1229a (governing removal proceedings); *see also id.* §§ 1225(b)(1)(A), 1228(b) (setting out expedited removal procedures for certain arriving aliens and certain aliens convicted of aggravated felonies).

Before 2003, the Department of Justice, through the Immigration and Naturalization Service ("INS"), was also responsible for providing immigration-related administrative services and generally enforcing the immigration laws. In the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, Congress transferred most of these functions to DHS, giving it primary responsibility both for initiating removal proceedings and for carrying out final orders of removal. *See* 6 U.S.C. §§ 101 *et seq.*; *see also Clark v. Martinez*, 543 U.S. 371, 374 n.1 (2005) (noting that the immigration authorities previously exercised by the Attorney General and INS "now reside" in the Secretary of Homeland Security and DHS). The Act divided INS's functions among three different agencies within DHS: U.S. Citizenship and Immigration Services ("USCIS"), which oversees legal immigration into the United States and provides immigration and naturalization services to aliens; ICE, which enforces federal laws governing customs, trade, and immigration; and U.S. Customs and Border Protection ("CBP"), which monitors and secures the nation's borders and ports of entry. *See* Pub. L. No. 107-296, §§ 403, 442, 451, 471, 116 Stat. 2135, 2178, 2193, 2195, 2205; *see also Name Change From the Bureau of Citizenship and Immigration Services to U.S. Citizenship and Immigration Services*, 69 Fed. Reg. 60938, 60938 (Oct. 13, 2004); *Name Change of Two DHS Components*, 75 Fed. Reg. 12445, 12445 (Mar. 16, 2010). The Secretary of Homeland Security is thus now "charged with the administration and

enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens." 8 U.S.C. § 1103(a)(1).

As a general rule, when Congress vests enforcement authority in an executive agency, that agency has the discretion to decide whether a particular violation of the law warrants prosecution or other enforcement action. This discretion is rooted in the President's constitutional duty to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, and it reflects a recognition that the "faithful[]" execution of the law does not necessarily entail "act[ing] against each technical violation of the statute" that an agency is charged with enforcing. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Rather, as the Supreme Court explained in *Chaney*, the decision whether to initiate enforcement proceedings is a complex judgment that calls on the agency to "balanc[e] . . . a number of factors which are peculiarly within its expertise." *Id.* These factors include "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and . . . whether the agency has enough resources to undertake the action at all." *Id.* at 831; *cf. United States v. Armstrong*, 517 U.S. 456, 465 (1996) (recognizing that exercises of prosecutorial discretion in criminal cases involve consideration of "'[s]uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan'" (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985))). In *Chaney*, the Court considered and rejected a challenge to the Food and Drug Administration's refusal to initiate enforcement proceedings with respect to alleged violations of the Federal Food, Drug, and Cosmetic Act, concluding that an agency's decision not to initiate enforcement proceedings is presumptively immune from judicial review. *See* 470 U.S. at 832. The Court explained that, while Congress may "provide[] guidelines for the agency to follow in exercising its enforcement powers," in the absence of such "legislative direction," an agency's non-enforcement determination is, much like a prosecutor's decision not to indict, a "special province of the Executive." *Id.* at 832 33.

The principles of enforcement discretion discussed in *Chaney* apply with particular force in the context of immigration. Congress enacted the INA against a background understanding that immigration is "a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (internal quotation marks omitted). Consistent with this understanding, the INA vested the Attorney General (now the Secretary of Homeland Security) with broad authority to "establish such regulations; . . . issue such instructions; and perform such other acts as he deems necessary for carrying out his authority" under the statute. 8 U.S.C. § 1103(a)(3). Years later, when Congress created the Department of Homeland Security, it expressly charged DHS with responsibility for "[e]stablishing national immigration enforcement policies and

priorities." Homeland Security Act of 2002, Pub. L. No. 107-296, § 402(5), 116 Stat. 2135, 2178 (codified at 6 U.S.C. § 202(5)).

With respect to removal decisions in particular, the Supreme Court has recognized that "the broad discretion exercised by immigration officials" is a "principal feature of the removal system" under the INA. *Arizona*, 132 S. Ct. at 2499. The INA expressly authorizes immigration officials to grant certain forms of discretionary relief from removal for aliens, including parole, 8 U.S.C. § 1182(d)(5)(A); asylum, *id.* § 1158(b)(1)(A); and cancellation of removal, *id.* § 1229b. But in addition to administering these statutory forms of relief, "[f]ederal officials, as an initial matter, must decide whether it makes sense to pursue removal at all." *Arizona*, 132 S. Ct. at 2499. And, as the Court has explained, "[a]t each stage" of the removal process "commenc[ing] proceedings, adjudicat[ing] cases, [and] execut[ing] removal orders" immigration officials have "discretion to abandon the endeavor." *Am.-Arab Anti-Discrim. Comm.*, 525 U.S. at 483 (quoting 8 U.S.C. § 1252(g) (alterations in original)). Deciding whether to pursue removal at each of these stages implicates a wide range of considerations. As the Court observed in *Arizona*:

> Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. Some discretionary decisions involve policy choices that bear on this Nation's international relations. . . . The foreign state may be mired in civil war, complicit in political persecution, or enduring conditions that create a real risk that the alien or his family will be harmed upon return. The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities.

132 S. Ct. at 2499.

Immigration officials' discretion in enforcing the laws is not, however, unlimited. Limits on enforcement discretion are both implicit in, and fundamental to, the Constitution's allocation of governmental powers between the two political branches. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 88 (1952). These limits, however, are not clearly defined. The open-ended nature of the inquiry under the Take Care Clause whether a particular exercise of discretion is "faithful[]" to the law enacted by Congress does not lend itself easily to the application of set formulas or bright-line rules. And because the exercise of enforcement discretion generally is not subject to judicial review, *see*

Chaney, 470 U.S. at 831 33, neither the Supreme Court nor the lower federal courts have squarely addressed its constitutional bounds. Rather, the political branches have addressed the proper allocation of enforcement authority through the political process. As the Court noted in *Chaney*, Congress "may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue." *Id.* at 833. The history of immigration policy illustrates this principle: Since the INA was enacted, the Executive Branch has on numerous occasions exercised discretion to extend various forms of immigration relief to categories of aliens for humanitarian, foreign policy, and other reasons. When Congress has been dissatisfied with Executive action, it has responded, as *Chaney* suggests, by enacting legislation to limit the Executive's discretion in enforcing the immigration laws.[1]

Nonetheless, the nature of the Take Care duty does point to at least four general (and closely related) principles governing the permissible scope of enforcement discretion that we believe are particularly relevant here. First, enforcement decisions should reflect "factors which are peculiarly within [the enforcing agency's] expertise." *Chaney*, 470 U.S. at 831. Those factors may include considerations related to agency resources, such as "whether the agency has enough resources to undertake the action," or "whether agency resources are best spent on this violation or another." *Id*. Other relevant considerations may include "the proper ordering of [the agency's] priorities," *id.* at 832, and the agency's assessment of "whether the particular enforcement action [at issue] best fits the agency's overall policies," *id*. at 831.

Second, the Executive cannot, under the guise of exercising enforcement discretion, attempt to effectively rewrite the laws to match its policy preferences. *See id*. at 833 (an agency may not "disregard legislative direction in the statutory scheme that [it] administers"). In other words, an agency's enforcement decisions should be consonant with, rather than contrary to, the congressional policy underlying the statutes the agency is charged with administering. *Cf. Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb."); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007) (explaining that where Congress has given an agency the power to administer a statutory scheme, a court will not vacate the agency's decision about the proper administration of the statute unless, among other things, the agency "'has relied on factors which Congress had not intended it to consider'" (quoting

[1] *See, e.g.*, Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 Yale L.J. 458, 503 05 (2009) (describing Congress's response to its dissatisfaction with the Executive's use of parole power for refugee populations in the 1960s and 1970s); *see also, e.g.*, *infra* note 5 (discussing legislative limitations on voluntary departure and extended voluntary departure).

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983))).

Third, the Executive Branch ordinarily cannot, as the Court put it in *Chaney*, "'consciously and expressly adopt[] a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." 470 U.S. at 833 n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)); *see id.* (noting that in situations where an agency had adopted such an extreme policy, "the statute conferring authority on the agency might indicate that such decisions were not 'committed to agency discretion'"). Abdication of the duties assigned to the agency by statute is ordinarily incompatible with the constitutional obligation to faithfully execute the laws. *But see, e.g.*, *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 200 (1994) (noting that under the Take Care Clause, "the President is required to act in accordance with the laws including the Constitution, which takes precedence over other forms of law").

Finally, lower courts, following *Chaney*, have indicated that non-enforcement decisions are most comfortably characterized as judicially unreviewable exercises of enforcement discretion when they are made on a case-by-case basis. *See, e.g.*, *Kenney v. Glickman*, 96 F.3d 1118, 1123 (8th Cir. 1996); *Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671, 676 77 (D.C. Cir. 1994). That reading of *Chaney* reflects a conclusion that case-by-case enforcement decisions generally avoid the concerns mentioned above. Courts have noted that "single-shot non-enforcement decisions" almost inevitably rest on "the sort of mingled assessments of fact, policy, and law . . . that are, as *Chaney* recognizes, peculiarly within the agency's expertise and discretion." *Crowley Caribbean Transp.*, 37 F.3d at 676 77 (emphasis omitted). Individual enforcement decisions made on the basis of case-specific factors are also unlikely to constitute "general polic[ies] that [are] so extreme as to amount to an abdication of [the agency's] statutory responsibilities." *Id.* at 677 (quoting *Chaney*, 477 U.S. at 833 n.4). That does not mean that all "general policies" respecting non-enforcement are categorically forbidden: Some "general policies" may, for example, merely provide a framework for making individualized, discretionary assessments about whether to initiate enforcement actions in particular cases. *Cf. Reno v. Flores*, 507 U.S. 292, 313 (1993) (explaining that an agency's use of "reasonable presumptions and generic rules" is not incompatible with a requirement to make individualized determinations). But a general policy of non-enforcement that forecloses the exercise of case-by-case discretion poses "special risks" that the agency has exceeded the bounds of its enforcement discretion. *Crowley Caribbean Transp.*, 37 F.3d at 677.

B.

We now turn, against this backdrop, to DHS's proposed prioritization policy. In their exercise of enforcement discretion, DHS and its predecessor, INS, have long

employed guidance instructing immigration officers to prioritize the enforcement of the immigration laws against certain categories of aliens and to deprioritize their enforcement against others. *See, e.g.*, INS Operating Instructions § 103(a)(1)(i) (1962); Memorandum for All Field Office Directors, ICE, et al., from John Morton, Director, ICE, *Re: Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* (June 17, 2011); Memorandum for All ICE Employees, from John Morton, Director, ICE, *Re: Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens* (Mar. 2, 2011); Memorandum for Regional Directors, INS, et al., from Doris Meissner, Commissioner, INS, *Re: Exercising Prosecutorial Discretion* (Nov. 17, 2000). The policy DHS proposes, which is similar to but would supersede earlier policy guidance, is designed to "provide clearer and more effective guidance in the pursuit" of DHS's enforcement priorities; namely, "threats to national security, public safety and border security." Johnson Prioritization Memorandum at 1.

Under the proposed policy, DHS would identify three categories of undocumented aliens who would be priorities for removal from the United States. *See generally id.* at 3 5. The highest priority category would include aliens who pose particularly serious threats to national security, border security, or public safety, including aliens engaged in or suspected of espionage or terrorism, aliens convicted of offenses related to participation in criminal street gangs, aliens convicted of certain felony offenses, and aliens apprehended at the border while attempting to enter the United States unlawfully. *See id*. at 3. The second-highest priority would include aliens convicted of multiple or significant misdemeanor offenses; aliens who are apprehended after unlawfully entering the United States who cannot establish that they have been continuously present in the United States since January 1, 2014; and aliens determined to have significantly abused the visa or visa waiver programs. *See id*. at 3 4. The third priority category would include other aliens who have been issued a final order of removal on or after January 1, 2014. *See id.* at 4. The policy would also provide that none of these aliens should be prioritized for removal if they "qualify for asylum or another form of relief under our laws." *Id*. at 3 5.

The policy would instruct that resources should be directed to these priority categories in a manner "commensurate with the level of prioritization identified." *Id.* at 5. It would, however, also leave significant room for immigration officials to evaluate the circumstances of individual cases. *See id.* (stating that the policy "requires DHS personnel to exercise discretion based on individual circumstances"). For example, the policy would permit an ICE Field Office Director, CBP Sector Chief, or CBP Director of Field Operations to deprioritize the removal of an alien falling in the highest priority category if, in her judgment, "there are compelling and exceptional factors that clearly indicate the alien is not a threat to national security, border security, or public safety and should not therefore be an enforcement priority." *Id.* at 3. Similar discretionary provisions would apply to

aliens in the second and third priority categories.[2] The policy would also provide a non-exhaustive list of factors DHS personnel should consider in making such deprioritization judgments.[3] In addition, the policy would expressly state that its terms should not be construed "to prohibit or discourage the apprehension, detention, or removal of aliens unlawfully in the United States who are not identified as priorities," and would further provide that "[i]mmigration officers and attorneys may pursue removal of an alien not identified as a priority" if, "in the judgment of an ICE Field Office Director, removing such an alien would serve an important federal interest." *Id*. at 5.

DHS has explained that the proposed policy is designed to respond to the practical reality that the number of aliens who are removable under the INA vastly exceeds the resources Congress has made available to DHS for processing and carrying out removals. The resource constraints are striking. As noted, DHS has informed us that there are approximately 11.3 million undocumented aliens in the country, but that Congress has appropriated sufficient resources for ICE to remove fewer than 400,000 aliens each year, a significant percentage of whom are typically encountered at or near the border rather than in the interior of the country. *See* E-mail for Karl R. Thompson, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from David Shahoulian, Deputy General Counsel, DHS, *Re: Immigration Opinion* (Nov. 19, 2014) ("Shahoulian E-mail"). The proposed policy explains that, because DHS "cannot respond to all immigration violations or remove all persons illegally in the United States," it seeks to "prioritize the use of enforcement personnel, detention space, and removal assets" to "ensure that use of its limited resources is devoted to the pursuit of" DHS's highest priorities. Johnson Prioritization Memorandum at 2.

In our view, DHS's proposed prioritization policy falls within the scope of its lawful discretion to enforce the immigration laws. To begin with, the policy is based on a factor clearly "within [DHS's] expertise." *Chaney*, 470 U.S. at 831. Faced with sharply limited resources, DHS necessarily must make choices about which removals to pursue and which removals to defer. DHS's organic statute itself recognizes this inevitable fact, instructing the Secretary to establish "national

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[2] Under the proposed policy, aliens in the second tier could be deprioritized if, "in the judgment of an ICE Field Office Director, CBP Sector Chief, CBP Director of Field Operations, USCIS District Director, or USCIS Service Center Director, there are factors indicating the alien is not a threat to national security, border security, or public safety, and should not therefore be an enforcement priority." Johnson Prioritization Memorandum at 4. Aliens in the third tier could be deprioritized if, "in the judgment of an immigration officer, the alien is not a threat to the integrity of the immigration system or there are factors suggesting the alien should not be an enforcement priority." *Id*. at 5.

[3] These factors include "extenuating circumstances involving the offense of conviction; extended length of time since the offense of conviction; length of time in the United States; military service; family or community ties in the United States; status as a victim, witness or plaintiff in civil or criminal proceedings; or compelling humanitarian factors such as poor health, age, pregnancy, a young child or a seriously ill relative." Johnson Prioritization Memorandum at 6.

immigration enforcement policies and priorities." 6 U.S.C. § 202(5). And an agency's need to ensure that scarce enforcement resources are used in an effective manner is a quintessential basis for the use of prosecutorial discretion. *See Chaney*, 470 U.S. at 831 (among the factors "peculiarly within [an agency's] expertise" are "whether agency resources are best spent on this violation or another" and "whether the agency has enough resources to undertake the action at all").

The policy DHS has proposed, moreover, is consistent with the removal priorities established by Congress. In appropriating funds for DHS's enforcement activities which, as noted, are sufficient to permit the removal of only a fraction of the undocumented aliens currently in the country Congress has directed DHS to "prioritize the identification and removal of aliens convicted of a crime by the severity of that crime." Department of Homeland Security Appropriations Act, 2014, Pub. L. No. 113-76, div. F, tit. II, 128 Stat. 5, 251 ("DHS Appropriations Act"). Consistent with this directive, the proposed policy prioritizes individuals convicted of criminal offenses involving active participation in a criminal street gang, most offenses classified as felonies in the convicting jurisdiction, offenses classified as "aggravated felonies" under the INA, and certain misdemeanor offenses. Johnson Prioritization Memorandum at 3 4. The policy ranks these priority categories according to the severity of the crime of conviction. The policy also prioritizes the removal of other categories of aliens who pose threats to national security or border security, matters about which Congress has demonstrated particular concern. *See, e.g.*, 8 U.S.C. § 1226(c)(1)(D) (providing for detention of aliens charged with removability on national security grounds); *id*. § 1225(b) & (c) (providing for an expedited removal process for certain aliens apprehended at the border). The policy thus raises no concern that DHS has relied "on factors which Congress had not intended it to consider." *Nat'l Ass'n of Home Builders*, 551 U.S. at 658.

Further, although the proposed policy is not a "single-shot non-enforcement decision," neither does it amount to an abdication of DHS's statutory responsibilities, or constitute a legislative rule overriding the commands of the substantive statute. *Crowley Caribbean Transp.*, 37 F.3d at 676 77. The proposed policy provides a general framework for exercising enforcement discretion in individual cases, rather than establishing an absolute, inflexible policy of not enforcing the immigration laws in certain categories of cases. Given that the resources Congress has allocated to DHS are sufficient to remove only a small fraction of the total population of undocumented aliens in the United States, setting forth written guidance about how resources should presumptively be allocated in particular cases is a reasonable means of ensuring that DHS's severely limited resources are systematically directed to its highest priorities across a large and diverse agency, as well as ensuring consistency in the administration of the removal system. The proposed policy's identification of categories of aliens who constitute removal

priorities is also consistent with the categorical nature of Congress's instruction to prioritize the removal of criminal aliens in the DHS Appropriations Act.

And, significantly, the proposed policy does not identify any category of removable aliens whose removal may not be pursued under any circumstances. Although the proposed policy limits the discretion of immigration officials to expend resources to remove non-priority aliens, it does not eliminate that discretion entirely. It directs immigration officials to use their resources to remove aliens in a manner "commensurate with the level of prioritization identified," but (as noted above) it does not "prohibit or discourage the apprehension, detention, or removal of aliens unlawfully in the United States who are not identified as priorities." Johnson Prioritization Memorandum at 5. Instead, it authorizes the removal of even non-priority aliens if, in the judgment of an ICE Field Office Director, "removing such an alien would serve an important federal interest," a standard the policy leaves open-ended. *Id*. Accordingly, the policy provides for case-by-case determinations about whether an individual alien's circumstances warrant the expenditure of removal resources, employing a broad standard that leaves ample room for the exercise of individualized discretion by responsible officials. For these reasons, the proposed policy avoids the difficulties that might be raised by a more inflexible prioritization policy and dispels any concern that DHS has either undertaken to rewrite the immigration laws or abdicated its statutory responsibilities with respect to non-priority aliens.[4]

II.

We turn next to the permissibility of DHS's proposed deferred action programs for certain aliens who are parents of U.S. citizens, lawful permanent residents ("LPRs"), or DACA recipients, and who are not removal priorities under the proposed policy discussed above. We begin by discussing the history and current practice of deferred action. We then discuss the legal authorities on which deferred

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[4] In *Crane v. Napolitano*, a district court recently concluded in a non precedential opinion that the INA "mandates the initiation of removal proceedings whenever an immigration officer encounters an illegal alien who is not 'clearly and beyond a doubt entitled to be admitted.'" Opinion and Order Respecting Pl. App. for Prelim. Inj. Relief, No. 3:12 cv 03247 O, 2013 WL 1744422, at *5 (N.D. Tex. Apr. 23) (quoting 8 U.S.C. § 1225(b)(2)(A)). The court later dismissed the case for lack of jurisdiction. *See Crane v. Napolitano*, No. 3:12 cv 03247 O, 2013 WL 8211660, at *4 (N.D. Tex. July 31). Although the opinion lacks precedential value, we have nevertheless considered whether, as it suggests, the text of the INA categorically forecloses the exercise of enforcement discretion with respect to aliens who have not been formally admitted. The district court's conclusion is, in our view, inconsistent with the Supreme Court's reading of the INA as permitting immigration officials to exercise enforcement discretion at any stage of the removal process, including when deciding whether to initiate removal proceedings against a particular alien. *See Arizona*, 132 S. Ct. at 2499; *Am. Arab Anti Discrim. Comm.*, 525 U.S. at 483 84. It is also difficult to square with authority holding that the presence of mandatory language in a statute, standing alone, does not necessarily limit the Executive Branch's enforcement discretion, *see, e.g.*, *Chaney*, 470 U.S. at 835; *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 381 (2d Cir. 1973).

action relies and identify legal principles against which the proposed use of deferred action can be evaluated. Finally, we turn to an analysis of the proposed deferred action programs themselves, beginning with the program for parents of U.S. citizens and LPRs, and concluding with the program for parents of DACA recipients.

A.

In immigration law, the term "deferred action" refers to an exercise of administrative discretion in which immigration officials temporarily defer the removal of an alien unlawfully present in the United States. *Am.-Arab Anti-Discrim. Comm.*, 525 U.S. at 484 (citing 6 Charles Gordon et al., *Immigration Law and Procedure* § 72.03[2][h] (1998)); *see* USCIS, *Standard Operating Procedures for Handling Deferred Action Requests at USCIS Field Offices* at 3 (2012) ("USCIS SOP"); INS Operating Instructions § 103.1(a)(1)(ii) (1977). It is one of a number of forms of discretionary relief in addition to such statutory and non-statutory measures as parole, temporary protected status, deferred enforced departure, and extended voluntary departure that immigration officials have used over the years to temporarily prevent the removal of undocumented aliens.[5]

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[5] Parole is available to aliens by statute "for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A). Among other things, parole gives aliens the ability to adjust their status without leaving the United States if they are otherwise eligible for adjustment of status, *see id*. § 1255(a), and may eventually qualify them for Federal means tested benefits, *see id.* §§ 1613, 1641(b)(4). Temporary protected status is available to nationals of designated foreign states affected by armed conflicts, environmental disasters, and other extraordinary conditions. *Id.* § 1254a. Deferred enforced departure, which "has no statutory basis" but rather is an exercise of "the President's constitutional powers to conduct foreign relations," may be granted to nationals of appropriate foreign states. USCIS, Adjudicator's Field Manual § 38.2(a) (2014). Extended voluntary departure was a remedy derived from the voluntary departure statute, which, before its amendment in 1996, permitted the Attorney General to make a finding of removability if an alien agreed to voluntarily depart the United States, without imposing a time limit for the alien's departure. *See* 8 U.S.C. §§ 1252(b), 1254(e) (1988 & Supp. II 1990); *cf*. 8 U.S.C. § 1229c (current provision of the INA providing authority to grant voluntary departure, but limiting such grants to 120 days). Some commentators, however, suggested that extended voluntary departure was in fact a form of "discretionary relief formulated administrative ly under the Attorney General's general authority for enforcing immigration law." Sharon Stephan, Cong. Research Serv., 85 599 EPW, *Extended Voluntary Departure and Other Grants of Blanket Relief from Deportation* at 1 (Feb. 23, 1985). It appears that extended voluntary departure is no longer used following enactment of the Immigration Act of 1990, which established the temporary protected status program. *See U.S. Citizenship and Immigration Services Fee Schedule*, 75 Fed. Reg. 33446, 33457 (June 11, 2010) (proposed rule) (noting that "since 1990 neither the Attorney General nor the Secretary have designated a class of aliens for nationality based 'extended voluntary departure,' and there no longer are aliens in the United States benefiting from such a designation," but noting that deferred enforced departure is still used); H.R. Rep. No. 102 123, at 2 (1991) (indicating that in establishing temporary protected status, Congress was "codif[ying] and supersed[ing]" extended voluntary departure). *See generally* Andorra Bruno et al., Cong. Research Serv., *Analysis of June 15, 2012 DHS Memorandum,* Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children at 5 10 (July 13, 2012) ("CRS Immigration Report").

The practice of granting deferred action dates back several decades. For many years after the INA was enacted, INS exercised prosecutorial discretion to grant "non-priority" status to removable aliens who presented "appealing humanitarian factors." Letter for Leon Wildes, from E. A. Loughran, Associate Commissioner, INS at 2 (July 16, 1973) (defining a "non-priority case" as "one in which the Service in the exercise of discretion determines that adverse action would be unconscionable because of appealing humanitarian factors"); *see* INS Operating Instructions § 103.1(a)(1)(ii) (1962). This form of administrative discretion was later termed "deferred action." *Am.-Arab Anti-Discrim. Comm.*, 525 U.S. at 484; *see* INS Operating Instructions § 103.1(a)(1)(ii) (1977) (instructing immigration officers to recommend deferred action whenever "adverse action would be unconscionable because of the existence of appealing humanitarian factors").

Although the practice of granting deferred action "developed without express statutory authorization," it has become a regular feature of the immigration removal system that has been acknowledged by both Congress and the Supreme Court. *Am.-Arab Anti-Discrim. Comm.*, 525 U.S. at 484 (internal quotation marks omitted); *see id.* at 485 (noting that a congressional enactment limiting judicial review of decisions "to commence proceedings, adjudicate cases, or execute removal orders against any alien under [the INA]" in 8 U.S.C. § 1252(g) "seems clearly designed to give some measure of protection to 'no deferred action' decisions and similar discretionary determinations"); *see also, e.g.*, 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV) (providing that certain individuals are "eligible for deferred action"). Deferred action "does not confer any immigration status" i.e., it does not establish any enforceable legal right to remain in the United States and it may be revoked by immigration authorities at their discretion. USCIS SOP at 3, 7. Assuming it is not revoked, however, it represents DHS's decision not to seek the alien's removal for a specified period of time.

Under longstanding regulations and policy guidance promulgated pursuant to statutory authority in the INA, deferred action recipients may receive two additional benefits. First, relying on DHS's statutory authority to authorize certain aliens to work in the United States, DHS regulations permit recipients of deferred action to apply for work authorization if they can demonstrate an "economic necessity for employment." 8 C.F.R. § 274a.12(c)(14); *see* 8 U.S.C. § 1324a(h)(3) (defining an "unauthorized alien" not entitled to work in the United States as an alien who is neither an LPR nor "authorized to be . . . employed by [the INA] or by the Attorney General [now the Secretary of Homeland Security]"). Second, DHS has promulgated regulations and issued policy guidance providing that aliens who receive deferred action will temporarily cease accruing "unlawful presence" for purposes of 8 U.S.C. § 1182(a)(9)(B)(i) and (a)(9)(C)(i)(I). 8 C.F.R. § 214.14(d)(3); 28 C.F.R. § 1100.35(b)(2); Memorandum for Field Leadership, from Donald Neufeld, Acting Associate Director, Domestic Operations Directorate, USCIS, *Re: Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act* at 42

(May 6, 2009) ("USCIS Consolidation of Guidance") (noting that "[a]ccrual of unlawful presence stops on the date an alien is granted deferred action"); *see* 8 U.S.C. § 1182(a)(9)(B)(ii) (providing that an alien is "unlawfully present" if, among other things, he "is present in the United States after the expiration of the period of stay authorized by the Attorney General").[6]

Immigration officials today continue to grant deferred action in individual cases for humanitarian and other purposes, a practice we will refer to as "ad hoc deferred action." Recent USCIS guidance provides that personnel may recommend ad hoc deferred action if they "encounter cases during [their] normal course of business that they feel warrant deferred action." USCIS SOP at 4. An alien may also apply for ad hoc deferred action by submitting a signed, written request to USCIS containing "[a]n explanation as to why he or she is seeking deferred action" along with supporting documentation, proof of identity, and other records. *Id.* at 3.

For decades, INS and later DHS have also implemented broader programs that make discretionary relief from removal available for particular classes of aliens. In many instances, these agencies have made such broad-based relief available through the use of parole, temporary protected status, deferred enforced departure, or extended voluntary departure. For example, from 1956 to 1972, INS implemented an extended voluntary departure program for physically present aliens who were beneficiaries of approved visa petitions known as "Third Preference" visa petitions relating to a specific class of visas for Eastern Hemisphere natives. *See United States ex rel. Parco v. Morris*, 426 F. Supp. 976, 979 80 (E.D. Pa. 1977). Similarly, for several years beginning in 1978, INS granted extended voluntary departure to nurses who were eligible for H-1 visas. *Voluntary Departure for Out-of-Status Nonimmigrant H-1 Nurses*, 43 Fed. Reg. 2776, 2776 (Jan. 19, 1978). In addition, in more than two dozen instances dating to 1956, INS and later DHS granted parole, temporary protected status, deferred enforced departure, or extended voluntary departure to large numbers of nationals of designated foreign states. *See, e.g.*, CRS Immigration Report at 20 23; Cong. Research Serv., ED206779, *Review of U.S. Refugee Resettlement Programs and Policies* at 9, 12 14 (1980). And in 1990, INS implemented a "Family Fairness" program that authorized granting extended voluntary departure and work authorization to the estimated 1.5 million spouses and children of aliens who had been granted legal status under the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 ("IRCA"). *See* Memorandum for Regional Commissioners,

[6] Section 1182(a)(9)(B)(i) imposes three and ten year bars on the admission of aliens (other than aliens admitted to permanent residence) who departed or were removed from the United States after periods of unlawful presence of between 180 days and one year, or one year or more. Section 1182(a)(9)(C)(i)(I) imposes an indefinite bar on the admission of any alien who, without being admitted, enters or attempts to reenter the United States after previously having been unlawfully present in the United States for an aggregate period of more than one year.

INS, from Gene McNary, Commissioner, INS, *Re: Family Fairness: Guidelines for Voluntary Departure under 8 CFR 242.5 for the Ineligible Spouses and Children of Legalized Aliens* (Feb. 2, 1990) ("Family Fairness Memorandum"); *see also* CRS Immigration Report at 10.

On at least five occasions since the late 1990s, INS and later DHS have also made discretionary relief available to certain classes of aliens through the use of deferred action:

1. Deferred Action for Battered Aliens Under the Violence Against Women Act. INS established a class-based deferred action program in 1997 for the benefit of self-petitioners under the Violence Against Women Act of 1994 ("VAWA"), Pub. L. No. 103-322, tit. IV, 108 Stat. 1796, 1902. VAWA authorized certain aliens who have been abused by U.S. citizen or LPR spouses or parents to self-petition for lawful immigration status, without having to rely on their abusive family members to petition on their behalf. *Id.* § 40701(a) (codified as amended at 8 U.S.C. § 1154(a)(1)(A)(iii) (iv), (vii)). The INS program required immigration officers who approved a VAWA self-petition to assess, "on a case-by-case basis, whether to place the alien in deferred action status" while the alien waited for a visa to become available. Memorandum for Regional Directors et al., INS, from Paul W. Virtue, Acting Executive Associate Commissioner, INS, *Re: Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues* at 3 (May 6, 1997). INS noted that "[b]y their nature, VAWA cases generally possess factors that warrant consideration for deferred action." *Id.* But because "[i]n an unusual case, there may be factors present that would militate against deferred action," the agency instructed officers that requests for deferred action should still "receive individual scrutiny." *Id.* In 2000, INS reported to Congress that, because of this program, no approved VAWA self-petitioner had been removed from the country. *See Battered Women Immigrant Protection Act: Hearings on H.R. 3083 Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 106th Cong. at 43 (July 20, 2000) ("H.R. 3083 Hearings").

2. Deferred Action for T and U Visa Applicants. Several years later, INS instituted a similar deferred action program for applicants for nonimmigrant status or visas made available under the Victims of Trafficking and Violence Protection Act of 2000 ("VTVPA"), Pub. L. No. 106-386, 114 Stat. 1464. That Act created two new nonimmigrant classifications: a "T visa" available to victims of human trafficking and their family members, and a "U visa" for victims of certain other crimes and their family members. *Id.* §§ 107(e), 1513(b)(3) (codified at 8 U.S.C. § 1101(a)(15)(T)(i), (U)(i)). In 2001, INS issued a memorandum directing immigration officers to locate "possible victims in the above categories," and to use "[e]xisting authority and mechanisms such as parole, deferred action, and stays of removal" to prevent those victims' removal "until they have had the opportunity to avail themselves of the provisions of the VTVPA." Memorandum

for Michael A. Pearson, Executive Associate Commissioner, INS, from Michael D. Cronin, Acting Executive Associate Commissioner, INS, *Re: Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) Policy Memorandum #2 "T" and "U" Nonimmigrant Visas* at 2 (Aug. 30, 2001). In subsequent memoranda, INS instructed officers to make "deferred action assessment[s]" for "all [T visa] applicants whose applications have been determined to be bona fide," Memorandum for Johnny N. Williams, Executive Associate Commissioner, INS, from Stuart Anderson, Executive Associate Commissioner, INS, *Re: Deferred Action for Aliens with Bona Fide Applications for T Nonimmigrant Status* at 1 (May 8, 2002), as well as for all U visa applicants "determined to have submitted *prima facie* evidence of [their] eligibility," Memorandum for the Director, Vermont Service Center, INS, from William R. Yates, USCIS, *Re: Centralization of Interim Relief for U Nonimmigrant Status Applicants* at 5 (Oct. 8, 2003). In 2002 and 2007, INS and DHS promulgated regulations embodying these policies. *See* 8 C.F.R. § 214.11(k)(1), (k)(4), (m)(2) (promulgated by *New Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for "T" Nonimmigrant Status*, 67 Fed. Reg. 4784, 4800 01 (Jan. 31, 2002)) (providing that any T visa applicant who presents "*prima facie* evidence" of his eligibility should have his removal "automatically stay[ed]" and that applicants placed on a waiting list for visas "shall maintain [their] current means to prevent removal (deferred action, parole, or stay of removal)"); *id.* § 214.14(d)(2) (promulgated by *New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status*, 72 Fed. Reg. 53014, 53039 (Sept. 17, 2007)) ("USCIS will grant deferred action or parole to U-1 petitioners and qualifying family members while the U-1 petitioners are on the waiting list" for visas.).

3. Deferred Action for Foreign Students Affected by Hurricane Katrina. As a consequence of the devastation caused by Hurricane Katrina in 2005, several thousand foreign students became temporarily unable to satisfy the requirements for maintaining their lawful status as F-1 nonimmigrant students, which include "pursuit of a 'full course of study.'" USCIS, *Interim Relief for Certain Foreign Academic Students Adversely Affected by Hurricane Katrina: Frequently Asked Questions (FAQ)* at 1 (Nov. 25, 2005) (quoting 8 C.F.R. § 214.2(f)(6)), *available at* http//www.uscis.gov/sites/default/files/USCIS/Humanitarian/Special%20Situations/Previous%20Special%20Situations%20By%20Topic/faq-interim-student-relief-hurricane-katrina.pdf (last visited Nov. 19, 2014). DHS announced that it would grant deferred action to these students "based on the fact that [their] failure to maintain status is directly due to Hurricane Katrina." *Id.* at 7. To apply for deferred action under this program, students were required to send a letter substantiating their need for deferred action, along with an application for work authorization. Press Release, USCIS, *USCIS Announces Interim Relief for Foreign Students Adversely Impacted by Hurricane Katrina* at 1 2 (Nov. 25, 2005), *available at* http://www.uscis.gov/sites/default/files/files/pressrelease/F1Student_11_25_05_PR.pdf (last visited Nov. 19, 2014). USCIS explained that such

requests for deferred action would be "decided on a case-by-case basis" and that it could not "provide any assurance that all such requests will be granted." *Id.* at 1.

4. Deferred Action for Widows and Widowers of U.S. Citizens. In 2009, DHS implemented a deferred action program for certain widows and widowers of U.S. citizens. USCIS explained that "no avenue of immigration relief exists for the surviving spouse of a deceased U.S. citizen if the surviving spouse and the U.S. citizen were married less than 2 years at the time of the citizen's death" and USCIS had not yet adjudicated a visa petition on the spouse's behalf. Memorandum for Field Leadership, USCIS, from Donald Neufeld, Acting Associate Director, USCIS, *Re: Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and Their Children* at 1 (Sept. 4, 2009). "In order to address humanitarian concerns arising from cases involving surviving spouses of U.S. citizens," USCIS issued guidance permitting covered surviving spouses and "their qualifying children who are residing in the United States" to apply for deferred action. *Id.* at 2, 6. USCIS clarified that such relief would not be automatic, but rather would be unavailable in the presence of, for example, "serious adverse factors, such as national security concerns, significant immigration fraud, commission of other crimes, or public safety reasons." *Id.* at 6.[7]

5. Deferred Action for Childhood Arrivals. Announced by DHS in 2012, DACA makes deferred action available to "certain young people who were brought to this country as children" and therefore "[a]s a general matter . . . lacked the intent to violate the law." Memorandum for David Aguilar, Acting Commissioner, CBP, et al., from Janet Napolitano, Secretary, DHS, *Re: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* at 1 (June 15, 2012) ("Napolitano Memorandum"). An alien is eligible for DACA if she was under the age of 31 when the program began; arrived in the United States before the age of 16; continuously resided in the United States for at least 5 years immediately preceding June 15, 2012; was physically present on June 15, 2012; satisfies certain educational or military service requirements; and neither has a serious criminal history nor "poses a threat to national security or public safety." *See id.* DHS evaluates applicants' eligibility for DACA on a case-by-case basis. *See id.* at 2; USCIS, *Deferred Action for Childhood Arrivals (DACA) Toolkit: Resources for Community Partners* at 11 ("DACA Toolkit"). Successful DACA applicants receive deferred action for a

[7] Several months after the deferred action program was announced, Congress eliminated the requirement that an alien be married to a U.S. citizen "for at least 2 years at the time of the citizen's death" to retain his or her eligibility for lawful immigration status. Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111 83, § 568(c), 123 Stat. 2142, 2186 (2009). Concluding that this legislation rendered its surviving spouse guidance "obsolete," USCIS withdrew its earlier guidance and treated all pending applications for deferred action as visa petitions. *See* Memorandum for Executive Leadership, USCIS, from Donald Neufeld, Acting Associate Director, USCIS, et al., *Re: Additional Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and Their Children (REVISED)* at 3, 10 (Dec. 2, 2009).

period of two years, subject to renewal. *See* DACA Toolkit at 11. DHS has stated that grants of deferred action under DACA may be terminated at any time, *id.* at 16, and "confer[] no substantive right, immigration status or pathway to citizenship," Napolitano Memorandum at 3.[8]

Congress has long been aware of the practice of granting deferred action, including in its categorical variety, and of its salient features; and it has never acted to disapprove or limit the practice.[9] On the contrary, it has enacted several pieces of legislation that have either assumed that deferred action would be available in certain circumstances, or expressly directed that deferred action be extended to certain categories of aliens. For example, as Congress was considering VAWA reauthorization legislation in 2000, INS officials testified before Congress about their deferred action program for VAWA self-petitioners, explaining that "[a]pproved [VAWA] self-petitioners are placed in deferred action status," such that "[n]o battered alien who has filed a[n approved] self petition . . . has been deported." H.R. 3083 Hearings at 43. Congress responded by not only acknowledging but also expanding the deferred action program in the 2000 VAWA reauthorization legislation, providing that children who could no longer self-petition under VAWA because they were over the age of 21 would nonetheless be "eligible for deferred action and work authorization." Victims of Trafficking and

[8] Before DACA was announced, our Office was consulted about whether such a program would be legally permissible. As we orally advised, our preliminary view was that such a program would be permissible, provided that immigration officials retained discretion to evaluate each application on an individualized basis. We noted that immigration officials typically consider factors such as having been brought to the United States as a child in exercising their discretion to grant deferred action in individual cases. We explained, however, that extending deferred action to individuals who satisfied these and other specified criteria on a class wide basis would raise distinct questions not implicated by ad hoc grants of deferred action. We advised that it was critical that, like past policies that made deferred action available to certain classes of aliens, the DACA program require immigration officials to evaluate each application for deferred action on a case by case basis, rather than granting deferred action automatically to all applicants who satisfied the threshold eligibility criteria. We also noted that, although the proposed program was predicated on humanitarian concerns that appeared less particular ized and acute than those underlying certain prior class wide deferred action programs, the concerns animating DACA were nonetheless consistent with the types of concerns that have customarily guided the exercise of immigration enforcement discretion.

[9] Congress has considered legislation that would limit the practice of granting deferred action, but it has never enacted such a measure. In 2011, a bill was introduced in both the House and the Senate that would have temporarily suspended DHS's authority to grant deferred action except in narrow circumstances. *See* H.R. 2497, 112th Cong. (2011); S. 1380, 112th Cong. (2011). Neither chamber, however, voted on the bill. This year, the House passed a bill that purported to bar any funding for DACA or other class wide deferred action programs, H.R. 5272, 113th Cong. (2014), but the Senate has not considered the legislation. Because the Supreme Court has instructed that unenacted legislation is an unreliable indicator of legislative intent, *see Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 381 n.11 (1969), we do not draw any inference regarding congressional policy from these unenacted bills.

Violence Protection Act of 2000, Pub. L. No. 106-386, § 1503(d)(2), 114 Stat. 1464, 1522 (codified at 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV)).[10]

Congress demonstrated a similar awareness of INS's (and later DHS's) deferred action program for bona fide T and U visa applicants. As discussed above, that program made deferred action available to nearly all individuals who could make a prima facie showing of eligibility for a T or U visa. In 2008 legislation, Congress authorized DHS to "grant . . . an administrative stay of a final order of removal" to any such individual. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 204, 122 Stat. 5044, 5060 (codified at 8 U.S.C. § 1227(d)(1)). Congress further clarified that "[t]he denial of a request for an administrative stay of removal under this subsection shall not preclude the alien from applying for . . . deferred action." *Id.* It also directed DHS to compile a report detailing, among other things, how long DHS's "specially trained [VAWA] Unit at the [USCIS] Vermont Service Center" took to adjudicate victim-based immigration applications for "deferred action," along with "steps taken to improve in this area." *Id.* § 238. Representative Berman, the bill's sponsor, explained that the Vermont Service Center should "strive to issue work authorization and deferred action" to "[i]mmigrant victims of domestic violence, sexual assault and other violence crimes . . . in most instances within 60 days of filing." 154 Cong. Rec. 24603 (2008).

In addition, in other enactments, Congress has specified that certain classes of individuals should be made "eligible for deferred action." These classes include certain immediate family members of LPRs who were killed on September 11, 2001, USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 423(b), 115 Stat. 272, 361, and certain immediate family members of certain U.S. citizens killed in combat, National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1703(c) (d), 117 Stat. 1392, 1694. In the same legislation, Congress made these individuals eligible to obtain lawful status as "family-sponsored immigrant[s]" or "immediate relative[s]" of U.S. citizens. Pub. L. No. 107-56, § 423(b), 115 Stat. 272, 361; Pub. L. No. 108-136, § 1703(c)(1)(A), 117 Stat. 1392, 1694; *see generally Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2197 (2014) (plurality opinion) (explaining which aliens typically qualify as family-sponsored immigrants or immediate relatives).

Finally, Congress acknowledged the practice of granting deferred action in the REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 231, 302 (codified at

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[10] Five years later, in the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109 162, 119 Stat. 2960, Congress specified that, "[u]pon the approval of a petition as a VAWA self petitioner, the alien . . . is eligible for work authorization." *Id.* § 814(b) (codified at 8 U.S.C. § 1154(a)(1)(K)). One of the Act's sponsors explained that while this provision was intended to "give[] DHS statutory authority to grant work authorization . . . without having to rely upon deferred action . . . [t]he current practice of granting deferred action to approved VAWA self petitioners should continue." 151 Cong. Rec. 29334 (2005) (statement of Rep. Conyers).

49 U.S.C. § 30301 note), which makes a state-issued driver's license or identification card acceptable for federal purposes only if the state verifies, among other things, that the card's recipient has "[e]vidence of [l]awful [s]tatus." Congress specified that, for this purpose, acceptable evidence of lawful status includes proof of, among other things, citizenship, lawful permanent or temporary residence, or "approved deferred action status." *Id.* § 202(c)(2)(B)(viii).

B.

The practice of granting deferred action, like the practice of setting enforcement priorities, is an exercise of enforcement discretion rooted in DHS's authority to enforce the immigration laws and the President's duty to take care that the laws are faithfully executed. It is one of several mechanisms by which immigration officials, against a backdrop of limited enforcement resources, exercise their "broad discretion" to administer the removal system and, more specifically, their discretion to determine whether "it makes sense to pursue removal" in particular circumstances. *Arizona*, 132 S. Ct. at 2499.

Deferred action, however, differs in at least three respects from more familiar and widespread exercises of enforcement discretion. First, unlike (for example) the paradigmatic exercise of prosecutorial discretion in a criminal case, the conferral of deferred action does not represent a decision not to prosecute an individual for past unlawful conduct; it instead represents a decision to openly tolerate an undocumented alien's continued presence in the United States for a fixed period (subject to revocation at the agency's discretion). Second, unlike most exercises of enforcement discretion, deferred action carries with it benefits in addition to non-enforcement itself; specifically, the ability to seek employment authorization and suspension of unlawful presence for purposes of 8 U.S.C. § 1182(a)(9)(B)(i) and (a)(9)(C)(i)(I). Third, class-based deferred action programs, like those for VAWA recipients and victims of Hurricane Katrina, do not merely enable individual immigration officials to select deserving beneficiaries from among those aliens who have been identified or apprehended for possible removal as is the case with ad hoc deferred action but rather set forth certain threshold eligibility criteria and then invite individuals who satisfy these criteria to apply for deferred action status.

While these features of deferred action are somewhat unusual among exercises of enforcement discretion, the differences between deferred action and other exercises of enforcement discretion are less significant than they might initially appear. The first feature the toleration of an alien's continued unlawful presence is an inevitable element of almost any exercise of discretion in immigration enforcement. Any decision not to remove an unlawfully present alien even through an exercise of routine enforcement discretion necessarily carries with it a tacit acknowledgment that the alien will continue to be present in the United States without legal status. Deferred action arguably goes beyond such tacit acknowledgment by expressly communicating to the alien that his or her unlawful

presence will be tolerated for a prescribed period of time. This difference is not, in our view, insignificant. But neither does it fundamentally transform deferred action into something other than an exercise of enforcement discretion: As we have previously noted, deferred action confers no lawful immigration status, provides no path to lawful permanent residence or citizenship, and is revocable at any time in the agency's discretion.

With respect to the second feature, the additional benefits deferred action confers the ability to apply for work authorization and the tolling of unlawful presence do not depend on background principles of agency discretion under DHS's general immigration authorities or the Take Care Clause at all, but rather depend on independent and more specific statutory authority rooted in the text of the INA. The first of those authorities, DHS's power to prescribe which aliens are authorized to work in the United States, is grounded in 8 U.S.C. § 1324a(h)(3), which defines an "unauthorized alien" not entitled to work in the United States as an alien who is neither an LPR nor "authorized to be . . . employed by [the INA] or by the Attorney General [now the Secretary of Homeland Security]." This statutory provision has long been understood to recognize the authority of the Secretary (and the Attorney General before him) to grant work authorization to particular classes of aliens. *See* 8 C.F.R. § 274a.12; *see also Perales v. Casillas*, 903 F.2d 1043, 1048 50 (5th Cir. 1990) (describing the authority recognized by section 1324a(h)(3) as "permissive" and largely "unfettered").[11] Although the INA

[11] Section 1324a(h)(3) was enacted in 1986 as part of IRCA. Before then, the INA contained no provisions comprehensively addressing the employment of aliens or expressly delegating the authority to regulate the employment of aliens to a responsible federal agency. INS assumed the authority to prescribe the classes of aliens authorized to work in the United States under its general responsibility to administer the immigration laws. In 1981, INS promulgated regulations codifying its existing procedures and criteria for granting employment authorization. *See Employment Authorization to Aliens in the United States*, 46 Fed. Reg. 25079, 25080 81 (May 5, 1981) (citing 8 U.S.C. § 1103(a)). Those regulations permitted certain categories of aliens who lacked lawful immigration status, including deferred action recipients, to apply for work authorization under certain circumstances. 8 C.F.R. § 109.1(b)(7) (1982). In IRCA, Congress introduced a "comprehensive scheme prohibiting the employment of illegal aliens in the United States," *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002), to be enforced primarily through criminal and civil penalties on employers who knowingly employ an "unauthorized alien." As relevant here, Congress defined an "unauthorized alien" barred from employment in the United States as an alien who "is not . . . either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter *or by the Attorney General*." 8 U.S.C. § 1324a(h)(3) (emphasis added). Shortly after IRCA was enacted, INS denied a petition to rescind its employment authorization regulation, rejecting an argument that "the phrase 'authorized to be so employed by this Act or the Attorney General' does not recognize the Attorney General's authority to grant work authorization except to those aliens who have already been granted specific authorization by the Act." *Employment Authorization; Classes of Aliens Eligible*, 52 Fed. Reg. 46092, 46093 (Dec. 4, 1987). Because the same statutory phrase refers both to aliens authorized to be employed by the INA and aliens authorized to be employed by the Attorney General, INS concluded that the only way to give effect to both references is to conclude "that Congress, being fully aware of the Attorney General's authority to promulgate regulations, and approving of the manner in which he has exercised that authority in this matter, defined 'unauthorized alien' in such fashion as to exclude aliens who have been authorized employment by the Attorney General through the

requires the Secretary to grant work authorization to particular classes of aliens, *see, e.g.*, 8 U.S.C. § 1158(c)(1)(B) (aliens granted asylum), it places few limitations on the Secretary's authority to grant work authorization to other classes of aliens. Further, and notably, additional provisions of the INA expressly contemplate that the Secretary may grant work authorization to aliens lacking lawful immigration status even those who are in active removal proceedings or, in certain circumstances, those who have already received final orders of removal. *See id.* § 1226(a)(3) (permitting the Secretary to grant work authorization to an otherwise work-eligible alien who has been arrested and detained pending a decision whether to remove the alien from the United States); *id.* § 1231(a)(7) (permitting the Secretary under certain narrow circumstances to grant work authorization to aliens who have received final orders of removal). Consistent with these provisions, the Secretary has long permitted certain additional classes of aliens who lack lawful immigration status to apply for work authorization, including deferred action recipients who can demonstrate an economic necessity for employment. *See* 8 C.F.R. § 274a.12(c)(14); *see also id.* § 274a.12(c)(8) (applicants for asylum), (c)(10) (applicants for cancellation of removal); *supra* note 11 (discussing 1981 regulations).

The Secretary's authority to suspend the accrual of unlawful presence of deferred action recipients is similarly grounded in the INA. The relevant statutory provision treats an alien as "unlawfully present" for purposes of 8 U.S.C. § 1182(a)(9)(B)(i) and (a)(9)(C)(i)(I) if he "is present in the United States after the expiration of the period of stay authorized by the Attorney General." 8 U.S.C. § 1182(a)(9)(B)(ii). That language contemplates that the Attorney General (and now the Secretary) may authorize an alien to stay in the United States without accruing unlawful presence under section 1182(a)(9)(B)(i) or section 1182(a)(9)(C)(i). And DHS regulations and policy guidance interpret a "period of stay authorized by the Attorney General" to include periods during which an alien has been granted deferred action. *See* 8 C.F.R. § 214.14(d)(3); 28 C.F.R. § 1100.35(b)(2); USCIS Consolidation of Guidance at 42.

The final unusual feature of deferred action programs is particular to class-based programs. The breadth of such programs, in combination with the first two features of deferred action, may raise particular concerns about whether immigration officials have undertaken to substantively change the statutory removal system rather than simply adapting its application to individual circumstances. But the salient feature of class-based programs the establishment of an affirmative application process with threshold eligibility criteria does not in and of itself cross the line between executing the law and rewriting it. Although every class-wide deferred action program that has been implemented to date has established

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regulatory process, in addition to those who are authorized employment by statute." *Id.*; *see Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 844 (1986) (stating that "considerable weight must be accorded" an agency's "contemporaneous interpretation of the statute it is entrusted to administer").

certain threshold eligibility criteria, each program has also left room for case-by-case determinations, giving immigration officials discretion to deny applications even if the applicant fulfills all of the program criteria. *See supra* pp. 15 18. Like the establishment of enforcement priorities discussed in Part I, the establishment of threshold eligibility criteria can serve to avoid arbitrary enforcement decisions by individual officers, thereby furthering the goal of ensuring consistency across a large agency. The guarantee of individualized, case-by-case review helps avoid potential concerns that, in establishing such eligibility criteria, the Executive is attempting to rewrite the law by defining new categories of aliens who are automatically entitled to particular immigration relief. *See Crowley Caribbean Transp.*, 37 F.3d at 676 77; *see also Chaney*, 470 U.S. at 833 n.4. Furthermore, while permitting potentially eligible individuals to apply for an exercise of enforcement discretion is not especially common, many law enforcement agencies have developed programs that invite violators of the law to identify themselves to the authorities in exchange for leniency.[12] Much as is the case with those programs, inviting eligible aliens to identify themselves through an application process may serve the agency's law enforcement interests by encouraging lower-priority individuals to identify themselves to the agency. In so doing, the process may enable the agency to better focus its scarce resources on higher enforcement priorities.

Apart from the considerations just discussed, perhaps the clearest indication that these features of deferred action programs are not per se impermissible is the fact that Congress, aware of these features, has repeatedly enacted legislation appearing to endorse such programs. As discussed above, Congress has not only directed that certain classes of aliens be made eligible for deferred action programs and in at least one instance, in the case of VAWA beneficiaries, directed the expansion of an existing program but also ranked evidence of approved deferred action status as evidence of "lawful status" for purposes of the REAL ID Act. These enactments strongly suggest that when DHS in the past has decided to grant deferred action to an individual or class of individuals, it has been acting in a manner consistent with congressional policy "'rather than embarking on a frolic of its own.'" *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139

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[12] For example, since 1978, the Department of Justice's Antitrust Division has implemented a "leniency program" under which a corporation that reveals an antitrust conspiracy in which it participated may receive a conditional promise that it will not be prosecuted. *See* Dep't of Justice, *Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters (November 19, 2008)*, *available at* http://www.justice.gov/atr/public/criminal/239583.pdf (last visited Nov. 19, 2014); *see also* Internal Revenue Manual § 9.5.11.9(2) (Revised IRS Voluntary Disclosure Practice), *available at* http://www.irs.gov/uac/Revised IRS Voluntary Disclosure Practice (last visited Nov. 19, 2014) (explaining that a taxpayer's voluntary disclosure of misreported tax information "may result in prosecution not being recommended"); U.S. Marshals Service, *Fugitive Safe Surrender FAQs*, *available at* http://www.usmarshals.gov/safesurrender/faqs.html (last visited Nov. 19, 2014) (stating that fugitives who surrender at designated sites and times under the "Fugitive Safe Surrender" program are likely to receive "favorable consideration").

(1985) (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 375 (1969)); *cf. id.* at 137 39 (concluding that Congress acquiesced in an agency's assertion of regulatory authority by "refus[ing] . . . to overrule" the agency's view after it was specifically "brought to Congress'[s] attention," and further finding implicit congressional approval in legislation that appeared to acknowledge the regulatory authority in question); *Dames & Moore v. Regan*, 453 U.S. 654, 680 (1981) (finding that Congress "implicitly approved the practice of claim settlement by executive agreement" by enacting the International Claims Settlement Act of 1949, which "create[d] a procedure to implement" those very agreements).

Congress's apparent endorsement of certain deferred action programs does not mean, of course, that a deferred action program can be lawfully extended to any group of aliens, no matter its characteristics or its scope, and no matter the circumstances in which the program is implemented. Because deferred action, like the prioritization policy discussed above, is an exercise of enforcement discretion rooted in the Secretary's broad authority to enforce the immigration laws and the President's duty to take care that the laws are faithfully executed, it is subject to the same four general principles previously discussed. *See supra* pp. 6 7. Thus, any expansion of deferred action to new classes of aliens must be carefully scrutinized to ensure that it reflects considerations within the agency's expertise, and that it does not seek to effectively rewrite the laws to match the Executive's policy preferences, but rather operates in a manner consonant with congressional policy expressed in the statute. *See supra* pp. 6 7 (citing *Youngstown*, 343 U.S. at 637, and *Nat'l Ass'n of Home Builders*, 551 U.S. at 658). Immigration officials cannot abdicate their statutory responsibilities under the guise of exercising enforcement discretion. *See supra* p. 7 (citing *Chaney*, 470 U.S. at 833 n.4). And any new deferred action program should leave room for individualized evaluation of whether a particular case warrants the expenditure of resources for enforcement. *See supra* p. 7 (citing *Glickman*, 96 F.3d at 1123, and *Crowley Caribbean Transp.*, 37 F.3d at 676 77).

Furthermore, because deferred action programs depart in certain respects from more familiar and widespread exercises of enforcement discretion, particularly careful examination is needed to ensure that any proposed expansion of deferred action complies with these general principles, so that the proposed program does not, in effect, cross the line between executing the law and rewriting it. In analyzing whether the proposed programs cross this line, we will draw substantial guidance from Congress's history of legislation concerning deferred action. In the absence of express statutory guidance, the nature of deferred action programs Congress has implicitly approved by statute helps to shed light on Congress's own understandings about the permissible uses of deferred action. Those understandings, in turn, help to inform our consideration of whether the proposed deferred action programs are "faithful[]" to the statutory scheme Congress has enacted. U.S. Const. art. II, § 3.

C.

We now turn to the specifics of DHS's proposed deferred action programs. DHS has proposed implementing a policy under which an alien could apply for, and would be eligible to receive, deferred action if he or she: (1) is not an enforcement priority under DHS policy; (2) has continuously resided in the United States since before January 1, 2010; (3) is physically present in the United States both when DHS announces its program and at the time of application for deferred action; (4) has a child who is a U.S. citizen or LPR; and (5) presents "no other factors that, in the exercise of discretion, make[] the grant of deferred action inappropriate." Johnson Deferred Action Memorandum at 4. You have also asked about the permissibility of a similar program that would be open to parents of children who have received deferred action under the DACA program. We first address DHS's proposal to implement a deferred action program for the parents of U.S. citizens and LPRs, and then turn to the permissibility of the program for parents of DACA recipients in the next section.

1.

We begin by considering whether the proposed program for the parents of U.S. citizens and LPRs reflects considerations within the agency's expertise. DHS has offered two justifications for the proposed program for the parents of U.S. citizens and LPRs. First, as noted above, severe resource constraints make it inevitable that DHS will not remove the vast majority of aliens who are unlawfully present in the United States. Consistent with Congress's instruction, DHS prioritizes the removal of individuals who have significant criminal records, as well as others who present dangers to national security, public safety, or border security. *See supra* p. 10. Parents with longstanding ties to the country and who have no significant criminal records or other risk factors rank among the agency's lowest enforcement priorities; absent significant increases in funding, the likelihood that any individual in that category will be determined to warrant the expenditure of severely limited enforcement resources is very low. Second, DHS has explained that the program would serve an important humanitarian interest in keeping parents together with children who are lawfully present in the United States, in situations where such parents have demonstrated significant ties to community and family in this country. *See* Shahoulian E-mail.

With respect to DHS's first justification, the need to efficiently allocate scarce enforcement resources is a quintessential basis for an agency's exercise of enforcement discretion. *See Chaney*, 470 U.S. at 831. Because, as discussed earlier, Congress has appropriated only a small fraction of the funds needed for full enforcement, DHS can remove no more than a small fraction of the individuals who are removable under the immigration laws. *See supra* p. 9. The agency must therefore make choices about which violations of the immigration laws it

will prioritize and pursue. And as *Chaney* makes clear, such choices are entrusted largely to the Executive's discretion. 470 U.S. at 831.

The deferred action program DHS proposes would not, of course, be costless. Processing applications for deferred action and its renewal requires manpower and resources. *See Arizona*, 132 S. Ct. at 2521 (Scalia, J., concurring in part and dissenting in part). But DHS has informed us that the costs of administering the proposed program would be borne almost entirely by USCIS through the collection of application fees. *See* Shahoulian E-mail; *see also* 8 U.S.C. § 1356(m); 8 C.F.R. § 103.7(b)(1)(i)(C), (b)(1)(i)(HH). DHS has indicated that the costs of administering the deferred action program would therefore not detract in any significant way from the resources available to ICE and CBP the enforcement arms of DHS which rely on money appropriated by Congress to fund their operations. *See* Shahoulian E-mail. DHS has explained that, if anything, the proposed deferred action program might increase ICE's and CBP's efficiency by in effect using USCIS's fee-funded resources to enable those enforcement divisions to more easily identify non-priority aliens and focus their resources on pursuing aliens who are strong candidates for removal. *See id.* The proposed program, in short, might help DHS address its severe resource limitations, and at the very least likely would not exacerbate them. *See id.*

DHS does not, however, attempt to justify the proposed program solely as a cost-saving measure, or suggest that its lack of resources alone is sufficient to justify creating a deferred action program for the proposed class. Rather, as noted above, DHS has explained that the program would also serve a particularized humanitarian interest in promoting family unity by enabling those parents of U.S. citizens and LPRs who are not otherwise enforcement priorities and who have demonstrated community and family ties in the United States (as evidenced by the length of time they have remained in the country) to remain united with their children in the United States. Like determining how best to respond to resource constraints, determining how to address such "human concerns" in the immigration context is a consideration that is generally understood to fall within DHS's expertise. *Arizona*, 132 S. Ct. at 2499.

This second justification for the program also appears consonant with congressional policy embodied in the INA. Numerous provisions of the statute reflect a particular concern with uniting aliens with close relatives who have attained lawful immigration status in the United States. *See, e.g.*, *Fiallo v. Bell*, 430 U.S. 787, 795 n.6 (1977); *INS v. Errico*, 385 U.S. 214, 220 n.9 (1966) ("'The legislative history of the Immigration and Nationality Act clearly indicates that the Congress . . . was concerned with the problem of keeping families of United States citizens and immigrants united.'" (quoting H.R. Rep. No. 85-1199, at 7 (1957)). The INA provides a path to lawful status for the parents, as well as other immediate relatives, of U.S. citizens: U.S. citizens aged twenty-one or over may petition for parents to obtain visas that would permit them to enter and permanently reside

in the United States, and there is no limit on the overall number of such petitions that may be granted. *See* 8 U.S.C. § 1151(b)(2)(A)(i); *see also Cuellar de Osorio*, 134 S. Ct. at 2197 99 (describing the process for obtaining a family-based immigrant visa). And although the INA contains no parallel provision permitting LPRs to petition on behalf of their parents, it does provide a path for LPRs to become citizens, at which point they too can petition to obtain visas for their parents. *See, e.g.*, 8 U.S.C. § 1427(a) (providing that aliens are generally eligible to become naturalized citizens after five years of lawful permanent residence); *id.* § 1430(a) (alien spouses of U.S. citizens become eligible after three years of lawful permanent residence); *Demore v. Kim*, 538 U.S. 510, 544 (2003).[13] Additionally, the INA empowers the Attorney General to cancel the removal of, and adjust to lawful permanent resident status, aliens who have been physically present in the United States for a continuous period of not less than ten years, exhibit good moral character, have not been convicted of specified offenses, and have immediate relatives who are U.S. citizens or LPRs and who would suffer exceptional hardship from the alien's removal. 8 U.S.C. § 1229b(b)(1). DHS's proposal to focus on the parents of U.S. citizens and LPRs thus tracks a congressional concern, expressed in the INA, with uniting the immediate families of individuals who have permanent legal ties to the United States.

At the same time, because the temporary relief DHS's proposed program would confer to such parents is sharply limited in comparison to the benefits Congress has made available through statute, DHS's proposed program would not operate to circumvent the limits Congress has placed on the availability of those benefits. The statutory provisions discussed above offer the parents of U.S. citizens and LPRs the prospect of permanent lawful status in the United States. The cancellation of removal provision, moreover, offers the prospect of receiving such status

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[13] The INA does permit LPRs to petition on behalf of their spouses and children even before they have attained citizenship. *See* 8 U.S.C. § 1153(a)(2). However, the exclusion of LPRs' parents from this provision does not appear to reflect a congressional judgment that, until they attain citizenship, LPRs lack an interest in being united with their parents comparable to their interest in being united with their other immediate relatives. The distinction between parents and other relatives originated with a 1924 statute that exempted the wives and minor children of U.S. citizens from immigration quotas, gave "preference status" eligibility for a specially designated pool of immigrant visas to other relatives of U.S. citizens, and gave no favorable treatment to the relatives of LPRs. Immigration Act of 1924, Pub. L. No. 68 139, §§ 4(a), 6, 43 Stat. 153, 155 56. In 1928, Congress extended preference status to LPRs' wives and minor children, reasoning that because such relatives would be eligible for visas without regard to any quota when their LPR relatives became citizens, granting preference status to LPRs' wives and minor children would "hasten[]" the "family reunion." S. Rep. No. 70 245, at 2 (1928); *see* Act of May 29, 1928, ch. 914, 45 Stat. 1009, 1009 10. The special visa status for wives and children of LPRs thus mirrored, and was designed to complement, the special visa status given to wives and minor children of U.S. citizens. In 1965, Congress eliminated the basis on which the distinction had rested by exempting all "immediate relatives" of U.S. citizens, including parents, from numerical restrictions on immigration. Pub. L. No. 89 236, § 1, 79 Stat. 911, 911. But it did not amend eligibility for preference status for relatives of LPRs to reflect that change. We have not been able to discern any rationale for this omission in the legislative history or statutory text of the 1965 law.

immediately, without the delays generally associated with the family-based immigrant visa process. DHS's proposed program, in contrast, would not grant the parents of U.S. citizens and LPRs any lawful immigration status, provide a path to permanent residence or citizenship, or otherwise confer any legally enforceable entitlement to remain in the United States. *See* USCIS SOP at 3. It is true that, as we have discussed, a grant of deferred action would confer eligibility to apply for and obtain work authorization, pursuant to the Secretary's statutory authority to grant such authorization and the longstanding regulations promulgated thereunder. *See supra* pp. 13, 21 22. But unlike the automatic employment eligibility that accompanies LPR status, *see* 8 U.S.C. § 1324a(h)(3), this authorization could be granted only on a showing of economic necessity, and would last only for the limited duration of the deferred action grant, *see* 8 C.F.R. § 274a.12(c)(14).

The other salient features of the proposal are similarly consonant with congressional policy. The proposed program would focus on parents who are not enforcement priorities under the prioritization policy discussed above a policy that, as explained earlier, comports with the removal priorities set by Congress. *See supra* p. 10. The continuous residence requirement is likewise consistent with legislative judgments that extended periods of continuous residence are indicative of strong family and community ties. *See* IRCA, Pub. L. No. 99-603, § 201(a), 100 Stat. 3359, 3394 (1986) (codified as amended at 8 U.S.C. § 1255a(a)(2)) (granting lawful status to certain aliens unlawfully present in the United States since January 1, 1982); *id.* § 302(a) (codified as amended at 8 U.S.C. § 1160) (granting similar relief to certain agricultural workers); H.R. Rep. No. 99-682, pt. 1, at 49 (1986) (stating that aliens present in the United States for five years "have become a part of their communities[,] . . . have strong family ties here which include U.S. citizens and lawful residents[,] . . . have built social networks in this country[, and] . . . have contributed to the United States in myriad ways"); S. Rep. No. 99-132, at 16 (1985) (deporting aliens who "have become well settled in this country" would be a "wasteful use of the Immigration and Naturalization Service's limited enforcement resources"); *see also Arizona*, 132 S. Ct. at 2499 (noting that "[t]he equities of an individual case" turn on factors "including whether the alien has . . . long ties to the community").

We also do not believe DHS's proposed program amounts to an abdication of its statutory responsibilities, or a legislative rule overriding the commands of the statute. As discussed earlier, DHS's severe resource constraints mean that, unless circumstances change, it could not as a practical matter remove the vast majority of removable aliens present in the United States. The fact that the proposed program would defer the removal of a subset of these removable aliens a subset that ranks near the bottom of the list of the agency's removal priorities thus does not, by itself, demonstrate that the program amounts to an abdication of DHS's responsibilities. And the case-by-case discretion given to immigration officials under DHS's proposed program alleviates potential concerns that DHS has

abdicated its statutory enforcement responsibilities with respect to, or created a categorical, rule-like entitlement to immigration relief for, the particular class of aliens eligible for the program. An alien who meets all the criteria for deferred action under the program would receive deferred action only if he or she "present[ed] no other factors that, in the exercise of discretion," would "make[] the grant of deferred action inappropriate." Johnson Deferred Action Memorandum at 4. The proposed policy does not specify what would count as such a factor; it thus leaves the relevant USCIS official with substantial discretion to determine whether a grant of deferred action is warranted. In other words, even if an alien is not a removal priority under the proposed policy discussed in Part I, has continuously resided in the United States since before January 1, 2010, is physically present in the country, and is a parent of an LPR or a U.S. citizen, the USCIS official evaluating the alien's deferred action application must still make a judgment, in the exercise of her discretion, about whether that alien presents any other factor that would make a grant of deferred action inappropriate. This feature of the proposed program ensures that it does not create a categorical entitlement to deferred action that could raise concerns that DHS is either impermissibly attempting to rewrite or categorically declining to enforce the law with respect to a particular group of undocumented aliens.

Finally, the proposed deferred action program would resemble in material respects the kinds of deferred action programs Congress has implicitly approved in the past, which provides some indication that the proposal is consonant not only with interests reflected in immigration law as a general matter, but also with congressional understandings about the permissible uses of deferred action. As noted above, the program uses deferred action as an interim measure for a group of aliens to whom Congress has given a prospective entitlement to lawful immigration status. While Congress has provided a path to lawful status for the parents of U.S. citizens and LPRs, the process of obtaining that status "takes time." *Cuellar de Osorio*, 134 S. Ct. at 2199. The proposed program would provide a mechanism for families to remain together, depending on their circumstances, for some or all of the intervening period.[14] Immigration officials have on several

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[14] DHS's proposed program would likely not permit all potentially eligible parents to remain together with their children for the entire duration of the time until a visa is awarded. In particular, undocumented parents of adult citizens who are physically present in the country would be ineligible to adjust their status without first leaving the country if they had never been "inspected and admitted or paroled into the United States." 8 U.S.C. § 1255(a) (permitting the Attorney General to adjust to permanent resident status certain aliens present in the United States if they become eligible for immigrant visas). They would thus need to leave the country to obtain a visa at a U.S. consulate abroad. *See id.* § 1201(a); *Cuellar de Osorio*, 134 S. Ct. at 2197 99. But once such parents left the country, they would in most instances become subject to the 3 or 10 year bar under 8 U.S.C. § 1182(a)(9)(B)(i) and therefore unable to obtain a visa unless they remained outside the country for the duration of the bar. DHS's proposed program would nevertheless enable other families to stay together without regard to the 3 or 10 year bar. And even as to those families with parents who would become subject to that bar, the proposed deferred action program would have the effect of reducing the

occasions deployed deferred action programs as interim measures for other classes of aliens with prospective entitlements to lawful immigration status, including VAWA self-petitioners, bona fide T and U visa applicants, certain immediate family members of certain U.S. citizens killed in combat, and certain immediate family members of aliens killed on September 11, 2001. As noted above, each of these programs has received Congress's implicit approval and, indeed, in the case of VAWA self-petitioners, a direction to expand the program beyond its original bounds. *See supra* pp. 18 20.[15] In addition, much like these and other programs Congress has implicitly endorsed, the program serves substantial and particularized humanitarian interests. Removing the parents of U.S. citizens and LPRs that is, of children who have established permanent legal ties to the United States would separate them from their nuclear families, potentially for many years, until they were able to secure visas through the path Congress has provided. During that time, both the parents and their U.S. citizen or LPR children would be deprived of both the economic support and the intangible benefits that families provide.

We recognize that the proposed program would likely differ in size from these prior deferred action programs. Although DHS has indicated that there is no reliable way to know how many eligible aliens would actually apply for or would be likely to receive deferred action following individualized consideration under the proposed program, it has informed us that approximately 4 million individuals could be eligible to apply. *See* Shahoulian E-mail. We have thus considered whether the size of the program alone sets it at odds with congressional policy or the Executive's duties under the Take Care Clause. In the absence of express statutory guidance, it is difficult to say exactly how the program's potential size bears on its permissibility as an exercise of executive enforcement discretion. But because the size of DHS's proposed program corresponds to the size of a population to which Congress has granted a prospective entitlement to lawful status

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amount of time the family had to spend apart, and could enable them to adjust the timing of their separation according to, for example, their children's needs for care and support.

[15] Several extended voluntary departure programs have been animated by a similar rationale, and the most prominent of these programs also received Congress's implicit approval. In particular, as noted above, the Family Fairness policy, implemented in 1990, authorized granting extended voluntary departure and work authorization to the estimated 1.5 million spouses and children of aliens granted legal status under IRCA aliens who would eventually "acquire lawful permanent resident status" and be able to petition on behalf of their family members. Family Fairness Memorandum at 1; *see supra* pp. 14 15. Later that year, Congress granted the beneficiaries of the Family Fairness program an indefinite stay of deportation. *See* Immigration Act of 1990, Pub. L. No. 101 649, § 301, 104 Stat. 4978, 5030. Although it did not make that grant of relief effective for nearly a year, Congress clarified that "the delay in effectiveness of this section shall not be construed as reflecting a Congressional belief that the existing family fairness program should be modified in any way before such date." *Id.* § 301(g). INS's policies for qualifying Third Preference visa applicants and nurses eligible for H 1 nonimmigrant status likewise extended to aliens with prospective entitlements to lawful status. *See supra* p. 14.

without numerical restriction, it seems to us difficult to sustain an argument, based on numbers alone, that DHS's proposal to grant a limited form of administrative relief as a temporary interim measure exceeds its enforcement discretion under the INA. Furthermore, while the potential size of the program is large, it is nevertheless only a fraction of the approximately 11 million undocumented aliens who remain in the United States each year because DHS lacks the resources to remove them; and, as we have indicated, the program is limited to individuals who would be unlikely to be removed under DHS's proposed prioritization policy. There is thus little practical danger that the program, simply by virtue of its size, will impede removals that would otherwise occur in its absence. And although we are aware of no prior exercises of deferred action of the size contemplated here, INS's 1990 Family Fairness policy, which Congress later implicitly approved, made a comparable fraction of undocumented aliens approximately four in ten potentially eligible for discretionary extended voluntary departure relief. *Compare* CRS Immigration Report at 22 (estimating the Family Fairness policy extended to 1.5 million undocumented aliens), *with* Office of Policy and Planning, INS, *Estimates of the Unauthorized Immigrant Population Residing in the United States: 1990 to 2000* at 10 (2003) (estimating an undocumented alien population of 3.5 million in 1990); *see supra* notes 5 & 15 (discussing extended voluntary departure and Congress's implicit approval of the Family Fairness policy). This suggests that DHS's proposed deferred action program is not, simply by virtue of its relative size, inconsistent with what Congress has previously considered a permissible exercise of enforcement discretion in the immigration context.

In light of these considerations, we believe the proposed expansion of deferred action to the parents of U.S. citizens and LPRs is lawful. It reflects considerations responding to resource constraints and to particularized humanitarian concerns arising in the immigration context that fall within DHS's expertise. It is consistent with congressional policy, since it focuses on a group law-abiding parents of lawfully present children who have substantial ties to the community that Congress itself has granted favorable treatment in the immigration process. The program provides for the exercise of case-by-case discretion, thereby avoiding creating a rule-like entitlement to immigration relief or abdicating DHS's enforcement responsibilities for a particular class of aliens. And, like several deferred action programs Congress has approved in the past, the proposed program provides interim relief that would prevent particularized harm that could otherwise befall both the beneficiaries of the program and their families. We accordingly conclude that the proposed program would constitute a permissible exercise of DHS's enforcement discretion under the INA.

2.

We now turn to the proposed deferred action program for the parents of DACA recipients. The relevant considerations are, to a certain extent, similar to those

discussed above: Like the program for the parents of U.S. citizens and LPRs, the proposed program for parents of DACA recipients would respond to severe resource constraints that dramatically limit DHS's ability to remove aliens who are unlawfully present, and would be limited to individuals who would be unlikely to be removed under DHS's proposed prioritization policy. And like the proposed program for LPRs and U.S. citizens, the proposed program for DACA parents would preserve a significant measure of case-by-case discretion not to award deferred action even if the general eligibility criteria are satisfied.

But the proposed program for parents of DACA recipients is unlike the proposed program for parents of U.S. citizens and LPRs in two critical respects. First, although DHS justifies the proposed program in large part based on considerations of family unity, the parents of DACA recipients are differently situated from the parents of U.S. citizens and LPRs under the family-related provisions of the immigration law. Many provisions of the INA reflect Congress's general concern with not separating individuals who are legally entitled to live in the United States from their immediate family members. *See, e.g.*, 8 U.S.C. § 1151(b)(2)(A)(i) (permitting citizens to petition for parents, spouses and children); *id.* § 1229b(b)(1) (allowing cancellation of removal for relatives of citizens and LPRs). But the immigration laws do not express comparable concern for uniting persons who lack lawful status (or prospective lawful status) in the United States with their families. DACA recipients unquestionably lack lawful status in the United States. *See* DACA Toolkit at 8 ("Deferred action . . . does not provide you with a lawful status."). Although they may presumptively remain in the United States, at least for the duration of the grant of deferred action, that grant is both time-limited and contingent, revocable at any time in the agency's discretion. Extending deferred action to the parents of DACA recipients would therefore expand family-based immigration relief in a manner that deviates in important respects from the immigration system Congress has enacted and the policies that system embodies.

Second, as it has been described to us, the proposed deferred action program for the parents of DACA recipients would represent a significant departure from deferred action programs that Congress has implicitly approved in the past. Granting deferred action to the parents of DACA recipients would not operate as an interim measure for individuals to whom Congress has given a prospective entitlement to lawful status. Such parents have no special prospect of obtaining visas, since Congress has not enabled them to self-petition as it has for VAWA self-petitioners and individuals eligible for T or U visas or enabled their undocumented children to petition for visas on their behalf. Nor would granting deferred action to parents of DACA recipients, at least in the absence of other factors, serve interests that are comparable to those that have prompted implementation of deferred action programs in the past. Family unity is, as we have discussed, a significant humanitarian concern that underlies many provisions of the INA. But a concern with furthering family unity alone would not justify the

proposed program, because in the absence of any family member with lawful status in the United States, it would not explain why that concern should be satisfied by permitting family members to remain in the United States. The decision to grant deferred action to DACA parents thus seems to depend critically on the earlier decision to make deferred action available to their children. But we are aware of no precedent for using deferred action in this way, to respond to humanitarian needs rooted in earlier exercises of deferred action. The logic underlying such an expansion does not have a clear stopping point: It would appear to argue in favor of extending relief not only to parents of DACA recipients, but also to the close relatives of any alien granted deferred action through DACA or any other program, those relatives' close relatives, and perhaps the relatives (and relatives' relatives) of any alien granted any form of discretionary relief from removal by the Executive.

For these reasons, the proposed deferred action program for the parents of DACA recipients is meaningfully different from the proposed program for the parents of U.S. citizens and LPRs. It does not sound in Congress's concern for maintaining the integrity of families of individuals legally entitled to live in the United States. And unlike prior deferred action programs in which Congress has acquiesced, it would treat the Executive's prior decision to extend deferred action to one population as justifying the extension of deferred action to additional populations. DHS, of course, remains free to consider whether to grant deferred action to individual parents of DACA recipients on an ad hoc basis. But in the absence of clearer indications that the proposed class-based deferred action program for DACA parents would be consistent with the congressional policies and priorities embodied in the immigration laws, we conclude that it would not be permissible.

III.

In sum, for the reasons set forth above, we conclude that DHS's proposed prioritization policy and its proposed deferred action program for parents of U.S. citizens and lawful permanent residents would be legally permissible, but that the proposed deferred action program for parents of DACA recipients would not be permissible.

KARL R. THOMPSON
Principal Deputy Assistant Attorney General
Office of Legal Counsel

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

x

16 CV 4756(NGG JO)

MAKE THE ROAD NEW YORK and
MARTIN JONATHAN BATALLA VIDAL,

Plaintiffs,

against

KATHY A. BARAN, ET AL.,

Defendants.

x

United States Courthouse
Brooklyn, New York

September 14, 2017
2:30 p.m.

TRANSCRIPT OF CIVIL CAUSE FOR PRE MOTION CONFERENCE
BEFORE THE HONORABLE NICHOLAS G. GARAUFIS
UNITED STATES SENIOR DISTRICT JUDGE
UNITED STATES MAGISTRATE JUDGE JAMES ORENSTEIN

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THE COURT: You may be seated in the back and on the side. Call the case, please.

THE COURTROOM DEPUTY: Everybody on the Vidal matter please state your appearances for the record.

THE COURT: All right. For the plaintiff.

MR. WISHNIE: Good afternoon, Your Honor, for plaintiffs, Michael Wishnie, Jerome N. Frank Legal Services Organization, Yale Law School. With me today is law student intern, Susanna Evarts. Ms. Evarts will be prepared to address the Court regarding the claims set forth in our filings.

Attorney Karen Tumlin of the National Immigration Law Center will be prepared to address the Court regarding case management and scheduling, any matters like that. I'll invite everybody else to introduce themselves.

THE COURT: That's fine, please go ahead.

MR. COX: Justin Cox with the National Immigration Law Center.

MS. JOACHIN: Mayra Joachin, National Immigration Law Center.

MS. HANSON: Jessica Hanson, National Immigration Law Center.

MS. TAYLOR: Amy Taylor, Make The Road New York.

MS. ORIHUELA: Marisol Orihuela, Jerome N. Frank Legal Services Organization.

MR. AHMAD: Muneer Ahmad, Jerome N. Frank Legal Services Organization.

THE COURT: Thank you. Yes.

MS. RILEY: Good afternoon, Your Honor, Susan Riley, chief of the civil division in the U.S. Attorney's Office.

THE COURT: Nice to see you again, Ms. Riley.

MS. RILEY: Thank you, Your Honor.

I'd like to introduce to you our Deputy Assistant Attorney General for the civil division in Washington, D.C., Brett Shumate. He will be presenting the government's arguments today.

Also at counsel table is John Tyler, an assistant director in the Federal Programs Branch in the civil division Department of Justice in Washington, D.C. With us also is Brad Rosenberg, also of the Federal Programs Branch of the civil division in Washington, D.C. Lastly, but not least, Joe Marutollo of our offices, USAO office, chief of immigration litigation.

THE COURT: He has replaced Mr. Dunn?

MS. RILEY: Yes, he has, Your Honor.

THE COURT: Who has taken the bench in New York City.

MS. RILEY: Yes, he has.

THE COURT: How nice for him.

MS. RILEY: Yes, it is, Your Honor.

THE COURT: All right. It's nice to see every one from out of town, New Haven and Washington.

With me is Magistrate Judge James Orenstein, who is also assigned to this case and we thought for the purposes of efficiency the two of us would preside over this proceeding. You may be seated.

This case was brought last year and it was, in effect, stayed while the political process continued and here we are on September 14th, 2017, and we've been asked by the plaintiffs to file a second amended complaint.

So why don't we start with the application made by the plaintiff.

MS. EVARTS: Good afternoon, Your Honor, thank you. I would like to first start by introducing my client, Martin Batalla Vidal and many members of Make the Road New York who are with us today.

THE COURT: Where is your client?

MR. VIDAL: Right here, Your Honor.

THE COURT: Nice to meet you.

MS. EVARTS: Second, with your permission, I would like to state the case briefly as we see it.

THE COURT: Have you been keeping up with all the news from Washington and Florida that's been articulated by the President in the last 12 hours about this case not about this case about the DACA situation?

MS. EVARTS: Yes, I have, Your Honor.

THE COURT: Okay, fine. I'll be asking the other side a few questions about that. Go ahead.

MS. EVARTS: The Trump administration's decision to terminate the DACA program was both heartless and cruel and it was also illegal. The purpose of the Administrative Procedure Act, the APA, is to ensure that when an agency undertakes action that it think through its decision and it think through the cost of taking that action and make a deliberate decision, especially this is especially true when people's lives are at stake.

THE COURT: They didn't follow the Administrative Procedure Act when the established DACA, did they? That was done without an opportunity for notice and comment, right?

MS. EVARTS: That is correct, Your Honor.

THE COURT: So going in there hasn't been the APA wasn't followed but you're saying they should be following it in connection with the rescission.

MS. EVARTS: Yes.

THE COURT: Is that it?

MS. EVARTS: We are, Your Honor.

THE COURT: Okay.

MS. EVARTS: And while we fully acknowledge that an agency can change its policy, when it does it needs to be legal, it cannot be pretextual and it needs to be

constitutional. The agency has failed all three of those.

After its termination of the DACA program, we proposed to amend our complaint in order to bring claims, statutory claims and constitutional claims. Our statutory claims arise under the Administrative Procedure Act and the Regulatory Flexibility Act. And our constitutional claims arise under the equal protection guarantee of the Fifth Amendment along with the due process clause of the Fifth Amendment.

And I can describe the claims in more depth if you would like, Your Honor.

THE COURT: Well, briefly speaking, you are proposing to amend the complaint, according to your letter, to make certain claims for individuals who are not yet plaintiffs in the case, right?

MS. EVARTS: That is correct, Your Honor.

THE COURT: And also to make claims on behalf of a class or a number of classes.

MS. EVARTS: That is correct, Your Honor.

THE COURT: Can you describe the class or classes that you propose to include in your amended complaint.

MS. EVARTS: Yes, Your Honor. We propose a nationwide class that would be nationwide. And I can get into more detail. We also expect in our class certification motion, if you grant us leave to amend our complaint, that we

will also more fully flesh out the particular aspects of the class that we propose.

THE COURT: When could you have this second amended complaint filed so we can move along with this case, and as the government as the Attorney General has established certain deadlines for making application to extend these permits.

Just state your name for the court reporter.

MS. TUMLIN: Absolutely. Karen Tumlin for plaintiffs. Your Honor, the plaintiffs are prepared to file our second amended complaint on Tuesday, the 19th, if that would work for the Court.

THE COURT: All right. And so you are pretty far along then in preparing your second amended complaint.

MS. TUMLIN: We're working diligently, Your Honor.

THE COURT: Okay, well, that's what weekends are for.

MS. TUMLIN: Turns out.

THE COURT: Let me just ask the government welcome, first of all, sir.

MR. SHUMATE: Thank you, Your Honor.

THE COURT: Let me just ask you, are you the career person in your position at the justice department or are you the political appointee?

MR. SHUMATE: I'm the political appointee, Your

Honor.

THE COURT: Which means you know more about what the President is thinking than a career person would.

MR. SHUMATE: I don't think you should assume that, Your Honor, but

THE COURT: Okay.

MR. SHUMATE: I'm the Deputy Assistant Attorney General for the Federal Programs.

THE COURT: Well, it is nice to have you here.

MR. SHUMATE: Thank you.

THE COURT: So I take it from your correspondence that you don't object to the filing of the second amended complaint.

MR. SHUMATE: That's correct, Your Honor.

First of all, I just wanted to say that we recognize the importance of this case, the significance of the issues that are presented, and the public interest in the case. So we obviously have no objection to the filing of the amended complaint. We see it makes perfect sense to move this case along quickly, so we're not opposing the amended complaint.

What the government would be willing to do is file a motion to dismiss within 30 days of when we see the amended complaint. Even though we typically have 60 days, we're willing to move very quickly to put the Court in a position to address what we think are fundamental flaws in the claims that

the plaintiffs propose to bring by the end of the year. And as you know, there is a March deadline in DHS's memorandum. In the event the Court does not dismiss the case, we feel the Court should do that, the Court will be able to take some action and we can move to PI briefing potentially next year if the plaintiffs so choose to do so.

But we think the best course of action would be, for example, if the plaintiffs were to file the amended complaint next week, we would file a motion to dismiss within 30 days, say October 20th, the plaintiffs could have another 30 days or so to file an opposition, which we would propose November 17th, we would file a reply on December 15th and then the Court could hold a hearing, if it decided to do so, at the end of the year and the Court would be in a position to make the decision on our motion to dismiss end of this year, early next year. So that would

THE COURT: Okay. Let me just ask you this. Isn't there there's a first deadline that was set forth by the Attorney General in his statement and that I think was October 5th. What was that deadline for?

MR. SHUMATE: So it's actually October 5th, that's correct, it is actually a DHS deadline for renewal applications for certain categories of individuals whose permits expire. So, yes, that deadline is upcoming.

One thing the plaintiffs had asked us to consider is

whether DHS would consider extending that deadline in light of the hurricanes in Texas and Florida. We took that issue very seriously, we took it to DHS, they have considered our request. Their position right now is that that deadline will remain October 5th as of now, but I am authorized to say that they are actively considering whether to extend the deadline in light of the hurricanes. So that's what I know about the October 5th deadline. As of right now, it still stands.

THE COURT: I'm more concerned about the October 5th deadline in terms of how it might prejudice the rights of certain persons who are already covered by the DACA certificates or permits, work permits and so on that have already been issued. And so I'm not worried I mean, we're all concerned about what has happened with the hurricanes, but if you're living in Michigan or in Oregon or in Vermont, you don't have a problem with the hurricane, you've got a problem with the fact that based on this deadline you may be preempted from making an application to extend the benefit that you received under DACA. So since this is a nationwide program, I think we should just not focus on people in the impacted areas from the hurricanes, we need to focus on everybody. If this is going to be an application for a nationwide class, we have to think of the whole country, so and then there's also the question of whether DHS and the immigration officials have the latitude, absent DACA, to grant certain applications

irrespective of whether DACA exists and whether this, in effect, creates a legislative rule on the part of DHS that bars people, based on their classification, from being considered for this kind of benefit or remedy or exception to the general rule.

I'm just wondering, have you all thought about the question of whether that kind of hard and fast deadline for certain categories of individuals covered by DACA would, in effect, constitute a legislative rule, irrespective of whether the creation of DACA violated that in effect the requirement that legislative rules not be established.

MR. SHUMATE: Thank you, Your Honor. We certainly understand the plaintiffs' concern about the October 5th deadline. In DHS's judgment, 30 days was a sufficient amount of time to allow individuals to complete the paperwork to file for renewals. I think there is a virtue in having a clear deadline that people know about, that's clear and why we're reporting. So in their discretion they thought that was appropriate and, in their defense, Your Honor, this is a decision that has been made to wind down the program. It was not an abrupt decision, so the program is not ending immediately. Nobody is losing their DACA benefits immediately. The opportunity has been provided to renew certain applications and so we think that is eminently reasonable.

And our position in the case is that this decision to rescind DACA is not subject to judicial review of the APA at all. So it is not subject to the arbitrary and capricious decision making requirement, it's not subject to notice in common rule making, so this was an eminently reasonable decision that, you know, it's an exercise of prosecutorial discretion. We had to decide how to wind it down in some way, so they felt this was just a reasonable way to establish some deadlines so folks would have clear notice of what the deadlines would be.

THE COURT: Well, the Attorney General said in his statement that DACA is unconstitutional and yet in this process you're allowing people to renew, certain people, whose coverage ends by a certain time to renew even though it is an allegedly unconstitutional procedure. Is that what do I get that right or do I get that wrong?

MR. SHUMATE: That is right. The Attorney General and DHS both decided that this is an unlawful program and what they decided was it was a decision based on litigation risk. That if we did not wind down the program in a responsible way it was very likely that the other states were going to go to the Southern District of Texas and ask for an immediate preliminary injunction in which case the program could have been ended immediately. So in their judgment what they decided to do is we're going to have a responsible way to

wind this program down that gives folks a chance to know when the deadlines are, gives an opportunity to apply for renewal permits so people aren't losing their benefits immediately. So it was a decision based on litigation risk that if we didn't wind this down in a responsible way, then the District Court in Texas would do it for us.

MS. TUMLIN: If I may speak briefly to the October 5th and the notice issue. Leaving aside the tremendous turmoil that states and individuals impacted by the hurricanes but looking at the entire country, one of the things that we're greatly troubled by as plaintiffs and would like to address to the Court is, the renewal process for DACA how it has worked traditionally is 180 days before someone's work authorization in DACA is set to expire they get a notice and that notice directs them to file the renewal application between 120 and 150 days. And those notices and I think the government can of course correct me if this is not the case have continued to go out, but what that means with the hard and fast October 5th deadline is, individuals whose DACA is expiring between February and March, have received notices that are false and misleading in this context that has changed. They don't state that you only have until October 5th and our understanding is there is no plan to provide individualized notice that provides the right date and provide a warning to individuals that if they don't submit

their renewal applications three weeks from today, not in the 120 or 150 day window, that they risk losing their chance to renew.

THE COURT: I see. So let me just move on to the next question, which is after you file your second amended complaint, assuming that the problem isn't resolved legislatively by the political branches, if you will, of the federal government, between now and October 5th

MS. TUMLIN: Correct.

THE COURT: then do you anticipate requesting some kind of preliminary injunctive relief? What can we expect, what can the Court expect from the plaintiffs, the new the current plaintiff and any additional plaintiffs at that point. I'm just trying to plan for what may happen. My hope would be, frankly, that the executive branch would put a voluntary halt to this, the termination process, to permit Congress and the President to find a legislative solution so the courts are not involved.

There are apparently 800,000 individuals who are affected potentially by what's happening with DACA, and that doesn't even cover family members of those people who are also potentially affected. There are people who are working supporting families. We're not talking about people who are children, we're talking about people who are grown and in the work force many, many of them, and they support families, they

support their parents, they support their own children some of them. This is a much wider situation than just the individuals. And this affects others as well. They pay taxes, they pay rent, they pay for mortgages, they support their communities, and so I'm concerned, the Court is concerned that the government if it proceeds with these arbitrary deadlines, which is what they are, they are just arbitrary deadlines, that the consequence will be far greater in scope than simply you can't apply and down the road some judge or the Congress will solve the problem and all will be well, all right. We can't expect that in this environment that is a likely outcome. It's a hoped for outcome. And from what the President has said in the last 24 hours, I'm encouraged that this can be resolved by a legislative solution. But you're here because you anticipate that it may not be resolved by a legislative solution. So I'm just wondering whether you have a plan since you're plaintiffs.

MS. TUMLIN: Yes.

THE COURT: So tell us, give us a little bit of a hint as to where we're going to go from here apart from the filing of a second amended complaint.

MS. TUMLIN: Absolutely, Your Honor, I appreciate that. And I'd like to do that in two tracks: One, talking about what the Court might anticipate what plaintiffs' plan might be for the October 5th and then we can turn to the other

deadline, which is the March deadline.

So with respect to whether any type of injunctive relief or temporary restraining order would be sought in advance of the October 5th deadline, a couple of things would be useful. I think having, first and foremost, a date certain by when the defendants can provide an answer whether the government will voluntarily extend that deadline and perhaps coming back and having another conference when we're closer to that date, perhaps around September the 25th would be amenable to plaintiffs or 26th. We're sitting three weeks today from the deadline for October 5th. But at that point we can make a determination and be ready to set a schedule if we were still in a situation where the defendants had not moved the October 5th date and it became necessary to seek immediate relief. So that would be one plan, Your Honor.

We could if that became necessary, a need for temporary restraining order that's something we could file on Monday, October the 2nd.

THE COURT: So you're saying something like Thursday, September 28th might be a good date?

MS. TUMLIN: I was suggesting the Monday or Tuesday, the 25th or 26th for a conference, Your Honor, to see the defendants may have more information at that time and then if we're in resolution, terrific, we can focus on the March 5th date. If not, we could proceed to set a schedule for a

temporary restraining order if that's still necessary.

THE COURT: Let me hear from the deputy assistant attorney general.

MR. SHUMATE: Thank you, Your Honor. We obviously have no objection to coming back for another status conference. I think we can also just engage with the plaintiffs and let them know the government's position or file a letter with the Court letting the Court know what DHS has decided on the October 5th deadline. It may obviate the need for a status conference, I can't speak to that now, it's still actively under consideration.

THE COURT: Well, let me say this with great respect for the Department of Homeland Security, that it would be helpful if we could try to avoid judicial intervention in this case if all that it takes, at least at this point, is to extend one deadline, the reason for which is unknown to me and probably unknown to many people, but which is so close in time that taking into account the President's comments where he said in a tweet today I do follow the President's tweets Does anybody really want to throw out good, educated and accomplished young people who have jobs, some serving in the military, question mark. Really. And I think that the message that's being sent is that there is room for a solution and to set to keep a deadline that is so close in time to today while a solution is being engineered and it's

difficult to engineer these solutions for reasons that I need not go into, you can read about them in the media that it would be useful to take some of the pressure off the various parties, particularly those who are affected, these people, these good, educated and accomplished young people who the President speaks about with admiration, so that way at least we wouldn't have to deal with a potential judicial intervention at this early stage and we would give the Congress and the President the opportunity to work through some of the difficulties that they may face in engineering the solution. And that's really that's the Court's hope. The Court can stay out of this and that the political branches of the government can resolve this. And it would appear there is some progress being made in that regard and DHS I believe would be well served by giving that process the chance to bear fruit.

So I wish you would take that back to your client.

Who is the secretary of DHS now that General Kelly has become Chief of Staff?

MR. SHUMATE: Acting Secretary Duke.

THE COURT: You know, General Kelly, according to the Daily News at least, was at the dinner last night at the White House with the democratic leaders of the House and the Senate where the President and leadership, the minority leadership had a discussion about this very issue, so he's

very familiar with this situation and I'm sure he could be helpful as well.

MR. SHUMATE: Yes, Your Honor, we will absolutely take your concerns back to our clients.

I think one thing to keep in mind is if the plaintiffs intend to move for a TRO or a preliminary injunction so close to that October 5th deadline, we do have serious concerns about the merits of their claims. That they are going to ask for that type of emergency relief, they are going to have a show a likelihood of success in the merits, so

THE COURT: I know all the rules.

MR. SHUMATE: Right. We think it really makes sense to initiate a briefing schedule on our motion to dismiss so we can get moving quickly to put the Court in a position to address what we think are substantial defects in their claims. So what we would propose

THE COURT: But that motion to dismiss goes beyond October 5th, right?

MR. SHUMATE: Yes.

THE COURT: The schedule we don't even have a motion until when, according to your schedule?

MR. SHUMATE: October 20th. But the plaintiffs have not yet indicated whether they for certain intend to move for a TRO or a preliminary injunction before that October 5th

deadline. So I think barring some kind of a commitment that they intend to do that, it would be well served and Court would be to go ahead and initiate a briefing schedule on our motion to dismiss.

THE COURT: What is the injury to the government in moving the date by which someone would have to apply for a continuation of a work permit, for instance, from October 5th to December 15th for instance, just for the sake of argument? What is the harm that's done in that situation when all it basically does is it affords the Congress during the latter part of this session and the White House to draw up and enact a legislative solution.

MR. SHUMATE: The harm would be, Your Honor, interference with a decision that is committed to the executive branch. This is all about prosecutorial discretion. The deferred action is a restraint on deportation. It's a decision not to deport.

So if an Article III Court were to second guess the decisions of the executive branch has made about how to exercise its prosecutorial discretion, that would be interference with the executive branch's prerogatives in terms of how it exercises discretion under the immigration laws.

THE COURT: Well, I understand that argument and I even made that argument when I was chief counsel of the FAA in Washington from time to time, but the flip side of that is

that the President has said that he doesn't want to throw out good, educated and accomplished young people who have jobs, some serving in the military. And so it might appear to be arbitrary and capricious to establish a hard and fast policy that would throw these people out of the country even though they meet all of these wonderful standards that he recognizes and he is, after all, not the Secretary of Homeland Security, he's the president. So his own statements would belie any effort to throw these people out without good cause and it would just seem to be arbitrary and I'm not concluding that, but it could be argued with some merit that it constitutes an arbitrary and capricious act if it doesn't afford the DHS with flexibility where it is a hard and fast rule. And so that's one of my concerns.

So take that back to your clients so that they understand that the Court has deep concerns about how this would play out if there isn't some flexibility and movement with regard to this date that's been established for October 5th. That's the only date that I'm concerned about right now.

The ultimate outcome of this case should not be in a Court of law in my opinion. It should be handled by the political branches. But if it can't be handled by the political branches, I have an obligation within the law to protect the 800,000 people or at least those who are within my

jurisdiction, which could be tens of thousands of people, from any arbitrary and capricious implementation of legislative rule, which this may or may not be.

I just want you to understand that in view of where we are today, this afternoon, I don't know about tomorrow, this afternoon it would make sense in my view to be more flexible about the cutoff date so that we could actually resolve this in a more orderly and appropriate way.

That's what I would like you to take back to the acting secretary.

MR. SHUMATE: Absolutely, Your Honor.

THE COURT: Thank you. Judge Orenstein.

JUDGE ORENSTEIN: Thank you, Judge Garaufis. I wanted to jump in only because you teed up the issue and it's going to affect something that I'll be addressing when we get to other pretrial matters.

I want to understand the harm relating to the October 5th deadline. Are you saying the harm that you're seeking to avoid is not necessarily related to the deadline itself but to judicial control of the deadline?

MR. SHUMATE: I would also say that there is a concern that if we start pushing this October 5th deadline back we're going to jam officials at the DHS who process the applications.

JUDGE ORENSTEIN: Right.

MR. SHUMATE: So they need a certain amount of time to process the flood of applications. I'm not sure exactly how much time they need, but that's something we can talk about

JUDGE ORENSTEIN: That's a separate issue.

MR. SHUMATE: Separate issue.

JUDGE ORENSTEIN: In terms of the harm arising from the wrong branch of government making the decision, I'm just having trouble understanding what you're saying. Is it that the harm is infringing on the Executive's exercise of prosecutorial discretion as to when to discontinue its exercise of prosecutorial discretion that it believes to be an unconstitutional exercise of that discretion?

MR. SHUMATE: That's correct, Your Honor.

JUDGE ORENSTEIN: You want to control how long you do something that you believe to be unconstitutional.

MR. SHUMATE: Because this is a matter the enforcement and

JUDGE ORENSTEIN: Why are you doing something that's unconstitutional at all?

MR. SHUMATE: Because the Attorney General decided that it would be harsh we'd be in a much different situation if the Attorney General had decided we need to end this program now. We need to wind this down in an orderly fashion. So it wasn't just a decision that DACA is

unconstitutional, it was also a policy judgment that in light of the importance of this issue that really Congress should make this decision, we're going to wind this down in an orderly manner rather than just cutting it off tomorrow, which would be you know, I'm sure we would be arguing about TRO in a different matter, so

JUDGE ORENSTEIN: But if the judiciary says it's appropriate under applicable law for that process that you believe to be unconstitutional to go longer, that itself is an unconstitutional intrusion on the President.

MR. SHUMATE: I think it would be a violation of separation of powers or

JUDGE ORENSTEIN: Thank you.

MR. SHUMATE: Yes, Judge.

THE COURT: And the other question is, with regard to those whose DACA status expires after March 5th, 2018, those individuals would be barred from applying for a renewal. I don't know where that date came from but that's the other piece of this.

MR. SHUMATE: I think

THE COURT: So, in other words, it would be okay to extend someone's coverage by DACA if their status expires before March 5th that would be okay, but it would be unconstitutional and improper to extend someone whose coverage expires after March 5th, 2018.

MR. SHUMATE: These are decisions that are committed to the executive branch and the Attorney General and DHS decided that in the exercise of their discretion, they're going to wind down this program that had substantial litigation risk, that they believe as a policy matter really Congress should make this decision. Let's give a six month window to wind this down in an orderly fashion.

Yes, they may seem arbitrary, but these are decisions that are best left by the decisions best made by the executive branch because these are competing policy interests. So while they may seem arbitrary in the abstract, these are decisions that have to be committed to the executive branch or else courts are going to be second guessing. If October 5th is arbitrary what's to say that November 5th isn't arbitrary or December 5th isn't arbitrary. So it's entirely reasonable for the government to set a hard deadline, that is, everybody knows about, that folks have 30 days to meet that deadline.

So, again, we will go back to DHS and absolutely express the Court's concern about that deadline. But I do believe that that is an eminently reasonable decision to make by the executive branch in their discretion. We're going to wind this down in an orderly fashion, let's set October 5th as the deadline for these renewal applications and March 5th as the deadline to wind down the program altogether.

THE COURT: Now you've got a president who has basically said that this is going to affect all these wonderful people and we have to find a legislative solution and you're putting the President, in effect, up against the wall and he's got to solve this problem by a date that's been set by a bureaucrat at the Department of Homeland Security. I don't understand how that makes sense if the President has already stated he's committed to finding a political solution, meaning that the political branches, Congress and the President would find a solution. Isn't it time to go back and you said you will, but it's not just you're not just doing it for the Court, you're doing it for the administration that and there are people who, obviously, oppose this kind of solution that the President is hinting at and there's going to be give and take, and the concern of the Court is that October 5th is three weeks away and the date that was set was set before the president made his statements and it would make a lot of sense from various vantage points to extend this deadline. And you know something about deadlines, they can be extended. No one will be harmed by extending this deadline. Certainly not the $800,000 people who are sweating over whether someone is going to knock on their door and send them to a country they don't even know, where they speak a language they don't even speak.

So, on the one hand, those are the only they are

really the only people who are going to be injured here. The other people who are going to be injured are people who have a political axe to grind or they have a philosophical disagreement or whatever it happens to be, but you can always the fact is you can always deport them later if you can't reach an agreement and the courts let you do it. You can always deport them later. And they're not going to object to being here an extra six months or an extra year while you find them.

So I don't see what the there is no harm done, in the Court's view, by allowing this legislative process to play out and not establishing this October 5th deadline and also barring people whose permits expire after, what is it, March 5th from applying. You can always deny them. You have discretion. And that's another point that has to be made.

Even without DACA, the Department of Homeland Security would still have discretion to allow people to remain in the United States. So you don't need DACA for that. DACA established a protocol that helped the people at Homeland Security understand what the priorities of the prior administration were, that's what DACA did. It was not a statute, it wasn't even a formal rule making. So that's another concern just add that to my concern for your clients.

Is there anything else before we set your schedule

for your motion to dismiss?

Anything else from the plaintiff?

MS. TUMLIN: No, Your Honor, we'd be happy to move on to scheduling on the motion to dismiss and then class cert.

THE COURT: Okay. On the motion to dismiss, tell me what your schedule is.

MR. SHUMATE: So our thought was as soon as they file the amended complaint we would file our motion to dismiss within 30 days, I think that would probably put us around October 20. The plaintiffs could have 30 days to file an opposition, so around November 17th, and then we could file a reply December 15th and the Court could hold a hearing after that.

THE COURT: All right, any disagreement over that, that schedule?

MS. TUMLIN: No, Your Honor, that's workable. The one thing plaintiffs would be interested perhaps preceding around the October 20th date would be a meet and confer with the government on a Rule 26 discovery schedule, and then a date to present a report to the Court.

JUDGE ORENSTEIN: We'll take that up separately and that's on the agenda for today.

THE COURT: Okay. And judge Orenstein will be handling that whole discovery process and he'll go over that with you in a few minutes.

MS. TUMLIN: Your Honor, just to clarify, we did have a chance to confer with the defendants that under these dates we think it would be efficient for plaintiffs to be moving on those same dates for our class cert. So on the October 20th date you would receive the motion for class certification from the plaintiffs with the defendants' motion under Rule 12 and then we would oppose and reply on the same dates.

THE COURT: Is that agreeable?

MR. SHUMATE: Yes, Your Honor.

THE COURT: So both sides will be sending me Christmas presents in December.

MS. TUMLIN: Many.

THE COURT: I want to thank you all.

All right. Which brings us to the discovery issue.

JUDGE ORENSTEIN: Right. You want to be heard, Mr. Shumate?

MR. SHUMATE: Sure.

JUDGE ORENSTEIN: Go ahead.

MR. SHUMATE: Oh, no, I'm sorry.

JUDGE ORENSTEIN: Let me just frame the issue. So as Ms. Tumlin was saying, the issue comes with a Rule 26 conference and let me ask you, have the parties conferred already about just the threshold issue of whether there is discovery and what discovery is appropriate at this stage?

MR. SHUMATE: Yes, we have.

THE COURT: What have you come up with?

MR. SHUMATE: Our position is that no discovery is appropriate in this case. The primary claims that are being brought are APA claims, which typically are not susceptible to discovery they're the Court makes a decision based on the record that is before the Court, we don't look behind that record. So we have decisions, the Court you know, assuming the claims survive a motion to dismiss, the Court will decide whether this action on its face is arbitrary and capricious. So at least for the APA claims we don't think discovery is appropriate.

On the constitutional claims, again, we don't think discovery is appropriate. We think those claims are susceptible to a motion to dismiss.

JUDGE ORENSTEIN: But typically at least my cases, I know Ms. Riley knows this because I've had the U.S. Attorney's Offices in many cases and some of her colleagues are here, typically the mere fact that the motion to dismiss is not in itself a reason to postpone discovery and, as we've been talking about it at some length today, the parties on both sides, obviously the plaintiffs and the class that they hope to represent and the many government officials who have administrative tasks, they all have an interest in knowing what's coming on October 5th and March 5th. It strikes me

that if there is going to be discovery there's going to be little enough time to do it to allow an orderly resolution of the merits.

So here's what I'm going to propose. I really don't anticipate we can give you all a fair chance to argue the issue much less have resolve today, but I would like to very quickly we'll set a schedule very quickly to confer about this and tee up with your respective positions in letters two things: One, the threshold issue of whether discovery should proceed and, second, this will require a real meet and confer, assuming that it does, what it should look like, what deadlines we should set, how if at all it should be phased. To the extent it goes forward there are going to be, I'm sure, some very contentious issues because I know you want to rely on a very concrete administrative record, I imagine you want to get into the intent of various actors and that will implicate the question of depositions. Please identify the issues that are going to divide you and come up with a proposal for getting done what you would agree has to be done if discovery goes forward and what issues need to be resolved, because we need to address them quickly.

MR. SHUMATE: Your Honor, we will certainly do that. I would just say here that the government will strongly oppose any discovery here and to the extent the Court wants to move quickly and plaintiffs want to move quickly, any attempt to

get discovery of cabinet officials is going to be strongly opposed by the government.

JUDGE ORENSTEIN: I anticipate that there are a lot of contentious issues here, I'm not making an assumption one way or the other about how they play out, but if the parties are going to get the rulings that they need in time to have a practical effect, we're going to have to have those discovery issues resolved quickly. So I want you to get started on meeting and conferring.

Unless there's an objection to this schedule I'd like to have your respective positions, I don't care if it's two letters or one, your respective positions on the threshold issue of whether it should go forward by next Friday and so I guess that would be the 23rd, a week from tomorrow.

MS. TUMLIN: Twenty second.

MR. SHUMATE: Twenty second.

THE COURT: The 22nd.

JUDGE ORENSTEIN: The 22nd, okay. Thank you. I was looking at the wrong date.

So by September 22nd your respective positions and accompanying that either a joint proposal or competing proposals for a schedule. To the extent you can identify issues that you agree would need to be decided within a discovery regime and you want to propose dates for getting those done, all the better. And then let's I don't know if

you want to do this as a joint conference.

THE COURT: Yes, what I'm going to do here is I'm setting a status conference for Tuesday, September 26th at 4:00 p.m. It would be earlier but I have a I'm spending a great deal of time with the criminal division in Washington on a fraud trial next week and the week after and the week after and the week after. So my trial day ends at 4:00 p.m. and we'll take you promptly at 4:00 o'clock.

JUDGE ORENSTEIN: We'll address these issues there as well.

MR. SHUMATE: Just to be clear, what are we prepared to discuss on the status conference, the discovery issues, the October 5th deadline as well.

THE COURT: Oh, yes, absolutely.

You're going to tell me all about your discussions with your client, about how cooperative your client is going to be with my suggestion.

MR. SHUMATE: I will.

JUDGE ORENSTEIN: Anything else that we thought we needed to address in terms of discovery issues that have to be resolved early on.

THE COURT: Anything else from the plaintiff?

MS. TUMLIN: No, Your Honor.

JUDGE ORENSTEIN: Thank you.

MS. TUMLIN: Your Honors.

THE COURT: Does the plaintiff have anything else for today?

MS. TUMLIN: No, thank you, Your Honors.

THE COURT: All right. Is there anything else from the defense?

MR. SHUMATE: No, Your Honor, thank you both.

THE COURT: Thank you very much everyone.

(Matter concluded.)

* * * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above entitled matter.

s/ Georgette K. Betts — September 15, 2017

GEORGETTE K. BETTS — DATE

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

STATE OF CALIFORNIA, ex rel. XAVIER BECERRA, in his official capacity as Attorney General of the State of California

Plaintiff,

v.

JEFFERSON B. SESSIONS, in his official capacity as Attorney General of the United States; ALAN R. HANSON, in his official capacity as Acting Assistant Attorney General; UNITED STATES DEPARTMENT OF JUSTICE; and DOES 1-100,

Defendants.

Case No. 17-cv-4701

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiff State of California, ex rel. Xavier Becerra, in his official capacity as Attorney General of the State ("Plaintiff") brings this complaint to protect California from the Trump Administration's attempt to usurp the State and its political subdivisions' discretion to determine how to best protect public safety in their jurisdictions. The Administration has threatened to withhold congressionally appropriated federal funds unless the State and local jurisdictions acquiesce to the President's immigration enforcement demands. This is unconstitutional and should be halted.

2. Congress has appropriated $28.3 million in law enforcement funding to California and its political subdivisions pursuant to the Edward Byrne Memorial Justice Assistance Grant ("JAG") program. The United States Department of Justice ("USDOJ"), led by Attorney General Jefferson B. Sessions III, and the Office of Justice Programs ("OJP"), led by Acting Assistant Attorney General Alan R. Hanson (collectively, with USDOJ and Attorney General Sessions, the "Defendants"), are responsible for administering these grants.

3. JAG awards are provided to each state, and certain local jurisdictions within each state, to, among other things, support law enforcement programs, reduce recidivism, conduct prevention and education programs for at-risk youth, and support programs for crime victims and witnesses. Every state is entitled by law to a share of these funds.

4. The JAG authorizing statute, 42 U.S.C. §§ 3750-3758, requires that jurisdictions comply with "applicable Federal laws." The statute governing OJP, 42 U.S.C. § 3712(a)(6) ("Section 3712"), also allows for the imposition of "special conditions," which historically have been understood to refer to conditions imposed to address performance issues with particular high-risk grantees, and not as conditions to be placed on *all* grantees.

5. In this year's JAG FY 2017 State Solicitation ("JAG State Solicitation"), for the first time, Defendants imposed two additional so-called "special conditions" on all JAG recipients that require compliance with immigration enforcement activities. These conditions require jurisdictions to: (a) provide federal immigration enforcement agents with the Department of Homeland Security ("DHS") access to detention facilities to interview inmates who are "aliens"

or believed to be "aliens" (the "access condition"); and (b) provide 48 hours' advance notice to DHS regarding the scheduled release date of an "alien" upon request by DHS (the "notification condition"). In effect, they attempt to create, without congressional approval, a national requirement that state and local law enforcement engage in specific behaviors to assist in the Executive's approach to federal immigration enforcement.

6. Based on one reading of these new conditions, California believes that its laws, in fact, comply with them. Nevertheless, Defendants' incorrect conclusions about California law have placed at risk the $28.3 million in JAG funds received by the State and its political subdivisions. The Transparency and Responsibility Using State Tools Act ("TRUST Act"), Cal. Gov't Code § 7282 *et seq.*, defines the circumstances in which a local law enforcement agency ("LEA") may detain an individual at the request of federal immigration authorities. The Transparent Review of Unjust Transfers and Holds ("TRUTH Act"), Cal. Gov't Code § 7283 *et seq.*, provides notice protections to inmates in state and local custody whom Immigration and Customs Enforcement ("ICE") wishes to interview. Defendant Sessions has inaccurately characterized California's laws as denying ICE access to jails in California.

7. To compound upon the peril to the State caused by Defendant Sessions' misinterpretation of California law, the grant conditions regarding access and notification also suffer from ambiguity. The access condition fails to specify whether jurisdictions are prohibited from notifying inmates of their basic rights prior to an ICE interview, which would conflict with the TRUTH Act. The notification condition is ambiguous as to whether it requires LEAs to hold individuals past their ordinary release when, for example, an individual is booked for a low-level infraction and promptly released, pays bail, or has his or her charges dropped. USDOJ has signaled that it interprets the notification condition as requiring that, once immigration officials have requested notice, state and local officials may not release an individual until federal agents have had 48 hours to try to take him or her into custody even if the federal notification request came less than 48 hours before the person's ordinary release. To comply with this requirement, LEAs would in some instances not only have to violate the TRUST Act, but would also have to violate the Fourth Amendment because ICE notification and detainer requests are not typically

supported by the probable cause required for detentions under the Fourth Amendment.

8. The ambiguity regarding how the Defendants will interpret and enforce the access and notification conditions harms California and its local jurisdictions. If California and local jurisdictions do not accept the funds authorized by the JAG statute and appropriated by Congress, important programs will need to be cut. And if this ambiguity pressures the State and/or its localities to change their public-safety oriented laws and policies in order to ensure they comply with these ambiguous conditions, they will have abandoned policies that the State and local jurisdictions have found to be effective in their communities. As a result, the State and its localities will lose control of their ability to focus their resources on fighting crime rather than federal immigration enforcement. And the trust and cooperation that the State's laws and local ordinances are intended to build between law enforcement and immigrant communities will be eroded.

9. Moreover, while Section 3712 allows for the imposition of "special conditions," it does not provide OJP with the authority to add these *particular* substantive immigration conditions. These are not special conditions, as that term is generally understood, since they are applicable to all recipients, not just high-risk grantees. In addition, they conflict with the JAG authorizing statute's Congressional intent to: (a) guarantee the delivery of appropriated formula grant funding to particular state and local jurisdictions so long as they satisfy the requirements found in federal law; and (b) not condition funding on immigration enforcement related activities.

10. Defendants also have exceeded constitutional limits under the Spending Clause of the United States Constitution. The access and notification conditions are not sufficiently related to the federal purpose areas of the JAG funding scheme designed by Congress, and the access and notification conditions are too ambiguous to provide clear notice to the State or its political subdivisions as to what is needed to comply. And depending on how compliance is measured, the notification condition would further offend the Spending Clause prohibition on conditioning funding on unconstitutional activities, here, by attaching funding conditions that may lead to a violation of the Fourth Amendment.

11. These conditions also violate the Administrative Procedure Act ("APA"), 5 U.S.C. § 551

et seq., because of their constitutional infirmities, and because Defendants acted in excess of their statutory authority and in an arbitrary and capricious manner.

12. The California Legislature, as well as local governments throughout the State, carefully crafted a statutory scheme that allows law enforcement resources to be allocated in the most effective manner to promote public safety for all people in California, regardless of immigration status, national origin, ancestry, or any other characteristic protected by California law. The Defendants' actions and statements threaten that design and intrudes on the sovereignty of California and its local jurisdictions.

13. California must apply for its JAG award by August 25, 2017, and the State's local jurisdictions that apply directly to USDOJ for JAG funding must apply by September 5, 2017, subject to the same conditions as the State. (JAG Solicitation for local jurisdictions ("JAG Local Solicitation") attached as Exhibit B. The JAG Local Solicitation, with the JAG State Solicitation, are referred to as "JAG Solicitations.") USDOJ is expected to provide its award notifications to state and local jurisdictions by September 30, 2017, but Defendants have announced that they will not provide any awards to jurisdictions that do not meet the access and notification conditions. California therefore immediately faces the prospect of losing $28.3 million for these "criminal justice" programs. Without this grant funding, California's award recipients and the programs funded will be harmed, which will have a detrimental effect on state and local law enforcement and budgets.

14. For these reasons, and those discussed below, the Court should strike down the access and notification conditions in the JAG Solicitations as unconstitutional and as a violation of the APA.

JURISDICTION AND VENUE

15. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1331 because this case involves a civil action arising under the Constitution and the laws of the United States. The Court also has jurisdiction under 28 U.S.C. § 1346 because this is a civil action against the federal government founded upon the Constitution and an Act of Congress. Jurisdiction is proper under

the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701-06. The Court has authority to provide relief under the Declaratory Judgment Act, 28 U.S.C. § 2201.

16. Pursuant to 28 U.S.C. § 1391(e)(1) and (3), venue is proper in the Northern District of California because the Attorney General and the State of California have offices at 455 Golden Gate Avenue, San Francisco, California and at 1515 Clay Street, Oakland, California and Defendants have offices at 450 Golden Gate Avenue, San Francisco, California.

INTRADISTRICT ASSIGNMENT

17. Assignment to the San Francisco Division of this District is proper pursuant to Civil Local Rule 3-2(c)-(d) because Plaintiff, the State of California, and Defendants both maintain offices in the District in San Francisco.

PARTIES

18. Plaintiff State of California is a sovereign state in the United States of America. Xavier Becerra is the Attorney General of California, and as such, is the chief law officer in the State and has "direct supervision over every … sheriff and over such other law enforcement officers as may be designated by laws, in all matters pertaining to their respective offices." Cal. Const., art. V, § 13; Cal. Gov't Code § 12500, *et seq;* see *Pierce v. Super.*, 1 Cal.2d 759, 761-62 (1934) [Attorney General "has the power to file any civil action or proceeding directly involving the rights and interests of the state. . . and the protection of public rights and interests."]. California is aggrieved by the actions of Defendants and has standing to bring this action because of the injury to its sovereignty as a state caused by the challenged federal actions. The inclusion of unconstitutional and unlawful conditions as part of the JAG award impairs the State's exercise of its police power in a manner it deems necessary to protect the public safety. As a result of Defendants' unconstitutional actions, the State of California, including its political subdivisions, is in imminent danger of losing $28.3 million this fiscal year, including $17.7 million that is owed to the State itself.

19. Plaintiff Attorney General Xavier Becerra, on behalf of California, has standing to bring this action because funding for law enforcement throughout the State is at stake and as the Attorney General of the State of California, he is responsible for enforcing and protecting

California's laws, such as the TRUST and TRUTH Acts, which the access and notification conditions threaten.

20. Defendant U.S. Department of Justice ("USDOJ") is an executive department of the United States of America pursuant to 5 U.S.C. § 101 and a federal agency within the meaning of 28 U.S.C. § 2671. As such, it engages in agency action, within the meaning of 5 U.S.C. § 702 and is named as a defendant in this action pursuant to 5 U.S.C. § 702. USDOJ is responsible for administering the JAG funds appropriated by Congress.

21. Defendant Sessions III, is Attorney General of the United States, and oversees the USDOJ, including the Office of Justice Programs ("OJP"). Defendant Sessions has declared that "[s]ome jurisdictions, including the State of California and many of its largest counties and cities, have enacted statutes and ordinances designed to specifically prohibit or hinder ICE from enforcing immigration law by prohibiting communication with ICE, and denying requests by ICE officers and agents to enter prisons and jails to make arrests." Defendant Sessions also made a statement announcing the access and notification conditions on the U.S. Department of Justice website on July 25, 2017. He is sued in his official capacity pursuant to 5 U.S.C. § 702.

22. Defendant Alan R. Hanson is Acting Assistant Attorney General in charge of the OJP, which administers JAG funding and which set forth the so-called "special conditions" at issue. He is sued in his official capacity pursuant to 5 U.S.C. § 702.

23. Each of the Defendants named in this Complaint is an agency of the United States government bearing responsibility, in whole or in part, for the acts enumerated in this Complaint.

24. The true names and capacities of Defendants identified as DOES 1-100 are unknown to Plaintiff, and Plaintiff will amend this Complaint to insert the true names and capacities of those fictitiously named Defendants when they are ascertained.

FACTUAL ALLEGATIONS

I. CALIFORNIA'S LAWS SEEK TO PROTECT THE STATE RESIDENTS' SAFETY AND WELFARE BY FOCUSING LAW ENFORCEMENT ON CRIMINAL ACTIVITY AND BY BUILDING TRUST BETWEEN LAW ENFORCEMENT AND COMMUNITIES

25. California state and local LEAs, guided by the duly enacted laws of the State and ordinances of local jurisdictions, are tasked with effectively policing, protecting, and serving all

residents, including more than 10 million foreign-born individuals, who live in the State. California's laws implicated in this suit, the TRUST Act and the TRUTH Act, are a valid exercise of the State's police power to regulate regarding the health, welfare, and public safety of its residents.

26. California has also enacted other laws that strengthen community policing efforts by encouraging undocumented victims to report crimes to local law enforcement. For example, California's Immigrant Victims of Crime Equity Act, Cal. Penal Code § 679.10, which took effect on January 1, 2016, ensures that all immigrant crime victims have equal access to the U nonimmigrant visa. Laws such as this are specifically designed to encourage immigrants to report crimes so that perpetrators are apprehended before harming others.

27. The purpose of these California laws is to ensure that law enforcement resources are focused on a core public safety mission and to build trust and cooperation between law enforcement and the State's immigrant communities. When local and state LEAs engage in immigration enforcement, as Defendants contemplate, vulnerable victims and witnesses are less likely to come forward to report crimes.

28. California's laws are not unique. Many jurisdictions across the country have policies that define the circumstances under which local law enforcement personnel expend time and resources in furtherance of federal immigration enforcement. Those jurisdictions variously impose limits on compliance with ICE detainer requests, ICE notification requests about release dates, and ICE's access to detainees, or provide additional procedural protections to them.

A. The TRUST Act

29. In 2013, California enacted the TRUST Act, Cal. Gov't Code, § 7282 *et seq.* The TRUST Act defines the circumstances under which local LEAs may detain an individual at the request of federal immigration authorities. The TRUST Act went into effect on January 1, 2014.

30. The TRUST Act was intended to address numerous public safety concerns regarding the federal practice of issuing detainers to local law enforcement. Among the Legislature's concerns were that federal courts have concluded that detainer requests do not provide sufficient probable cause, and data showing that detainer requests "have erroneously been placed on United States

citizens, as well as immigrants who are not deportable." Assem. Bill No. 4, 1st Reg. Sess. (Cal. 2013) § 1(c).

31. The Legislature also found that "immigration detainers harm community policing efforts because immigrant residents who are victims of or witnesses to crime, including domestic violence, are less likely to report crime or cooperate with law enforcement when any contact with law enforcement could result in deportation." *Id.* § 1(d). The Legislature also considered data demonstrating that the vast majority of individuals detained had no criminal history or were only convicted of minor offenses, and research establishing that "immigrants, including undocumented immigrants, do not commit crimes at higher rates than American-born residents." *Id.*

32. The TRUST Act sets forth two conditions that must be met for local law enforcement to have discretion to detain a person pursuant to an "immigration hold" (also known as a "detainer request" or "detainer hold") that occurs when a federal immigration agent requests that the law enforcement official "maintain custody of the individual for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays." Cal. Gov't Code § 7282(c). First, the detention cannot "violate any federal, state, or local law, or any local policy," which includes the Fourth Amendment of the U.S. Constitution. *Id.* § 7282(a). Second, law enforcement officers may only detain someone with certain, specified criminal backgrounds, an individual on the California Sex and Arson Registry, or a person charged with a serious or violent felony who was the subject of a probable cause determination from a magistrate judge. *Id.* § 7282.5(a)(1)-(6). Only when both of these conditions are met may local law enforcement detain an individual "on the basis of an immigration hold after the individual becomes eligible for release from custody." *Id.* § 7282.5(b).

33. The TRUST Act limits an LEA's discretion as to when it may detain individuals pursuant to an immigration hold beyond their ordinary release. This limitation is consistent with federal law, in that USDOJ, DHS and the courts have repeatedly characterized detainer requests as voluntary.

34. The TRUST Act, however, does not limit, in any way, a jurisdiction from complying with notification requests so long as the jurisdiction is not required to hold the individual beyond when he or she is otherwise legally eligible for release. It also does not prohibit a jurisdiction

from allowing federal immigration enforcement agents to access its jails to interview inmates.

B. The TRUTH Act

35. In 2016, California enacted the TRUTH Act, Cal. Gov't Code § 7283 *et seq.*, which took effect on January 1, 2017. The purpose of the TRUTH Act is to increase transparency about immigration enforcement and "to promote public safety and preserve limited resources because entanglement between local law enforcement and ICE undermines community policing strategies and drains local resources." Assem. Bill No. 2792, Reg. Sess. (Cal. 2016) § 2(a)-(c), (g)-(i).

36. Under the TRUTH Act, before an interview with ICE takes place, a local law enforcement officer must provide the detained individual with a "written consent form that explains the purpose of the interview, that the interview is voluntary, and that he or she may decline to be interviewed or may choose to be interviewed only with his or her attorney present." Cal. Gov't Code § 7283.1(a). In addition, when a local LEA receives a detainer hold, notification, or transfer request, the local LEA must "provide a copy of the request to the [detained] individual and inform him or her whether the law enforcement agency intends to comply with the request." *Id.* § 7283.1(b). If the LEA complies with ICE's request to notify ICE as to when the individual will be released, it must also "promptly provide the same notification in writing to the individual and to his or her attorney or to one additional person who the individual shall be permitted to designate." *Id.*

37. The TRUTH Act does not limit, in any way, a jurisdiction from complying with notification requests; rather, it only requires that the jurisdiction also provide notice to the individual of its actions. It also does not prohibit a jurisdiction from allowing ICE to access its jails to interview inmates.

II. CONGRESS DID NOT INTEND JAG TO BE CONDITIONED ON STATE AND LOCAL LAW ENFORCEMENT ASSISTING IN FEDERAL IMMIGRATION ENFORCEMENT

38. JAG is administered by OJP within USDOJ. JAG funding is authorized by Congress under 42 U.S.C. §§ 3750-58. The authorizing statute has been amended numerous times since its inception in 1988, evolving into the JAG program as it exists today.

39. The Anti-Drug Abuse Act of 1988 amended the Omnibus Crime Control and Safe Streets Act of 1968 to create the Edward Byrne Memorial State and Local Law Enforcement Assistance

Programs grants ("Byrne Grants") "to assist States and units of local government in carrying out specific programs which offer a high probability of improving the functioning of the criminal justice system." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, tit. VI, § 6091(a), 102 Stat. 4181 (1988) (repealed 2006). Congress placed a "special emphasis" on programs that support national drug control priorities across states and jurisdictions. *Id.* Congress identified 21 "purpose areas" for which Byrne Grants could be used. Many of the purpose areas relate to the investigation, enforcement, and prosecution of drug offenses. *See id.*, tit. V, § 5104. Immigration enforcement was never specified in any of the grant purpose areas.

40. In amendments between 1994 and 2000, Congress identified eight more purpose areas for which Byrne funding could be used, bringing the total to 29. 42 U.S.C. § 3751(b) (as it existed on Dec. 21, 2000) (repealed 2006). For Fiscal Year 1996, Congress separately authorized Local Law Enforcement Block Grants ("LLEBG") that directed payment to units of local government for the purpose of hiring more police officers or "reducing crime and improving public safety." Local Government Law Enforcement Block Grants Act of 1995, H.R. 728, 104th Cong. (1995). Congress identified eight "purpose areas" for LLEBG, none of which were immigration enforcement.

41. The Byrne Grant and LLEBG programs were then merged to eliminate duplication, improve their administration, and to provide State and local governments "more flexibility to spend money for programs that work for them rather than to impose a 'one size fits all' solution" to local law enforcement. Pub. L. No. 108-447, 118 Stat. 2809 (2004); H.R. Rep. No. 109-233, at 89 (2005); *see also* 42 U.S.C. § 3750(a), (b)(1).

42. Now the JAG authorizing statute enumerates eight purpose areas for: (A) law enforcement programs; (B) prosecution and court programs; (C) prevention and education programs; (D) corrections and community corrections programs; (E) drug treatments and enforcement programs; (F) planning, evaluation, and technology improvement programs; (G) crime victim and witness programs; and (H) mental health programs related to law enforcement and corrections. 42 U.S.C. §3751(a)(1).

43. The purpose areas for these grants are to support "criminal justice" programs;

immigration enforcement is generally civil in nature. *See Arizona v. U.S.*, 567 U.S. 387, 396 (2012). Immigration enforcement was also never specified in the purpose areas for any of these grants throughout this entire legislative history.

44. In 2006, Congress repealed the only immigration-related requirement that had ever existed for JAG funding, a requirement that the chief executive officer of the state receiving JAG funding provide certified records of criminal convictions of "aliens." *See* Immigration Act of 1990, Pub. L. No. 101-649, tit. V, § 507(a), 104 Stat. 4978, 5050-51 (1990); Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, tit. III, § 306(a)(6), 105 Stat. 1733, 1751 (1991) (repealed 2006). The repeal of this provision evidences Congress' intent not to condition JAG funding on immigration enforcement-related activities. This is consistent with the statutory scheme that does not include a purpose area connected to immigration enforcement.

45. In addition, more recently, Congress has considered but declined to adopt legislation that would penalize cities for setting their own law enforcement priorities and attempting to impose conditions similar to the conditions here.[1]

III. THE JAG AUTHORIZING STRUCTURE REQUIRES THAT STATE AND LOCAL JURISDICTIONS RECEIVE FORMULA GRANTS

A. The JAG Formula Structure and Conditions

46. When creating the merged JAG funding structure in 2006, Congress set a formula to apportion JAG funds to state and local jurisdictions. 42 U.S.C. § 3755. Population and violent crime rates are used to calculate each state's allocation. 42 U.S.C. § 3755(a)(1). Congress guarantees to each state a minimum allocation of JAG funds. 42 U.S.C. § 3755(a)(2).

47. In addition to determining the amount of money received by grantees within each state, Congress set forth how that money is to be shared between state and local jurisdictions. Under the statutory formula, 60 percent of the total allocation to a state must be given directly to the state. 42 U.S.C. § 3755(b)(1).

[1] *See, e.g.*, Stop Dangerous Sanctuary Cities Act, S. 3100, 114th Cong. (2016) (cloture on the motion to proceed rejected).

48. The statutory formula also provides that 40 percent of the total allocation to a state must be given to local governments within the state. 42 U.S.C. § 3755(d)(1). Each unit of local government receives funds based on its crime rate. 42 U.S.C. § 3755(d)(2)(A).

49. According to Congress's JAG funding scheme, states and local governments that apply for JAG funds are required to make limited certifications and assurances. Beyond ministerial requirements identified in the authorizing statute, the chief executive officer of each applicant must certify that: (A) the law enforcement programs to be funded meet all requirements of the JAG authorizing statute; (B) all information in the application is correct; (C) there was coordination with affected agencies; and (D) the applicant will comply with all provisions of the JAG authorizing statute. 42 U.S.C. § 3752(a)(5).

50. Congress has enacted reductions or penalties in JAG funds when certain conditions occur, such as a state failing to substantially implement the Sex Offender Registration and Notification Act or a governor not certifying compliance with the national Prison Rape Elimination Act standards. *See* 42 U.S.C. §§ 16925, 15607(e)(2). Unlike the access and notification conditions, these conditions were explicitly added by Congress.

B. California's Allocation and Use of the JAG Award

51. Based on the formula prescribed by statute, California is expected to receive approximately $28.3 million in JAG funding in FY 2017, with $17.7 million going to the Board of State and Community Corrections ("BSCC"), the entity that receives the formula grant funds that are allocated to the State.

52. BSCC disburses JAG funding using subgrants predominately to local jurisdictions throughout California to fund programs that meet the purpose areas identified in the JAG authorizing statute. Between FY 2015-17, BSCC funded 32 local jurisdictions and the California Department of Justice.

53. In the past, BSCC prioritized subgrants to those jurisdictions that focus on education and crime prevention programs, law enforcement programs, and court programs, including indigent defense. Some examples of California jurisdictions' purpose-driven use of JAG funds include: (a) implementing educational programs to improve educational outcomes, increase graduation

rates, and curb truancy; (b) providing youth and adult gang members with multi-disciplinary education, employment, treatment, and other support services to prevent gang involvement, reduce substance abuse, and curtail delinquency and recidivism; (c) implementing school-wide prevention and intervention initiatives for some of the county's highest-risk students; (d) providing comprehensive post-dispositional advocacy and reentry services to improve outcomes and reduce recidivism for juvenile probationers; (e) providing a continuum of detention alternatives to juvenile offenders who do not require secure detention, which includes assessment, referral, case advocacy, home detention, reporting centers, non-secure, shelter, intensive case management and wraparound family support services; and (f) funding diversion and re-entry programs for both minors and young adult offenders.

IV. OJP HAS EXCEEDED ITS STATUTORY AUTHORITY BY IMPOSING THE NEW CONDITIONS

A. Description of the JAG Solicitation

54. On July 25, 2017, OJP announced the FY 2017 State JAG Solicitation. OJP set the deadline for applications as August 25, 2017. On August 3, 2017, OJP announced the FY 2017 JAG Local Solicitation with a deadline of September 5, 2017.

55. In the JAG Solicitations, for the first time in Fiscal Year 2017, OJP announced two additional substantive "special conditions" related to federal immigration enforcement. To receive a JAG award, jurisdictions must:

- permit personnel of the U.S. Department of Homeland Security ("DHS") to access any correctional or detention facility in order to meet with an "alien" (or an individual believed to be an "alien") and inquire as to his or her right to be or remain in the United States (the "access condition"); and
- provide at least 48 hours' advance notice to DHS regarding the scheduled release date and time of an "alien" in the jurisdiction's custody when DHS requests such notice in order to take custody of the individual pursuant to the Immigration and Nationality Act (the "notification condition").

Exh. A, at 32. Both of these conditions exist in the State and Local JAG Solicitations.

56. Grant recipients, including the BSCC, must execute "Certified Standard Assurances" that it "will comply with all award requirements," including the access and notification conditions. *See id.* at Appx. IV.

57. Subgrantees must assure that they will comply with all award conditions, including the access and notification conditions. *See id*. at 20-21.

58. Based on information and belief, the state recipient must execute the Certified Standard Assurances by the application deadline on August 25, 2017. "OJP expects to issue award notifications by September 30, 2017." *Id*. at 31.

59. At no point has USDOJ or OJP provided any explanation as to how the access and notification conditions relate to Congress's intent in authorizing JAG.

B. OJP Lacks Statutory Authority to Impose "Special Conditions" of this Type

60. JAG's authorizing statute provides no authority for OJP to impose the access and notification conditions (the so-called "special conditions") on all grant recipients. Indeed, the same statute that authorizes JAG funding, the Omnibus Crime Control and Safe Streets Act of 1968, also authorizes funding pursuant to the Violence Against Women Act ("VAWA") that permits the Attorney General to "impose reasonable conditions on grant awards." 42 U.S.C. § 3796gg-1(e)(3). Congress's clear direction to USDOJ to add "reasonable conditions" pursuant to VAWA, but not for JAG, strongly indicates that Congress did not intend to confer discretion on OJP to add unlimited substantive conditions at its whim.

61. Although nothing related to the access and notification conditions is found within the statutory text or legislative history related to JAG, OJP claims it has the authority to add these conditions under Section 3712, which allows OJP to add "special conditions on all grants."

62. OJP's basis for using its purported authority to add these conditions here, without limitation, is statutorily and constitutionally flawed.

63. In 2006, when Section 3712 was amended to permit OJP to "plac[e] special conditions on all grants," the term "special conditions" had a precise meaning. According to a USDOJ regulation in place at the time, the agency could impose "special grant or subgrant conditions" on

"high-risk grantees" if the grant applicant: (a) had a history of poor performance; (b) was not financially stable; (c) had a management system that did not meet certain federal standards; (d) had not conformed to the terms and conditions of a previous grant award; or (e) was not otherwise responsible. 28 C.F.R. § 66.12 (removed December 25, 2014). This language was based on the grants management common rule adopted by the Office of Management and Budget ("OMB"), and followed by "all Federal agencies" when administering grants to state and local governments. OMB Circular A-102 (as amended Aug. 29, 1997). Other federal statutes and regulations have also historically identified "special conditions" as those that federal agencies may place on particular high-risk grantees who have struggled or failed to comply with grant conditions in the past, not on all grantees irrespective of performance.

64. Interpreting OJP's authority to permit it to impose any substantive conditions with respect to formula grants, like JAG, beyond what is allowed under federal law further conflicts with Congressional intent in establishing a prescribed formula grant structure. Congress designed JAG so that "*each State*" receives an allocation according to a precise statutory formula. 42 U.S.C. § 3755(a) (emphasis added). Likewise, Congress's formula provides allocation to "*each* unit of local government." 42 U.S.C. § 3755(d)(2) (emphasis added). As such, if USDOJ makes grants from funds that Congress appropriated to JAG, OJP must disburse the funds according to the statutory formula enacted by Congress so long as the jurisdiction complies with the conditions that exist in federal law.

65. The conditions also conflict with the immigration enforcement scheme set forth by Congress in the Immigration and Naturalization Act ("INA") that makes cooperation with immigration enforcement agencies voluntary. There is no provision in the INA, or any federal law, that requires jurisdictions to assist with otherwise voluntary immigration enforcement related activities in order to receive these federal funds.

66. While USDOJ has the ability to add conditions to JAG awards, it cannot add substantive grant conditions such as these, that are not tethered to any federal statute. For instance, it could add "special conditions" for high-risk grantees as described above. It could add conditions that stem from the authorizing JAG statute. And it could add conditions that Congress directed be

applied to federally funded programs. *See, e.g.,* 42 U.S.C. § 2000d-1; 29 U.S.C. § 794(a)(1); 20 U.S.C. § 1681(a)(1); 42 U.S.C. § 6102.

C. The Access and Notification Conditions do not Provide Jurisdictions with Clear Notice of what the Conditions Require

67. It is ambiguous what the access and notification conditions require grant recipients to do. For example, it is unclear whether the condition requiring jurisdictions to provide ICE jail access for interview purposes prohibits grant recipients from informing inmates of their right to have a lawyer present or decline an interview with ICE, which would implicate the notice requirements in the TRUTH Act.

68. It is also ambiguous as to whether the condition requiring compliance with immigration notification requests should be applied when an individual is scheduled to be released less than 48 hours after the jurisdiction receives a notification request, or if the individual becomes eligible for release without advance warning (*i.e.*, released on bail).

D. Interpreting the Notification Condition as a Requirement to Hold an Individual Past His or Her Ordinary Release would mean OJP is Conditioning Funding on Unconstitutional Activities

69. If OJP interprets the ambiguous notification condition to require a jurisdiction to hold an individual beyond his or her scheduled release date and time in order to comply with the 48-hour notice requirement, OJP would be transforming the notification request into a secondary immigration hold request. This would force jurisdictions to risk engaging in activities barred by the Fourth Amendment of the U.S. Constitution in order to receive federal funding. That is because jurisdictions would be required to detain individuals beyond when they would otherwise be eligible for release even if the jurisdiction lacks probable cause to do so.

70. As a matter of practice, when issuing detainer notification requests, ICE checks a box identifying whether: (a) there is a final order of removal; (b) removal proceedings are pending as to the individual; (c) "[B]iometric confirmation of the alien's identity and a records check of federal databases that affirmatively indicate, by themselves or in addition to other reliable information, that the alien either lacks immigration status or notwithstanding such status is removable under U.S. immigration law;" and/or (d) "[S]tatements made by the alien to an

immigration officer and/or reliable evidence that affirmatively indicate that the alien either lacks immigration status or notwithstanding such status is removable under U.S. immigration law."[2]

71. The notification and detainer requests alone do not provide jurisdictions with any other individually particularized information about the basis for removability. And detainer and notification requests are typically only accompanied by an ICE administrative warrant, which has not been reviewed and approved by a neutral magistrate. As federal courts throughout the country have determined, jurisdictions that hold individuals beyond their ordinary release pursuant to ICE detainer requests violate the Fourth Amendment of the U.S. Constitution if the detainer requests are not supported by independent probable cause or a judicial warrant. *See, e.g., Cty of Santa Clara.,* slip op. at 6 (N.D. Cal. Apr. 25, 2017).

72. OJP appears to interpret the notification condition as requiring jurisdictions to hold an individual beyond when he or she is otherwise eligible for release if necessary to provide 48-hour notice to ICE before release. On August 3, 2017, OJP sent a letter to four local jurisdictions, including the California cities of Stockton and San Bernardino, interested in the Public Safety Partnership ("PSP") Program, a non-formula grant funding source administered through JAG. The letter asked jurisdictions to inform ICE whether the jurisdiction has a "statute, rule, regulation, policy, or practice that is designed to ensure that your correctional and detention facilities provide at least 48 hours' advance notice, *where possible*, to DHS regarding the scheduled release date and time of an alien in the jurisdiction's custody when DHS requests such notice in order to take custody of the alien."[3]

73. A similar "where possible" limitation is not included in the JAG Solicitations. It thus appears that OJP may expect jurisdictions to detain individuals beyond their release date in order to comply with the condition which would require the recipient jurisdictions to potentially violate the Fourth Amendment. But even adding a "where possible" limitation does not cure the existing ambiguity. To cure the ambiguity and the Fourth Amendment problems with the

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[2] *See* Department of Homeland Security, Immigration Detainer Notice of Action, I-247A, https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf.

[3] *See* U.S. Department of Justice, *Alan Hanson Letters to Jurisdictions re PSP* (Aug 3. 2017), https://www.justice.gov/opa/press-release/file/986411/download (emphasis added).

notification condition, OJP would need to explicitly state that jurisdictions do not need to detain an individual beyond his or her ordinary release in order to comply with the condition.

V. USDOJ HAS MADE CLEAR THAT IT DOES NOT BELIEVE CALIFORNIA COMPLIES WITH THE ACCESS AND NOTIFICATION CONDITIONS

74. Although California's laws comply with the access and notification conditions under one interpretation of the conditions, Defendants have consistently stated or suggested their perception that California and its local jurisdictions fail to comply with these conditions.

A. California Has a Credible Fear that USDOJ Will Wrongly Withhold Funding Based on the Access Condition

75. On March 29, 2017, Defendant Sessions and then-DHS Secretary John Kelly sent a joint letter to the Chief Justice of California. The letter, which responded to the Chief Justice's expression of concern about ICE arrests occurring in state courthouses, stated that "[s]ome jurisdictions, including the State of California and many of its largest counties and cities, have enacted statutes and ordinances designed to specifically prohibit or hinder ICE from enforcing immigration law by prohibiting communication with ICE, and denying requests by ICE officers and agents to enter prisons and jails to make arrests."[4]

76. No California law prohibits ICE's access to jails. The TRUST Act only limits circumstances under which local law enforcement have discretion to comply with detainer requests. And the TRUTH Act only provides protections so that inmates are aware of their rights before they make the voluntary decision of whether to speak to ICE.

77. Defendant Sessions' inaccurate characterization of California law as denying ICE access to jails, and thereby failing to satisfy this new condition in the JAG Solicitations, places California and local jurisdictions at risk of not receiving the JAG funds.

[4] *Attorney General Jefferson B. Sessions and Secretary John F. Kelly Letter to the Honorable Tani G. Cantil* (Mar. 29, 2017), https://www.nytimes.com/interactive/2017/03/31/us/sessions-kelly-letter.html.

B. California Has a Credible Fear that USDOJ Will Wrongly Withhold Funding Based on the Notification Condition

78. California has a credible fear that the notification condition requires local jurisdictions to hold an individual beyond his or her ordinary release and, therefore, USDOJ will find that California and its political subdivisions fail to comply with this condition because of the TRUST Act.

79. In addition to the ambiguous wording of the notification condition, Defendant Sessions has made numerous statements asserting his desire to take federal funding away from jurisdictions that do not comply with detainer requests. For instance, on March 27, 2017, Defendant Sessions exclusively discussed "policies" regarding refusals "to detain known felons under federal detainer requests."[5] Defendant Sessions threatened that "policies" that limit compliance with detainer requests placed jurisdictions "at risk of losing valuable federal dollars."[6]

80. Defendant Sessions' statements targeting jurisdictions that do not universally comply with detainer holds further corroborate that USDOJ intends to enforce this condition to require jurisdictions to hold individuals beyond their ordinary release.

VI. THE IMPOSITION OF THE ILLEGAL FUNDING CONDITIONS WILL CREATE IRREPARABLE HARM TO THE STATE AND ITS LOCAL JURISDICTIONS

81. The ambiguity in the access and notification conditions, in combination with Defendants' interpretations of California law, create the prospect that the State and/or its local jurisdictions will not apply for JAG unless there is clarification about the scope of the new conditions. That means a loss of up to $28.3 million in critical funds that would otherwise go toward programs throughout the State that reduce recidivism for at-risk youth, counter the distribution of illegal drugs, advance community policing, and improve educational outcomes.

82. Another prospect is that the State and/or its localities accept the funding and change their public-safety oriented laws and policies in order to ensure they are viewed as complying with these ambiguous access and notification conditions. Abandoning these policies, that law

[5] U.S. Department of Justice, *Attorney General Jeff Sessions Delivers Remarks on Sanctuary Jurisdictions* (Mar. 27, 2017), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-sanctuary-jurisdictions.

[6] *Id.*

enforcement has found to be effective in their communities, could divert resources away from fighting crime and erode trust between the state and local governments and their immigrant communities that the TRUST and TRUTH Acts, as well as local ordinances, are intended to build.

83. In order to compel jurisdictions to adopt its federal immigration program, the Administration has admitted that it intends to force state and local jurisdictions to abandon policies these jurisdictions have adopted based on their considered judgment on how best to enhance public safety. The ambiguity of these conditions is part and parcel of the Administration's plan to create a chilling effect that makes state and local jurisdictions think twice about maintaining their current policies. If Defendants clarify the access condition to explain that they expect jurisdictions to not provide any procedural protections to detainees before an ICE interview, or the notification condition to mean that jurisdictions must provide ICE with 48-hour notice even if it means holding someone beyond his or her ordinary release, jurisdictions will still feel pressured to change their laws or policies to avoid losing any federal funding.

84. Compelling state and local governments to make a decision without providing clarity about the scope of the conditions, or construing these funding conditions to prohibit jurisdictions from providing notice protections for inmates or requiring jurisdictions to detain individuals beyond their ordinary release, undermines public safety, is unconstitutional, and should be halted.

FIRST CLAIM FOR RELIEF

VIOLATION OF CONSTITUTIONAL SEPARATION OF POWERS

85. Plaintiff incorporates the allegations of the preceding paragraphs by reference.

86. Article I, Section I of the United States Constitution enumerates that "[a]ll legislative Powers herein granted shall be vested in [the] Congress."

87. Article I, Section VIII of the United States Constitution vests exclusively in Congress the spending power to "provide for . . . the General Welfare of the United States."

88. Defendants have exceeded Congressional authority by adding conditions requiring jurisdictions to provide access to detention facilities to interview inmates and to comply with notification requests that are not conferred by the JAG authorizing statute or any other federal

law. *See* 42 U.S.C. §§ 3750-58. The new access and notification conditions therefore unlawfully exceed the Executive Branch's powers and intrude upon the powers of Congress.

89. For the reasons stated herein, the access and notification conditions in the JAG Solicitations are unlawful, unconstitutional, and should be set aside under 28 U.S.C. § 2201.

SECOND CLAIM FOR RELIEF

VIOLATION OF CONGRESSIONAL SPENDING AUTHORITY

90. Plaintiff incorporates the allegations of the preceding paragraphs by reference.

91. Congress' spending power is not unlimited. When "Congress desires to condition the States' receipt of federal funds, it 'must do so (a) unambiguously …, enable[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation;'" (b) by placing conditions that are related "to the federal interest in particular national projects or programs;" and (c) to not "induce the States to engage in activities that would themselves be unconstitutional." *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

92. To the extent that Congress delegated its authority to impose conditions (special conditions or otherwise) on JAG funding (which Plaintiff does not concede), the access and notification conditions violate the Spending Clause of the U.S. Constitution.

93. The access and notification conditions are unrelated to the "federal interest in particular national projects or programs" for which Congress intended JAG funding to be used.

94. The access and notification conditions violate the Spending Clause because they are ambiguous and do not provide the State with notice to make a "choice knowingly" of whether to comply.

95. Additionally, if the notification condition requires jurisdictions to hold individuals beyond their ordinary release to comply with the notification condition, that condition would also violate the independent constitutional bar prong of the Spending Clause by requiring local law enforcement to comply even when doing so would violate the Fourth Amendment of the U.S. Constitution.

96. For the reasons stated herein, the access and notification conditions in the JAG Solicitations are unlawful, and should be set aside under 28 U.S.C. § 2201.

THIRD CLAIM FOR RELIEF

VIOLATION OF ADMINISTRATIVE PROCEDURE ACT

(Constitutional Violations and Excess of Statutory Authority)

97. Plaintiff incorporates the allegations of the preceding paragraphs by reference.

98. Defendant USDOJ is an "agency" under the APA, 5 U.S.C. § 551(1), and the JAG solicitation is an "agency action" under the APA, *id.* § 551(13).

99. The JAG Solicitations constitute "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." Id. § 704.

100. The APA requires that a court "hold unlawful and set aside agency action, findings, and conclusions found to be … contrary to constitutional right, power, privilege, or immunity," or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." *Id.* § 706(2)(B)-(C).

101. Defendants' imposition of the access and notification conditions in the JAG Solicitations is unconstitutional because Defendants overstepped their powers by exercising lawmaking authority that is solely reserved to Congress under Article I, Section I of the U.S. Constitution. Also, Defendants' imposition of the access and notification conditions in the JAG Solicitations was in excess of their statutory authority. Furthermore, both conditions violate the Spending Clause because they are unrelated to the federal purpose of the grant, ambiguous, and/or tied to unconstitutional activities.

102. Because Defendants acted unconstitutionally and in excess of their statutory authority through the JAG Solicitations, these actions are unlawful and should be set aside under 5 U.S.C. § 706.

FOURTH CLAIM FOR RELIEF

VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT

(Arbitrary and Capricious)

103. Plaintiff incorporates the allegations of the preceding paragraphs by reference.

104. Defendant USDOJ is an "agency" under the APA, 5 U.S.C. § 551(1), and the JAG solicitation is an "agency action" under the APA, *id.* § 551(13).

105. The JAG Solicitations constitute "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." *Id.* § 704.

106. The APA requires that a court "hold unlawful and set aside agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706(2)(A).

107. The imposition of the access and notification conditions is arbitrary and capricious and an abuse of discretion because Defendants have relied on factors that Congress did not intend by adding these conditions to JAG funding.

108. For the reasons discussed herein, the access and notification conditions in the JAG solicitation are unlawful and shall be set aside under 5 U.S.C. § 706 for being arbitrary and capricious and an abuse of discretion.

FIFTH CLAIM FOR RELIEF

DECLARATORY RELIEF

109. Plaintiff incorporates the allegations of the preceding paragraphs by reference.

110. An actual controversy between California and Defendants exists as to whether the State of California and its localities comply with the access and notification conditions on the basis of the TRUST and TRUTH Acts. Although California law actually complies with an interpretation of the conditions, Defendants' statements indicate that they will determine that California does not comply with the conditions.

111. Plaintiff is entitled to a declaration that the TRUST and TRUTH Acts do not violate the access and notification conditions, and thus, should not be a basis for withholding, terminating, disbarring, or making ineligible federal funding from the State and its political subdivisions.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, including the State of California, respectfully that this Court enter judgment in its favor, and grant the following relief:

1. Issue a declaration that the access and notification conditions in the JAG Solicitations are unconstitutional and/or unlawful because (a) they exceed the Congressional authority conferred to the Executive Branch; (b) to the extent there is Congressional authorization, exceeds the Congress's spending powers under Article I of the Constitution; and (c) they violate the Administrative Procedures Act;

2. Permanently enjoin Defendants from using the access and notification conditions as restrictions for JAG funding;

3. Permanently enjoin Defendants from withholding, terminating, disbarring or making any state entity or local jurisdiction ineligible for JAG funding on account of the TRUTH Act or any law or policy that provides procedural protections to inmates about their rights;

4. Permanently enjoin Defendants from withholding, terminating, disbarring, or making any state entity or local jurisdiction ineligible for JAG funding on account of the TRUST Act or any law or policy that limits compliance with detainer requests;

5. In the alternative, declare that the State's TRUST and TRUTH Acts comply with the access and notification conditions in the JAG Solicitations; and

6. Award the State costs and grant such other relief as the Court may deem just and proper.

Dated: August 14, 2017

Respectfully submitted,

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OK2017900935

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE CITY OF PHILADELPHIA,

Plaintiff,

v.

JEFFERSON BEAUREGARD SESSIONS III,
Attorney General of the United States,

Defendant.

Civil Action No._____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff, the City of Philadelphia, hereby alleges as follows:

INTRODUCTION

1. The City of Philadelphia ("Philadelphia" or "the City") brings this action to enjoin the Attorney General of the United States from imposing new and unprecedented requirements on the Edward Byrne Memorial Justice Assistance Grant ("Byrne JAG"). Philadelphia also seeks a declaratory judgment that the new conditions are contrary to law, unconstitutional, and arbitrary and capricious. Additionally, Philadelphia seeks a declaratory judgment confirming that its policies comply with 8 U.S.C. § 1373 ("Section 1373"), to the extent that statute is lawfully deemed applicable to the Byrne JAG program.

2. Philadelphia has a vibrant immigrant community. Immigrants are an integral part of Philadelphia's workforce, small business sector, school and college population, and civic associations; their success is vital to the City's success. To ensure that Philadelphia's immigrant

community continues to thrive, the City has adopted policies that seek to foster trust between the immigrant population and City officials and employees, and to encourage people of all backgrounds to take full advantage of the City's resources and opportunities. Several of those policies protect the confidentiality of individuals' immigration and citizenship status information, and prevent the unnecessary disclosure of that information to third parties. The rationale behind these policies is that if immigrants, including undocumented immigrants, do not fear adverse consequences to themselves or to their families from interacting with City officers, they are more likely to report crimes, apply for public benefits to which they are entitled, enroll their children in Philadelphia's public schools, request health services like vaccines, and all in all contribute more fully to the City's health and prosperity.

3. Philadelphia also practices community policing. And, like most major cities, it has determined that public safety is best promoted *without* the City's active involvement in the enforcement of federal immigration law. To the contrary, Philadelphia has long recognized that a resident's immigration status has no bearing on his or her contributions to the community or on his or her likelihood to commit crimes, and that when people with foreign backgrounds are afraid to cooperate with the police, public safety in Philadelphia is compromised. For this reason, the Philadelphia Police Department ("PPD") has for many years prohibited its officers from asking individuals with whom they interact about their immigration status. Police officers also do not stop or question people on account of their immigration status, do not in any way act as immigration enforcement agents, and are particularly protective of the confidential information of victims and witnesses to crimes. In Philadelphia's experience with property crimes currently at their lowest since 1971, robberies at their lowest since 1969, and violent crime the

lowest since 1979 these policies have promoted the City's safety by facilitating greater cooperation with the immigrant community writ large.

4. For over a decade, Philadelphia has pursued the above policies while also relying upon the funding supplied by the Byrne JAG program to support critical criminal justice programming in the City. Indeed, the Byrne JAG award has become a staple in Philadelphia's budget and is today an important source of funding for the PPD, District Attorney's Office, and local court system. Since the grant was created in 2005, Philadelphia has applied for and successfully been awarded its local allocation every year. Philadelphia has never had any conflicts with the federal government in obtaining Byrne JAG funds.

5. That is all changing. On July 25, 2017, the Department of Justice ("DOJ" or "the Department") notified Philadelphia that, as a condition to receiving any Byrne JAG funds in fiscal year 2017, Philadelphia must comply with three conditions. Philadelphia must: (1) certify, as part of its FY 2017 grant application, that the City complies with Section 1373, a statute which bars states and localities from adopting policies that restrict immigration-related communications between state and local officials and the federal government; (2) permit officials from the U.S. Department of Homeland Security ("DHS") (which includes U.S. Immigration and Customs Enforcement ("ICE")) to access "any detention facility" maintained by Philadelphia in order to meet with persons of interest to DHS; and (3) provide at least 48 hours' advance notice to DHS regarding the "scheduled release date and time" of an inmate for whom DHS requests such advance notice.[1]

6. The imposition of these conditions marks a radical departure from the Department of Justice's past grant-making practices. No statute permits the Attorney General to impose

[1] U.S. Dep't of Justice, *Backgrounder On Grant Requirements* (July 25, 2017), *available at* https://goo.gl/h5uxMX. A copy of this document is attached as Exhibit 1.

these conditions on the Byrne JAG program. Although Congress delegated certain authorities to the Attorney General to administer Byrne JAG awards, the Attorney General has far exceeded that delegation here. Moreover, even if Congress *had* intended to authorize the Attorney General to attach conditions of this nature to JAG grants (which it did not), that would have been unlawful: Demanding that localities certify compliance with Section 1373, allow ICE agents unrestrained access to their prisons, or provide ICE advance notification of inmates' scheduled release dates as conditions of receiving Byrne JAG funds, would flout the limits of Congress' Spending Clause powers under the United States Constitution.

7. Simply put, the Attorney General's imposition of these three conditions on the FY 2017 Byrne JAG grant is contrary to law, unconstitutional, and arbitrary and capricious. That action should be enjoined.

8. The Department of Justice's decision to impose its sweeping conditions upon Byrne JAG grantees represents the latest affront in the Administration's ever-escalating attempts to force localities to forsake their local discretion and act as agents of the federal government. Within the President's first week in office, he signed an Executive Order commanding federal agencies to withhold funds from so-called "sanctuary cities" *i.e.*, cities that have exercised their basic rights to self-government and have chosen to focus their resources on local priorities rather than on federal immigration enforcement.[2] After a federal court enjoined much of that Order,[3] the Department of Justice singled out Philadelphia along with eight other jurisdictions by demanding that these jurisdictions certify their compliance with Section 1373 by June 30, 2017. The Department warned the localities that their failure to certify compliance "could result in the

[2] Exec. Order No. 13768, "Enhancing Public Safety in the Interior of the United States," 82 Fed. Reg. 8799 (Jan. 25, 2017).
[3] *County of Santa Clara v. Trump*, --- F. Supp. 3d ----, 2017 WL 1459081 (N.D. Cal. Apr. 25, 2017).

withholding of [Byrne JAG] funds, suspension or termination of the [Byrne JAG] grant, ineligibility for future OJP grants or subgrants, or other action."[4] By this time in the grant funding schedule, Philadelphia had already appropriated and in most cases obligated the funds it received under the FY 2016 JAG award to a number of important programs to strengthen its criminal justice system.

9. Without any facts or support, the Attorney General claimed in April that "the lawless practices" of cities he characterized as "so-called 'sanctuary' jurisdictions . . . make our country less safe."[5] Philadelphia's experience is quite the opposite: Philadelphia has witnessed a reduction in crime of over 17 percent since the City formally adopted policies protecting the confidentiality of its constituents.

10. Philadelphia certified its compliance with Section 1373 on June 22, 2017. Fundamentally, Philadelphia explained that it complies with Section 1373 because its agents do not collect immigration status information in the first place, and, as a result, the City is in no position to share or restrict the sharing of information it simply does not have. At the same time, the City explained, if immigration status information does inadvertently come into the City's possession, Philadelphia's policies allow local law enforcement to cooperate with federal authorities and to share identifying information about criminal suspects in the City. For these reasons and others, Philadelphia certified that it complies with all of the obligations that Section 1373 can constitutionally be read to impose on localities.

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[4] Letter from Alan R. Hanson, Acting Assistant Attorney General, Office of Justice Programs, to Major Jim Kenney, City of Philadelphia (Apr. 21, 2017).

[5] Press Release, U.S. Dep't of Justice, *Attorney General Jeff Sessions Delivers Remarks on Violent Crime to Federal, State and Local Law Enforcement* (Apr. 28, 2017), *available at* https://goo.gl/sk37qN.

11. In response to the certifications filed in June 2017 by Philadelphia and other jurisdictions, the Attorney General issued a press release condemning those submissions. He did not offer his definition of compliance or any details on the aspects of any locality's policies he considered illegal; he said only that "[i]t is not enough to assert compliance" and that "jurisdictions must actually be in compliance."[6]

12. Against this backdrop, the Department of Justice announced in a July 25, 2017 press release that it would now be imposing two additional conditions on jurisdictions applying for FY 2017 Byrne JAG funding, along with another mandatory certification of compliance with Section 1373. The fiscal year 2017 application is due on September 5, 2017.

13. The Attorney General's action was an unlawful, *ultra vires* attempt to force Philadelphia to abandon its policies and accede to the Administration's political agenda. It is one thing for the Department of Justice to disagree with Philadelphia as a matter of policy; it is quite another thing for the Department to violate both a congressionally-defined program and the Constitution in seeking to compel Philadelphia to forfeit its autonomy.

14. In response, Philadelphia now seeks a declaration from this Court that the Department of Justice's imposition of the new conditions to Byrne JAG funding was unlawful. That agency action is contrary to federal statute, contrary to the Constitution's separation of powers, and arbitrary and capricious. Further, even if Congress had intended to permit the Attorney General's action, it would violate the Spending Clause. The City also seeks a declaration from this Court that, to the extent Section 1373 can be made an applicable condition to the receipt of Byrne JAG funds, Philadelphia is in full compliance with that provision.

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[6] Press Release, U.S. Dep't of Justice, *Department of Justice Reviewing Letters from Ten Potential Sanctuary Jurisdictions* (July 6, 2017), *available at* https://goo.gl/of8UhG. A copy of this press release is attached as Exhibit 2.

15. The City also seeks injunctive relief. It requests that this Court permanently enjoin the Department of Justice from imposing these three conditions in conjunction with the FY 2017 Byrne JAG application, and any future grants under the Byrne JAG program. Further, the City seeks any other injunctive relief the Court deems necessary and appropriate to allow Philadelphia to receive its FY 2017 JAG allocation as Philadelphia has since the inception of the JAG program, and as Congress intended.

PARTIES

16. Plaintiff Philadelphia is a municipal corporation, constituted in 1701 under the Proprietor's Charter. William Penn, its founder, was a Quaker and early advocate for religious freedom and freedom of thought, having experienced persecution firsthand in his native England. He fashioned Philadelphia as a place of tolerance and named it such. "Philadelphia," the City of Brotherly Love, derives from the Greek words "philos," meaning love or friendship, and "adelphos," meaning brother.

17. Philadelphia is now the sixth-largest city in the United States and is home to almost 1.6 million residents. About 200,000 Philadelphia residents, or 13 percent of the City's overall population, are foreign-born, which includes approximately 50,000 undocumented immigrants. The number of undocumented Philadelphia residents therefore account for roughly one of every four foreign-born Philadelphians.

18. Defendant Jefferson Beauregard Sessions III is the Attorney General of the United States. The Attorney General is sued in his official capacity. The Attorney General is the federal official in charge of the United States Department of Justice, which took and threatens imminently to take the governmental actions at issue in this lawsuit.

JURISDICTION AND VENUE

19. The Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1346. The Court is authorized to issue the relief sought here under the Administrative Procedure Act, 5 U.S.C. §§ 702, 705, 706, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202.

20. Venue is proper in the Eastern District of Pennsylvania under 28 U.S.C. § 1391(e)(1) because substantial events giving rise to this action occurred therein and because Philadelphia resides therein and no real property is involved in this action.

FACTUAL ALLEGATIONS

I. PHILADELPHIA'S POLICIES

21. As the City of Brotherly Love, Philadelphia is recognized as a vital hub for immigrants from across the globe who seek good jobs and better futures for themselves and their children. A study by the Brookings Institute found "Philadelphia's current flow of immigrants [to be] sizable, varied, and . . . grow[ing] at a moderately fast clip."[7]

22. Philadelphia's policies developed over time to address the needs and concerns of its growing immigrant community. Today, Philadelphia has four sets of policies relevant to the present suit, as each concern the City's efforts to engender trust with the City's immigrant community and bring individuals from that community into the fold of City life. These policies work. They are discussed in turn below.

A. Philadelphia's Police Department Memorandum 01-06

23. Decades ago, the Philadelphia Police Department recognized that a resident's immigration status was irrelevant to effective policing and, if anything, that asking about an individual's immigration status hampers police investigations. For that reason, PPD officers

[7] Audrey Singer et al., *Recent Immigration to Philadelphia: Regional Change in a Re-Emerging Gateway*, Metropolitan Policy Program at Brookings (Nov. 2008), https://goo.gl/pZOnJx.

were trained to refrain from asking persons about their immigration status when investigating crimes or conducting routine patrols.

24. That practice was formalized into policy on May 17, 2001, when Philadelphia's then-Police Commissioner John F. Timoney issued Memorandum 01-06, entitled "Departmental Policy Regarding Immigrants" ("Memorandum 01-06").[8] The Memorandum states that one of its overarching goals is for "the Police Department [to] preserve the confidentiality of all information regarding law abiding immigrants to the maximum extent permitted by law." Memorandum 01-06 ¶ 2B.

25. Memorandum 01-06 generally prohibits police officers in Philadelphia from unnecessarily disclosing individuals' immigration status information to other entities. The Memorandum sets out this non-disclosure instruction, and three exceptions, as follows: "In order to safeguard the confidentiality of information regarding an immigrant, police personnel will transmit such information to federal immigration authorities only when: (1) required by law, or (2) the immigrant requests, in writing, that the information be provided, to verify his or her immigration status, or (3) the immigrant is suspected of engaging in criminal activity, including attempts to obtain public assistance benefits through the use of fraudulent documents." Memorandum 01-06 ¶¶ 3A-3B.

26. Notwithstanding the instruction to "safeguard the confidentiality of information regarding an immigrant," Memorandum 01-06 also directs police officers to continue adhering to typical law enforcement protocols for the reporting and investigating of crimes. Section 3B of the Memorandum provides that "[s]worn members of the Police Department who obtain information on immigrants suspected of criminal activity will comply with normal crime

[8] A copy of Memorandum 01-06 is attached hereto as Exhibit 3.

reporting and investigating procedures." *Id.* ¶ 3B. This mandate applies irrespective of the criminal suspect's identity or immigration status. Section 3C further instructs that "[t]he Philadelphia Police Department will continue to cooperate with federal authorities in investigating and apprehending immigrants suspected of criminal activities." *Id.* ¶ 3C. But as to "immigrants who are victims of crimes," the Memorandum provides a blanket assurance of confidentiality. Such persons "will not have their status as an immigrant transmitted in any manner." *Id.*

27. The Philadelphia Police Department's policy was motivated by the desire to encourage members of Philadelphia's immigrant community to make use of City services and to cooperate with the police without fear of negative repercussions. *See id.* ¶¶ 2B, 3C. Indeed, an essential tenet of modern policing is that police departments should engender trust from the communities they serve so that members of those communities will come forward with reports of criminal wrongdoing, regardless of their immigration status or that of their loved ones. Numerous police chiefs and criminal law enforcement experts have echoed that finding.[9]

28. Philadelphia has witnessed firsthand the positive effects that increased trust between communities, including immigrant communities, and the police, has on law and order. In part due to the tireless efforts of the PPD to forge that trust with the immigrant community, the City has seen a drop in its overall crime rate.

29. The success of Philadelphia's policies should come as no surprise. A systematic review of municipalities' "sanctuary city" policies, defined as "at least one law or formal

[9] *See* Hearing before the Comm. on Homeland Security & Gov't Affairs of the United States Senate, May 24, 2014 (statement of J. Thomas Manger, Chief of Police of Montgomery County, Maryland) (conveying that the "moment" immigrant "victims and witnesses begin to fear that their local police will deport them, cooperation with their police then ceases"); Chuck Wexler, *Police Chiefs Across the Country Support Sanctuary Cities Because They Keep Crime Down*, L.A. Times (Mar. 6, 2017), https://goo.gl/oQs9AT (similar).

resolution limiting local enforcement of immigration laws as of 2001," found that policies of this nature were *inversely correlated* with rates of robbery and homicide meaning that "sanctuary policies" made cities safer.[10] Indeed, cities with these policies saw lower rates of crime even among immigrant populations.[11] Social science research confirms that when there is a concern of deportation, immigrant communities are less likely to approach the police to report crime.[12]

30. Recent events also confirm the positive relationship between policies that forge community trust with immigrant populations and the overall reporting of crimes. Since President Trump was elected and announced plans to increase deportations and crack down on so-called sanctuary cities, overall crime reporting by Latinos in three major cities including in Philadelphia "markedly decline[d]" as compared to reporting by non-Latinos.[13]

B. Philadelphia's Confidentiality Order

31. Philadelphia's policies that engender confidence between its immigrant population and City officials extend beyond its police-related protocols. Indeed, the City's hallmark policy in building trust with all city service offerings is its "Confidentiality Order," signed by then-Mayor Michael A. Nutter on November 10, 2009. *See* Executive Order No. 8-09,

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[10] *See* Christopher Lyons, Maria B. Ve'lez, & Wayne A. Santoro, *Neighborhood Immigration, Violence, and City-Level Immigrant Political Opportunities*, 78 American Sociological Review, no. 4, pp. 9, 14-19 (June 17, 2013).

[11] *Id.* at 14, 18.

[12] Cecilia Menjiyar & Cynthia L. Bejarano, *Latino Immigrants' Perceptions of Crime and Police Authorities in the United States: A Case Study from the Phoenix Metropolitan Area*, 27 Ethnic and Racial Studies, no. 1, pp. 120-148 (Jan. 2004) ("As these cases illustrate, when there is a threat of immigration officials' intervention, immigrants (particularly those who fear any contacts with these officials due to their uncertain legal status, as is the case of the Mexicans and Central Americans in this study) are more reluctant to call the police because they are aware of the links between the two.").

[13] Rob Arthur, *Latinos in Three Cities Are Reporting Fewer Crimes Since Trump Took Office*, FiveThirtyEight (May 18, 2017), https://goo.gl/ft1fwW (surveying trends in Philadelphia, Dallas, and Denver).

"Policy Concerning Access of Immigrants to City Services" ("Confidentiality Order").[14] That policy recognizes that the City as a whole fares better if all residents, including undocumented immigrants, pursue health care services, enroll their children in public education, and report crimes.

32. The Confidentiality Order instructs City officials to protect the confidentiality of individuals' immigration status information in order to "promote the utilization of [City] services by all City residents and visitors who are entitled to and in need of them, including immigrants." *See* Confidentiality Order preamble. It intends that all immigrants, regardless of immigration status, equally come forward to access City services to which they are entitled, without having to fear "negative consequences to their personal lives." *Id.* The Order defines "confidential information" as "any information obtained and maintained by a City agency related to an individual's immigration status." *Id.* § 3A.

33. The Confidentiality Order directs City officers and employees to refrain from affirmatively collecting information about immigration status, unless that information is necessary to the officer or employee's specific task or the collection is otherwise required by law. The Order states: "No City officer or employee, other than law enforcement officers, shall inquire about a person's immigration status unless: (1) documentation of such person's immigration status is legally required for the determination of program, service or benefit eligibility . . . or (2) such officer or employee is required by law to inquire about such person's immigration status." *Id.* § 2A.

34. The Confidentiality Order has additional mandates for law enforcement officers. It directs that officers "shall not" stop, question, detain, or arrest an individual solely because of

[14] A copy of the Confidentiality Order is attached hereto as Exhibit 4.

his perceived immigration status; shall not "inquire about a person's immigration status, unless the status itself is a necessary predicate of a crime the officer is investigating or unless the status is relevant to identification of a person who is suspected of committing a crime"; and shall not "inquire regarding immigration status for the purpose of enforcing immigration laws." *Id.* §§ 2B(1), (2), (4). Witnesses and victims are afforded special protection: Law enforcement officers "shall not . . . inquire about the immigration status of crime victims, witnesses, or others who call or approach the police seeking help." *Id.* § 2B(3).

35. The Confidentiality Order also requires City officers and employees to avoid making unnecessary disclosures of immigration status information that may inadvertently come into their possession. *Id.* § 3B ("No City officer or employee shall disclose confidential information[.]"). But the Order permits disclosure both by City "officer[s] or employee[s]," when "such disclosure is required by law," or when the subject individual "is suspected . . . of engaging in criminal activity." *Id.* § 3B(2)-(3).

36. Philadelphia's Confidentiality Order, like the PPD's Memorandum 01-06, is motivated by concerns among officials across local government from the City's health and social services departments to its law enforcement departments that members of Philadelphia's immigrant community, especially those who are undocumented, would otherwise not access the municipal services to which they and their families are entitled and would avoid reporting crimes to the police, for fear of exposing themselves or their family members to adverse immigration consequences. The City's Confidentiality Order and Memorandum 01-06 play a vital role in mitigating undesired outcomes like neighborhoods where crimes go unreported, where families suffer from preventable diseases, and where children do not go to school.

37. Indeed, notwithstanding the Attorney General's claim that "[t]he residents of Philadelphia have been victimized" because the City has "giv[en] sanctuary to criminals,"[15] Philadelphia's crime statistics tell a very different story. Since 2009, when the Confidentiality Order was enacted, Philadelphia has witnessed a decrease in crime of over 17 percent, including a 20 percent decrease in violent crime. Tellingly, the Administration offers not a single statistic or fact to support their allegations otherwise either publicly or as a part of the JAG solicitation announcing the requirement of the three new conditions. This is because the Administration has no support for its claims that sanctuary cities promote crime or lawlessness.

C. Philadelphia's Policies on Responding to ICE Detainer and Notification Requests

38. On April 16, 2014, shortly after the United States Court of Appeals for the Third Circuit issued a decision concluding that "detainer" requests sent by ICE are voluntary upon localities, *see Galarza v. Szalczyk*, 745 F.3d 634, 640 (3d Cir. 2014), then-Mayor Nutter signed Executive Order No. 1-14, entitled "Policy Regarding U.S. Immigration and Customs Enforcement Agency Detainer Requests" ("Detainer Order I").[16]

39. Detainer Order I stated that under the "Secure Communities" program, the U.S. Immigration and Customs and Enforcement Agency had been "shift[ing] the burden of federal civil immigration enforcement onto local law enforcement, including shifting costs of detention of individuals in local custody who would otherwise be released." Detainer Order I preamble.

40. Accordingly, Detainer Order I announced a policy that "[n]o person in the custody of the City who otherwise would be released from custody shall be detained pursuant to an ICE civil immigration detainer request . . . nor shall notice of his or her pending release be

[15] Rebecca R. Ruiz, *Sessions Presses Immigration Agenda in Philadelphia, a Sanctuary City*, N.Y. Times (July 21, 2017), https://goo.gl/4EDuuo.
[16] A copy of Detainer Order I is attached hereto as Exhibit 5.

provided, unless such person is being released after conviction for a first or second degree felony involving violence and the detainer is supported by a judicial warrant." *Id.* § 1. The Order instructed the "Police Commissioner, the Superintendent of Prisons and all other relevant officials of the City" to "take appropriate action to implement this order." *Id.* § 2.

41. Detainer Order I was partly rescinded at the end of then-Mayor Nutter's term. After his election and upon taking office, on January 4, 2016, Mayor James F. Kenney signed a new order dealing with ICE detainer and notification requests. Its title was the same as Mayor Nutter's prior order and it was numbered Executive Order No. 5-16 ("Detainer Order II").[17]

42. Detainer Order II states that, although ICE had "recently discontinued its 'Secure Communities' program" and "the Department of Homeland Security and ICE have initiated the new Priority Enforcement Program (PEP) to replace Secure Communities[,] . . . it is incumbent upon the Federal government and its agencies to both listen to individuals concerned with this new program, and ensure that community members are both informed and invested in the program's success." Detainer Order II preamble. Until that occurs, Detainer Order II directs that Philadelphia officers "should not comply with detainer requests unless they are supported by a judicial warrant and they pertain to an individual being released after conviction for a first or second-degree felony involving violence." *Id.*

43. Detainer Order II therefore provides: "No person in the custody of the City who otherwise would be released from custody shall be detained pursuant to an ICE civil immigration detainer request . . . nor shall notice of his or her pending release be provided, unless such person is being released after conviction for a first or second degree felony involving violence and the detainer is supported by a judicial warrant." *Id.* § 1. The Order instructs "the Police

[17] A copy of Detainer Order II is attached hereto as Exhibit 6.

Commissioner, the Prisons Commissioner and all other relevant officials of the City" to "take appropriate action to implement this order." *Id.* § 2.

44. As a result of Detainer Orders I and II, Philadelphia prison authorities stopped notifying ICE of the forthcoming release of inmates, unless ICE provided the authorities a notification request that was accompanied by a judicial warrant. This has been the practice in the prisons since the signing of Detainer Order I in April 2014 through the date of this filing. Because the vast majority of individuals in Philadelphia's prison facilities are pre-trial or pre-sentence detainees, however, the vast majority of detainer or notification requests that the City receives from ICE concern persons without scheduled release dates. Since January 2016, only three individuals for whom ICE sent Philadelphia detainer or notification requests and who were in City custody had been serving a sentence after being convicted of a crime. Every other individual for whom ICE sent a detainer or notification request during that time period was an individual in a pre-trial, pre-sentencing, or temporary detention posture, whose release could often be ordered with no advance notification to local authorities.

45. On March 22, 2017, the City's First Deputy Managing Director, Brian Abernathy, clarified by memorandum that, although Executive Order 5-16 (Detainer Order II) suggested that in order for the City to cooperate with an ICE notification request, there needed to be both a "judicial warrant" and a prior conviction by the inmate for a first or second degree felony, that text did not and does not reflect the practice of the City's prisons.[18] Mr. Abernathy explained that the historical practice of the Department of Prisons has been to "cooperat[e] with all federal criminal warrants, including criminal warrants obtained by Immigration and Customs Enforcement," and "[b]y signing Executive Order 5-16, Mayor Kenney did not intend to alter

[18] A copy of Mr. Abernathy's March 22, 2017 internal memorandum is attached hereto as Exhibit 7.

this cooperation." Accordingly, Mr. Abernathy's memorandum stated that "the Department is directed to continue to cooperate with all federal agencies, including ICE, when presented with a warrant to the same extent it cooperated before Executive Order 5-16." Philadelphia therefore continues to comply with ICE advance notification requests, regardless of the crime for which the individual was convicted, when ICE also presents a "judicial warrant."

46. Philadelphia's policies on detainer requests that is, of complying with ICE requests to detain an individual for a brief period of time or to provide advance notification of a person's release *only* if ICE presents a judicial warrant serve an important function in the City. Like Police Memorandum 01-06 and the Confidentiality Order, these policies forge trust with the immigrant community because they convey the message that Philadelphia's local law enforcement authorities are not federal immigration enforcement agents. They tell residents that if they find themselves in the City's custody and are ordered released, they *will* be released not turned over to ICE unless a judge has determined such action is warranted. For instance, if a member of the immigrant community is arrested for a petty infraction and is temporarily detained in a Philadelphia Prison facility, or if he or she is arrested and then released the next morning, the City will not voluntarily detain that individual at the request of ICE or alert ICE to their release unless, in the rare circumstance, ICE presents a judicial warrant. This message of assurance is important to community trust: Philadelphia's residents do not have to fear that each and every encounter with the local police is going to land them in an ICE detention center. After all, lawful immigrants and even citizens can be wrongfully caught up in alleged immigration enforcement actions.

47. Philadelphia's detainer policies also ensure fair treatment for all of Philadelphia's residents, immigrants and non-immigrants alike. Just as Philadelphia would not detain an

individual at the request of the FBI for 48 hours without a judicial warrant, Philadelphia will not do so at the request of ICE. The City believes that all persons should be treated with equal dignity and respect, whatever their national origin or immigration status.

D. Philadelphia's Policies on ICE Access to Prisons

48. The Philadelphia Prison System ("PPS") is managed by the Philadelphia Department of Prisons ("PDP"). PDP operates six facilities: (1) the Curran-Fromhold Correctional Facility, which is PPS' largest facility and contains 256 cells; (2) the Detention Center; (3) the House of Correction; (4) the Philadelphia Industrial Correctional Center ("PICC"); (5) the Riverside Correctional Facility; and (6) the Alternative & Special Detention facilities.

49. Across these six facilities, the inmate population is roughly 6,700. Approximately 17 percent of those inmates are serving time for criminal sentences imposed, and the remaining 83 percent inmates are all in a pre-trial posture (roughly 78 percent of inmates), a pre-sentencing posture (roughly 2 percent of inmates), or some other form of temporary detention (roughly 3 percent of inmates). Of the 17 percent serving sentences, none are serving sentences longer than 23 months, and approximately 30 percent are serving sentences of one year or less.

50. In May 2017, the Philadelphia Department of Prisons implemented a new protocol providing that ICE may only interview an inmate if the inmate consents in writing to that interview. To implement this protocol, the Department of Prisons created a new "consent form," to be provided to any inmate in a PPS facility whom ICE seeks to interview. The consent

form informs the individual that "Immigration and Customs Enforcement ("ICE") wants to interview you" and that "[y]ou have the right to agree or to refuse this interview."[19]

51. The new consent-based policy for ICE access to PPS facilities was put in place to help protect prisoners' constitutional rights to decline speaking with law enforcement authorities against their will or to speak only with such authorities in the presence of counsel if they so choose. The consent-based policy also ensures the orderly administration of Philadelphia's prisons, by avoiding the unnecessary expenditure of time and resources that would otherwise occur were inmates to be delivered to interviews with ICE only then to exercise their constitutional rights to remain silent or have counsel present.

E. Other Relevant Policies and Practices

52. In addition to the above policies, each of which are important for strengthening Philadelphia's relationship with its immigrant communities and fostering the health and welfare of the City, Philadelphia also believes that combatting crime is a leading and entirely consistent policy priority. To that effect, the Philadelphia Police Department routinely cooperates with federal law enforcement authorities in detecting, combatting, and holding people accountable for crimes committed in the City or by residents of the City, irrespective of the identity of the perpetrator or their immigration status. For instance, Philadelphia actively participates in a number of federal task forces, including the Violent Crimes Task Force; the Alcohol, Tobacco, Firearms and Explosive (ATF) Task Force; the FBI Terrorism Task Force; Joint Terrorism Task Force; the Human Trafficking Task Force; and the U.S. Marshals Service's Task Force.

[19] *See* Philadelphia Department of Prisons "Inmate Consent Form ICE Interview," attached hereto as Exhibit 8.

53. Philadelphia also uses a number of databases as part of its regular police work and law enforcement activities. Philadelphia's use of these databases provides the federal government notice about and identifying information for persons stopped, detained, arrested, or convicted of a crime in the City. In turn, federal authorities can use information derived from those databases to obtain knowledge about undocumented persons of interest in the City. The databases Philadelphia uses include:

a. The FBI's National Crime Information Center ("NCIC") database: The Philadelphia Police Department's protocol is for its officers to voluntarily and regularly use the NCIC database as they engage in criminal law enforcement. For instance, Philadelphia police officers are trained to run an NCIC "look-up" for all individuals who are subjected to "investigative detention" by the police, for the purpose of determining if an outstanding warrant has been issued for the individual whether in Philadelphia or another jurisdiction. If the officer is able to collect the person's date of birth or license plate information, NCIC protocols mandate that that information will also be entered into NCIC.

b. The Automated Fingerprint Identification System ("AFIS")[20]: As part of a routine and longstanding protocol, at the time a person in Philadelphia is arrested, his or her fingerprints are inputted into Philadelphia's AFIS platform, which feeds automatically into Pennsylvania's identification bureau and then to the FBI. The FBI in turn has the capacity to run

[20] Philadelphia recently transitioned to the Multimodal Biometric Identification System ("MBIS"), which is the next generation to AFIS. But because the FBI refers to the Integrated Automated Fingerprint Identification System ("IAFIS"), we use AFIS here.

fingerprints against the Integrated Automated Fingerprint Identification System ("IAFIS"), a national fingerprint and criminal history system maintained by the FBI, and the Automated Biometric Identification System ("IDENT"), a DHS-wide system for storing and processing biometric data for national security and border management purposes.

c. The Preliminary Arraignment System ("PARS"): PARS is a database maintained by the First Judicial District of Pennsylvania, the Philadelphia Police Department, and the Philadelphia District Attorney. The purpose of the database is to give information that the police collect upon an arrest directly to the District Attorney's Office. Based upon an end-user license agreement signed with ICE in 2008 and amended in 2010, ICE has access to criminal information in the PARS database, *i.e.*, to information about people suspected of criminal activity and entered into the system.

54. Philadelphia does not have visibility into how various federal agencies use or share information derived from the above databases with one another. But to Philadelphia's awareness and understanding, the federal government can use the NCIC, AFIS, and PARS databases to look up persons of interest to the federal government (including ICE) and determine whether they are in Philadelphia's custody or otherwise in the City.

II. THE BYRNE JAG PROGRAM AND 2017 GRANT CONDITIONS

A. Overview of the Byrne JAG Program

55. Congress created the modern-day Byrne JAG program in 2005 as part of the Violence Against Women and Department of Justice Reauthorization Act. *See* Pub. L. No. 109-162 (codified at 42 U.S.C. § 3751 *et seq.*). In fashioning the present-day Byrne JAG grant,

Congress merged two prior grant programs that had also provided criminal justice assistance funding to states and localities. These two predecessor grant programs were the Edward Byrne Memorial Formula Grant Program, created in 1988, and the Local Law Enforcement Block Grant Program.[21]

56. Today, grants under the Byrne JAG program are the primary source of federal criminal justice funding for states and localities. As stated in a 2005 House Report accompanying the bill, the program's goal is to provide State and local governments the "flexibility to spend money for programs that work for them rather than to impose a 'one size fits all' solution" for local policing. *See* H.R. Rep. No. 109-233, at 89 (2005).

57. The authorizing statute for the Byrne JAG program provides that localities can apply for funds to support a range of local programming to strengthen their criminal justice systems. For instance, localities can apply for funds to support "law enforcement programs, prosecution and court programs, prevention and education programs, corrections and community corrections programs, drug treatment and enforcement programs," and "crime victim and witness programs." 42 U.S.C. § 3751(a)(1).

58. Byrne JAG funding is structured as a formula grant, awarding funds to all eligible grantees according to a prescribed formula. *See* 42 U.S.C. § 3755(d)(2)(A). The formula for states is a function of population and violent crime, *see id.* § 3755(a), while the formula for local governments is a function of the state's allocation and of the ratio of violent crime in that locality to violent crime in the state as a whole, *see id.* § 3755(d).

59. Unlike discretionary grants, which agencies award on a competitive basis, "formula grants . . . are not awarded at the discretion of a state or federal agency, but are

[21] *See* Nathan James, *Edward Byrne Memorial Justice Assistance Grant ("JAG") Program*, Congressional Research Service (Jan. 3, 2013), https://goo.gl/q8Tr6z.

awarded pursuant to a statutory formula." *City of Los Angeles v. McLaughlin*, 865 F.2d 1084, 1088 (9th Cir. 1989). States and local governments are entitled to their share of the Byrne JAG formula allocation as long as their proposed programs fall within at least one of eight broadly-defined goals, *see* 42 U.S.C. § 3751(a)(1)(A)-(H), and their applications contain a series of statutorily prescribed certifications and attestations, *see id.* § 3752(a).

60. Philadelphia has filed direct applications for Byrne JAG funding every year since the program's inception in 2005. All of its applications have been granted; the City has never been denied Byrne JAG funds for which it applied. For instance, in FY 2016, Philadelphia received $1.67 million in its direct Byrne JAG award. That award was dated August 23, 2016. In FY 2015, the City received $1.6 million in its direct Byrne JAG award. Over the past eleven years, excluding funds received as part of the 2009 Recovery Act, Philadelphia's annual Byrne JAG award has averaged $2.17 million and has ranged between $925,591 (in 2008) to $3.13 million (in 2005).

61. The City is also eligible for, and has previously been awarded, competitive subgrants from the annual Byrne JAG award to the State of Pennsylvania.

62. Philadelphia uses the federal funding provided by the Byrne JAG program to support a number of priorities within and improvements to its criminal justice system. In recent years, a significant portion of Philadelphia's Byrne JAG funding has gone towards Philadelphia Police Department technology and equipment enhancements, training, and over-time payments to police officers. Philadelphia has also drawn upon Byrne JAG funds to finance upgrades to courtroom technology in the City; to enable the District Attorney's Office to purchase new technology and invest in training programs for Assistant District Attorneys; to support juvenile delinquency programs for the City's youth; to bolster reentry programs for formerly incarcerated

individuals seeking to reenter the community; to operate alternative rehabilitation programs for low-level offenders with substance use disorders; to make physical improvements to blighted communities with Clean and Seal teams; and to improve indigent criminal defense services. It is clear, then, that the funds that the City receives from the Byrne JAG program play a vital role in many facets of the City's criminal justice programming.

B. Conditions for Byrne JAG Funding

63. The statute creating the Byrne JAG program authorizes the Attorney General to impose a limited set of conditions on applicants. First, the statute authorizes the Attorney General to require that applicants supply information about their intended use of the grant funding, and to demonstrate that they will spend the money on purposes envisioned by the statute. *See* 42 U.S.C. § 3752(a)(2) & (5) (the Attorney General can insist upon assurances by applicants that "the programs to be funded by the grant meet all the requirements of this part" and "that Federal funds . . . will not be used to supplant State or local funds"). Second, the statute allows the Attorney General to require that applicants provide information about their budget protocols; for instance, he can insist that a recipient of a Byrne JAG "maintain and report such data, records, and information (programmatic and financial) as [he] may reasonably require." *Id.* § 3752(a)(4). Third, the Attorney General can demand that localities "certif[y]," in conjunction with their applications for funding, that they "will comply with all provisions of this part and all other applicable Federal laws." *Id.* § 3752(a)(5)(D). Finally, the statute authorizes the Attorney General to "issue Rules to carry out this part." *Id.* § 3754.

64. That is all. The above delegations of authority do not include a general grant of authority to the Attorney General to impose new obligations the Attorney General himself creates and that are neither traceable to existing "applicable Federal law[]" nor reflected in

"provisions of this part" (*i.e.*, the JAG statute itself). *See id.* § 3752(a)(5)(D). Congress' decision *not* to delegate to the Attorney General such a broad scope of authority was intentional and clear.

65. Time and time again, Congress has demonstrated that it knows how to confer agency discretion to add substantive conditions to federal grants when it wants to. *See, e.g.*, 42 U.S.C. § 3796gg-1(e)(3) (authorizing the Attorney General to "impose reasonable conditions on grant awards" in a different program created by the Omnibus Control and Safe Streets Act); 42 U.S.C. § 14135(c)(1) (providing that the Attorney General shall "distribute grant amounts, and establish grant conditions . . ."); *see also Andrus v. Glover Const. Co.*, 446 U.S. 608, 616-617 (1980) ("Where Congress explicitly enumerates certain exceptions," its "omission" of a different exception means "only one inference can be drawn: Congress meant to" exclude that provision).

66. Furthermore, the Attorney General has never imposed conditions on Byrne JAG applicants beyond the bounds of his statutory authority, *i.e.*, conditions that neither reflect "applicable Federal laws" nor that relate to the disbursement of the grants themselves. For instance, the FY 2016 JAG funds awarded to Philadelphia on August 23, 2016 included many "special conditions." Philadelphia had to certify, among other things, that it:

a. complies with the Department of Justice's "Part 200" Uniform Administrative Requirements, Cost Principles, and Audit Requirements;

b. adheres to the "DOJ Grants Financial Guide";

c. will "collect and maintain data that measure the performance and effectiveness of activities under this award";

d. recognizes that federal funds "may not be used by the recipient, or any subrecipient" on "lobbying" activities;

e. "agrees to assist BJA in complying with the National Environmental Policy Act (NEPA) . . . in the use of these grant funds";

f. will ensure any recipients, subrecipients, or employees of recipients do not engage in any "conduct related to trafficking in persons";

g. will ensure that any recipient or subrecipient will "comply with all applicable requirements of 28 C.F.R. Part 42" (pertaining to civil rights and non-discrimination).[22]

67. These conditions almost all relate to the administration and expenditure of the grant itself. The few conditions that apply to the general conduct of the recipient or subrecipient are expressly made applicable to federal grantees by statute. The Department of Justice's new conditions do not apply to the expenditure of the grant funding, and neither the jail access nor advance notification conditions discussed below invoke any existing federal law or statute. Meanwhile, the Section 1373 condition refers to a federal law that is wholly inapplicable to the JAG grant. The Department offered no statistics, studies, or legal authority to support its imposition of these 2017 conditions as promoting public safety and the law enforcement purposes of the JAG program.

68. Had Congress authorized the Attorney General to create new substantive conditions for Byrne JAG funds at his choosing, that would have upended Congress' formula approach for distributing funds under the program based on population and violent crime. That in turn would have resulted in the allocating of grants according to criteria invented by the Department of Justice. That is not the program Congress created. *See Amalgamated Transit Union v. Skinner*, 894 F.2d 1362, 1364 (D.C. Cir. 1990) ("Where Congress prescribes the form

[22] All of these conditions appear in Philadelphia's FY 2016 JAG award, attached as Exhibit 9.

in which an agency may exercise its authority, . . . we cannot elevate the goals of an agency's action, however reasonable, over that prescribed form.").

C. Section 1373 Condition

69. On February 26, 2016, Congressman John Culberson, Chairman of the House Appropriations Subcommittee on Commerce, Justice, Science and Related Agencies, sent a letter to then-Attorney General Loretta Lynch, inquiring whether recipients of Department of Justice grants were complying with Section 1373.[23]

70. The Culberson letter spurred the Office of Justice Programs ("OJP") at the Department of Justice to ask that the Department's Office of Inspector General ("OIG") investigate local jurisdictions' compliance with Section 1373. In an email sent from OJP to Inspector General Michael Horowitz on April 8, 2016, OJP indicated that it had "received information" indicating that several jurisdictions who receive OJP funding may be in violation of Section 1373 and attached a spreadsheet of over 140 state and local jurisdictions that it wanted OIG to investigate.[24]

71. On May 31, 2016, Inspector General Horowitz transmitted a report to Department of Justice Assistant Attorney General Karol Mason, reviewing the policies of ten state and local jurisdictions, including Philadelphia, and whether they comply with Section

[23] *See* Letter from Cong. Culberson to Attorney General Lynch (Feb. 26, 2016), *available at* https://goo.gl/Cytb3B. Congressman Culberson's letter was accompanied by analysis from the Center for Immigration Studies, a non-profit institute that describes itself as "animated by a 'low-immigration, pro-immigrant' vision of America that admits fewer immigrants but affords a warmer welcome for those who are admitted." *About the Center for Immigration Studies*, Center for Immigration Studies (last visited August 29, 2017 2:42 PM EDT), https://goo.gl/GrsfoQ.

[24] *See* Memorandum from Department of Justice Inspector General Michael Horowitz to Assistant Attorney General Karol Mason (May 31, 2016) (describing OJP's earlier email to OIG). A copy of this memorandum is attached as Exhibit 10.

1373.[25] The other jurisdictions analyzed were: Connecticut, California, City of Chicago (Illinois), Clark County (Nevada), Cook County (Illinois), Miami-Dade (Florida), Milwaukee County (Wisconsin), Orleans Parish (Louisiana), and New York City. The report expressed "concerns" with several of the localities' laws and policies. The report did not analyze the effects of any of the ten local jurisdictions' policies on crime rates or public safety.

72. On July 7, 2016, Assistant Attorney General Mason, who then oversaw the Office of Justice Programs, sent a Memorandum to Inspector General Horowitz conveying that, in response to OIG's report, "the Office of Justice Programs has determined that Section 1373 is an applicable federal law for the purposes of the Edward Byrne Memorial Justice Assistant Grant (JAG) program and the State Criminal Alien Assistance Program (SCAAP)."[26] There was no analysis supporting this conclusion whatsoever, nor any explanation for why OJP had not reached that conclusion during the prior ten years that it administered the JAG program.

73. Also on July 7, 2016, the Office of Justice Programs released a Question and Answer "Guidance" document, entitled "Office of Justice Programs Guidance Regarding Compliance with 8 U.S.C. § 1373."[27] The Q&A Guidance document stated that under the Department's new policy, "[a] JAG grantee is required to assure and certify compliance with all applicable federal statutes, including Section 1373." The document explained that Section 1373 "prevents federal, state, and local government entities and officials from 'prohibit[ing] or in any way restrict[ing]' government officials or entities from sending to, or receiving from, federal immigration officers information concerning an individual's citizenship or immigration status." But it further stated that "Section 1373 does not impose on states and localities the affirmative

[25] *Id.*
[26] Memorandum from Assistant Attorney General Karol Mason to Inspector General Michael Horowitz (July 7, 2016). A copy of this memorandum is attached as Exhibit 11.
[27] A copy of this guidance document is attached as Exhibit 12.

obligation to collect information from private individuals regarding their immigration status, nor does it require that statutes and localities take specific actions upon obtaining such information."

74. On October 6, 2016, OJP released a document entitled "Additional Guidance Regarding Compliance with 8 U.S.C. § 1373."[28] That document addressed the question, "Does OJP's guidance on 8 U.S.C. § 1373 impact FY 2016 funding?" And it answered: "No FY 2016 or prior year Byrne/JAG or SCAAP funding will be impacted. However, OJP expects that JAG and SCAAP recipients will use this time to examine their policies and procedures to ensure they will be able to submit the required assurances when applying for JAG and SCAAP funding in FY 2017."

75. As DOJ has conceded, Section 1373 imposes no affirmative obligation on state or local entities to collect immigration status information or take any specific actions upon receiving immigration status information. Nor does the statutory provision address ICE detainer requests or release-date notification requests.

76. Within a week of taking office, on January 25, 2017, President Trump issued Executive Order 13768, a sweeping order aimed at punishing "sanctuary" jurisdictions. Entitled "Enhancing Public Safety in the Interior of the United States," the order announced that it is the policy of the Executive Branch to withhold "Federal funds" from "jurisdictions that fail to comply with applicable Federal law" by acting as "sanctuary jurisdictions." Exec. Order 13768 §§ 1, 2(c). The Order directed the Attorney General and the Secretary of Homeland Security to "ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. § 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants," and authorized the Secretary of DHS to "designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary

[28] A copy of this guidance document is attached as Exhibit 13.

jurisdiction." *Id.* § 8(a). The Order was ultimately enjoined in large part by the United States District Court for the Northern District of California because the court found that it violated multiple constitutional provisions. *County of Santa Clara v. Trump*, --- F. Supp. 3d ----, 2017 WL 1459081 (N.D. Cal. Apr. 25, 2017).

77. As the *Santa Clara* case unfolded, the Trump Administration sharpened its focus both within the context of that lawsuit and more broadly on denying local jurisdictions grants disbursed by the Departments of Justice and Homeland Security *in particular*, as the mechanism for carrying out the Administration's efforts to crack down on so-called sanctuary cities. At the preliminary injunction hearing in March in the *Santa Clara* case, the lawyer for the government represented that the Executive Order only applied to three federal grants administered by the Departments of Justice and Homeland Security. *Id.* at *1.

78. On April 21, 2017, the Department of Justice sent letters to Philadelphia and eight other jurisdictions "alert[ing]" the recipients that "under the terms of your FY 2016 Byrne JAG grant, award 2016 DJ-BX-0949 from the Office of Justice Programs ('OJP'), your jurisdiction is required to submit documentation to OJP that validates your jurisdiction is in compliance with 8 U.S.C. § 1373."[29] The letter went on that "this documentation must be accompanied by an official legal opinion from counsel . . . [and] must be submitted to OJP no later than June 30, 2017." It provided that "[f]ailure to comply with this condition could result in the withholding of grant funds, suspension, or termination of the grant, ineligibility for future OJP grants or subgrants, or other action, as appropriate."

[29] Letter from Alan R. Hanson to Mayor Jim Kenney, *supra* note 4. Connecticut does not appear to have received such a letter, but the other nine jurisdictions in the OIG report did. *See* https://goo.gl/r16Gmb (collecting letters from Alan R. Hanson dated April 21, 2017).

79. On June 22, 2017, Philadelphia City Solicitor Sozi Pedro Tulante signed a formal "certification" memorandum declaring that the City determined it is in compliance with Section 1373 and explaining why.[30] The letter was addressed to Tracey Trautman, Acting Director of the Bureau of Justice Assistance at the Department of Justice and submitted to DOJ that day.

80. Philadelphia certified that, as a general matter, it does not collect immigration status information from its residents. Both Memorandum 01-06 and the Confidentiality Order bar City officials and employees from asking residents or other persons within the City for such information, subject to discrete exceptions. Philadelphia certified that it neither restricts nor prohibits its officials and employees from sharing immigration-status information with the federal government in contravention of Section 1373, because as a result of the City's aforementioned policies, the City is rarely in possession of that type of information.

81. Philadelphia also certified that it complies with Section 1373 because its policies allow for the sharing of immigration-status and other identifying information with federal authorities in the case of criminals or persons suspected of crime. Both the Confidentiality Order and Memorandum 06-01 mandate the continued cooperation between local officers and federal authorities in combating crime. Further, those policies allow for the disclosure and "transmi[ssion] . . . to federal authorities" of confidential information (i.e., immigration status information) by Philadelphia police officers when the individual is suspected of engaging in criminal activity.[31] The Confidentiality Order and Memorandum 01-06 also contain "savings clauses," which permit inquiry into or disclosure of immigration status information if "required by law."

[30] A copy of the City's certification memorandum is attached hereto as Exhibit 14.
[31] *See* Exhibit 14, at 7 (citing Sections 2B and 2C of the Confidentiality Order and Parts 3B and 3C of Memorandum 06-01).

82. Philadelphia also explained how its everyday law enforcement practices comply with Section 1373. Specifically, Philadelphia's use of the FBI's National Crime Information Center ("NCIC") database, its sharing access with ICE to certain information in the City's Preliminary Arraignment System ("PARS") database, and its use of the Automated Fingerprint Identification System ("AFIS"), all enable federal immigration authorities to access identifying information about any persons stopped, detained, arrested, or convicted of a crime in the City.

83. Philadelphia acknowledged that for witnesses of crimes, victims of crimes, and law-abiding persons seeking City services, its policies do mean that immigration status information, to the extent it inadvertently comes into the City's possession, is ordinarily not disclosed to the federal government. But Philadelphia contended that Section 1373 cannot be construed to require the City to disclose confidential information about those persons because reading the statute in such a manner would raise constitutional problems. Specifically, construing Section 1373 to impose that type of mandate on the City would undermine its core police powers under the U.S. Constitution and its critical interests in protecting the safety and welfare of its residents.

84. Philadelphia reserved the right to challenge the Section 1373 certification requirement on several grounds in its June 22, 2017 submission. Notably, it reserved the argument that the DOJ's insistence that localities certify compliance with Section 1373 as a condition of receiving Byrne JAG grants is itself unlawful and beyond the authority that Congress delegated to the Attorney General. It also argued that making JAG grants contingent on compliance with Section 1373 violates the Spending Clause.

85. Days after receiving certifications from Philadelphia and other jurisdictions, the Department of Justice expressed non-specific concerns with those submissions. It issued a press

release saying that "some of these jurisdictions have boldly asserted that they will not comply with requests from federal immigration authorities," and that "[i]t is not enough to assert compliance, the jurisdictions must actually be in compliance."[32] Although the press release noted that the DOJ was "in the process of reviewing" the certifications and planned to "examine these claims carefully," it has since provided no further guidance on the matter, has not indicated which certifications it finds problematic, and has not responded to Philadelphia's certification specifically.[33]

D. July 2017 Announcement Regarding Advance Notification and Jail Access Conditions

86. On July 25, 2017, the Department of Justice announced two *more* significant changes that it would be unilaterally making without authority to the Byrne JAG application process. In a two-paragraph press release and accompanying press "backgrounder," the Department announced that in addition to requiring applicants for the FY 2017 Byrne JAG award to again certify their compliance with Section 1373, applicants would be required to adhere to two additional conditions.[34] These conditions are (1) the "advance notification" condition and (2) the "jail access" condition.

87. Under the advance notification condition, the Department of Justice will now require Byrne JAG grantees to "provide at least 48 hours' advance notice to DHS regarding the scheduled release date and time of an alien in the jurisdiction's custody when DHS requests such notice in order to take custody of the alien pursuant to the Immigration and Nationality Act."[35]

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[32] *See* Exhibit 2.
[33] *Id.*
[34] Press Release, U.S. Dep't of Justice, *Attorney General Sessions Announces Immigration Compliance Requirements for Edward Byrne Memorial Justice Assistance Grant Programs* (July 25, 2017), *available at* https://goo.gl/KBwVNP.
[35] *See* Exhibit 1.

88. The Department did not define the term "scheduled release date" as a part of the advance notification condition. The Federal Bureau of Prisons defines "date of release" as the "date of the expiration of the prisoner's term of imprisonment, less any time credited toward the service of the prisoner's sentence . . . ." 18 U.S.C. § 3624. Similarly, within the Philadelphia Department of Prisons, only inmates serving sentences would have "scheduled release dates." Accordingly, the advance notification condition appears to apply only to those inmates in Philadelphia's prisons who have been convicted of crimes and are serving sentences not to the roughly 83% of inmates in PPS facilities who are in a pre-trial, pre-sentence, or other temporary detention posture, many of whom may be ordered released with less than 48 hours' notice (i.e., because they post bond or the charges against them are dropped). But this is far from clear.

89. Under the jail access condition, the Department of Justice will now require Byrne JAG grantees to "permit personnel of the U.S. Department of Homeland Security (DHS) to access any correctional or detention facility in order to meet with an alien (or an individual believed to be an alien) and inquire as to his or her right to be or remain in the United States."[36] Like the advance notification condition, the jail access condition is vague and ambiguous; it gives no indication of what "access" means, and whether jurisdictions will be deemed compliant as long as they permit ICE personnel to access their facilities in order to meet with inmates who have in turn consented to such meetings. By its broadest construction, this requirement appears to mandate that federal immigration agents be given unprecedented and unfettered access to local correctional or detention facilities, including to meet with and to question inmates on a non-consensual basis and/or without notice of their right to have counsel present.

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[36] *See id.*; *see also* U.S. Dep't of Justice, Office of Justice Programs, *Overview of Legal Requirements Generally Applicable to OJP Grants and Cooperative Agreements - FY 2017 Awards* (last visited Aug. 29, 2017, 2:42 PM EDT), https://goo.gl/PcnsXV. A printed copy of this webpage is attached as Exhibit 15.

90. The application deadline for local FY 2017 Byrne JAG funding the grant for which cities, such as Philadelphia, apply is September 5, 2017.[37]

91. The Department of Justice's July 25, 2017 announcement was accompanied by virtually no explanation for the change in policy and no opportunity for public notice and comment. The Department did not explain how it arrived at these conditions or what alternatives it considered. The press release is also noticeably silent as to the purpose of the Byrne JAG program and the ways in which the newly-imposed conditions or even complying with Section 1373 relate to, let alone serve to advance, the interests of the Byrne JAG program. The Department also failed to provide law enforcement with any guidance as to how the conditions will operate in practice.

92. As a result of the Department of Justice's actions, for Philadelphia to apply for the FY 2017 Byrne JAG grant on September 5, 2017 and receive the award, the City will have to (1) certify again its compliance with Section 1373, (2) be prepared to adhere to the advance notification condition, and (3) be prepared to comply with the jail access condition, despite the ambiguity about what each condition will entail.

93. Although Philadelphia is confident that it complies with Section 1373 and has certified as much, the Department of Justice has not responded to Philadelphia's June 22, 2017 certification nor provided the City any guidance on the matter. All the while, the Administration has made confusing and threatening public statements that leave the City uncertain as to whether its certification in the FY 2017 application will be accepted. Likewise, Philadelphia believes that its jail access policy may comply with the new jail access condition, because Philadelphia

[37] U.S. Dep't of Justice, Office of Justice Programs, *Edward Byrne Memorial Justice Assistance Grant Program: FY 2017 Local Solicitation* (Aug. 3, 2017), https://goo.gl/SfiKMM. A copy of the FY 2017 JAG Local Solicitation is attached as Exhibit 16.

allows ICE agents to enter PPS facilities to meet with individuals who have consented to such meetings; and Philadelphia believes its detainer and notification policies do not meaningfully interfere with the Department of Justice's prerogatives, because while Philadelphia does not provide advance notification of release without a judicial warrant, it rarely if ever gets notification requests from ICE for inmates who have scheduled release dates. However, Philadelphia is left only to wonder whether the Department of Justice will accept these contentions because the jail access and advance notification conditions are inscrutably vague.

III. IMPACT OF THE NEW JAG CONDITIONS ON PHILADELPHIA

94. None of the three new conditions imposed by the Department of Justice upon applicants for FY 2017 Byrne JAG funding can withstand legal scrutiny.

95. The authorizing statute creating the Byrne JAG grant program does not delegate authority to the Attorney General to impose these conditions. Rather, the authorizing statute allows the Attorney General to insist that applicants "comply with all … applicable Federal laws." 42 U.S.C. § 3752(a)(5)(D). None of the three conditions constitutes "applicable" federal requirements. Each deals with civil immigration enforcement something wholly *inapplicable* to criminal justice grants. And the last two conditions are not reflected in any existing federal law whatsoever: There is no federal law requiring local jurisdictions to provide ICE "at least 48 hours' advance notice" before they release alleged aliens in their custody, and there is no federal law requiring jurisdictions to grant access to DHS officials to their detention facilities.

96. In fact, Congress has considered and failed to enact legislation that would have stripped federal funding from states and localities that do not provide ICE advance notification of the release of persons for whom detainer requests have been sent. *See, e.g.*, Stop Dangerous Sanctuary Cities Act §3(a)(2), S. 1300, 114th Cong. (rejected by Senate July 6, 2016)

(entities that do not "comply with a detainer for, or notify about the release of, an individual" in response to requests made by ICE shall be ineligible for public works and economic development grants and community development block grants). The fact that Congress failed to pass bills of this type demonstrates that Congress considered and then chose not to link federal spending to advance notification.

97. The Department of Justice's new conditions also represent a sharp break with past agency practice. The agency has never before attached any conditions of this nature to Byrne JAG funds.

98. The Department of Justice's imposition of the conditions violates several bedrock constitutional principles. The Department's actions violate the Separation of Powers between Congress and the Executive. They also exceed limits on the federal government's ability to place conditions on federal funds under the Spending Clause. In particular, although conditions on federal funds must be germane to the purpose of the federal program, the Department's new conditions bear no relation to the purpose of the Byrne JAG program. Moreover, the conditions are woefully ambiguous, leaving cities like Philadelphia guessing as to how to comply. At its worst, this ambiguity threatens to induce unconstitutional action, as the conditions could potentially be construed to require localities to detain individuals of interest to ICE even after they have been ordered released.

99. If the City is forced to comply with the Department's new conditions in order to receive its FY 2017 JAG award, and if those conditions are not construed in accordance with constitutional and reasonable limits, the result would be that Philadelphia would be forced to significantly change several of its policies. In turn, such changes would compromise the City's criminal enforcement, public safety, and health and welfare.

100. Philadelphia believes that it does already comply with Section 1373 when read in light of the U.S. Constitution. But if Section 1373 is interpreted to extend to victims, witnesses, and law-abiding persons in the City and to require that Philadelphia allow for the unfettered disclosure to federal authorities of those persons' immigration status information that would require Philadelphia to overhaul several of its policies, including Memorandum 01-06 and the Confidentiality Order. The trust that Philadelphia has worked so hard to build with its immigrant population would be broken, and the City's efforts to prosecute crimes to completion, provide redress to victims, and ensure full access to City services, would be hindered.

101. Philadelphia also believes that it may already comply with the jail access condition. The Department of Justice did not define the term "access" or explicitly state that jurisdictions must permit entry to ICE even when an inmate refuses to speak with ICE; Philadelphia, meanwhile, allows for meetings to which inmates consent. However, the condition as written is exceedingly vague, and in its most unreasonable light could be read to insist that jurisdictions provide federal agents unrestrained entry to their detention facilities. Requiring Philadelphia to apply for the FY 2017 grant amidst this uncertainty is harmful in itself, and if the Department takes an extreme reading, it could result in forcing Philadelphia to sacrifice an important local prerogative. Philadelphia should not be compelled to abandon its efforts to protect the constitutional rights of its inmates, nor to take actions that will sow the very fear and mistrust among the immigrant population that the City has worked so hard to overcome.

102. Philadelphia further believes that its notification and detainer policies do not meaningfully conflict with the Department of Justice's policy concerns that underlie the advance notification condition. Although Philadelphia only provides advance notification of an inmate's release when ICE presents a judicial warrant, ICE rarely sends advance notification requests for

inmates who have scheduled release dates. Given the ambiguity and lack of explanation for the condition, however, Philadelphia cannot be sure that the Department will accept the City's position. Requiring Philadelphia to apply for the FY 2017 grant amidst this uncertainty is harmful in itself, and if the Department seeks to apply the condition in its most extreme and unreasonable light, it could result in forcing Philadelphia to sacrifice an important local prerogative.

103. If the City's application for the FY 2017 Byrne JAG award is rejected or withheld, or if its award is clawed back, either because the Department of Justice rejects the City's Section 1373 certification, or because the Department insists on certain activities pursuant to the advance notification and jail access conditions and the City refuses to comply, the vitality of Philadelphia's criminal justice programs would be placed in jeopardy.

104. As a result of the injuries Philadelphia will suffer in all of the above circumstances, Philadelphia faces a significant danger of harm due to the Department of Justice's imposition of the new conditions for the FY 2017 grant.

CAUSES OF ACTION

COUNT I
(Violation of the Administrative Procedure Act through *Ultra Vires* Conduct Not Authorized by Congress in the Underlying Statute)

105. Plaintiff incorporates by reference the allegations in the preceding paragraphs.

106. The Department of Justice may only exercise authority conferred by statute. *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1869 (2013).

107. The Byrne JAG statute provides no authority to the Attorney General to impose conditions on the receipt of Byrne JAG funds that are neither reflected in "applicable Federal laws" nor concern the administration of the JAG program itself.

108. The three conditions added to the FY 2017 grant by the Department of Justice are neither "applicable Federal laws" nor conditions that deal with the administration and spending of the Byrne JAG funds.

109. The Attorney General's imposition of the new conditions is unauthorized by statute.

110. The Attorney General's imposition of the new conditions also contradicts the formula-grant structure of the Byrne JAG program. *See* 42 U.S.C. § 3755(d)(2)(A).

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

112. Pursuant to 5 U.S.C. § 706 and 28 U.S.C. § 2201, Plaintiff is entitled to a declaration that the Attorney General is without the statutory authority to impose the Section 1373, advance notification, and jail access conditions on FY 2017 Byrne JAG funds, and in doing so, has acted contrary to law under the APA. Plaintiff is also entitled to a permanent injunction preventing the Attorney General from putting those conditions into effect.

COUNT II
(Violation of the Administrative Procedure Act through Violation of the Constitution's Separation-of-Powers)

113. Plaintiff incorporates by reference the allegations of the preceding paragraphs.

114. The Constitution vests Congress, not the President or officials in the Executive Branch, with the power to appropriate funding to "provide for the . . . general Welfare of the United States." U.S. Const. art I, § 8, cl. 1.

115. The President's constitutional duty and that of his appointees in the Executive Branch is to "take Care that the Law be faithfully executed." U.S. Const. art. II, § 3, cl. 5.

116. The President "does not have unilateral authority to refuse to spend . . . funds" that have already been appropriate by Congress "for a particular project or program." *In re Aiken Cnty.*, 725 F.3d 255, 261 n.1 (D.C. Cir. 2013); *see also Train v. City of New York*, 420 U.S. 35, 44 (1975).

117. The President also cannot amend or cancel appropriations that Congress has duly enacted because doing such violates the Presentment Clause of the Constitution and results in the President purporting to wield a constitutional power not vested within his office. *See Clinton v. City of New York*, 524 U.S. 417, 438 (1998).

118. Imposing a new condition on a federal grant program amounts to refusing to spend money appropriated by Congress unless that condition is satisfied.

119. The Section 1373 condition was not imposed by Congress, but rather by the Department of Justice in issuing its Office of Justice Program Guidance for FY 2016 Byrne JAG awards and its FY 2017 Byrne JAG application. Therefore, the Section 1373 condition amounts to an improper usurpation of Congress's spending power by the Executive Branch.

120. The advance notification and jail access conditions were not imposed by Congress, but rather by the Department in issuing the FY 2017 Byrne JAG application. Therefore, the imposition of the advance notification and jail access conditions amounts to an improper usurpation of Congress's spending power by the Executive Branch.

121. Pursuant to 28 U.S.C. § 2201, Plaintiff is entitled to a declaration that the Attorney General's imposition of the Section 1373, advance notification, and jail access conditions violates the constitutional principle of separation of powers and impermissibly

arrogates to the Executive Branch power that which is reserved for the Legislative Branch. Plaintiff is also entitled to a permanent injunction preventing the Attorney General from putting those conditions into effect.

COUNT III
(Violation of the Administrative Procedure Act through Arbitrary and Capricious Agency Action)

122. Plaintiff incorporates by reference the allegations of the preceding paragraphs.

123. The Department of Justice's decision to impose the Section 1373, advance notification, and jail access conditions on the receipt of FY 2017 Byrne JAG funds deviates from past agency practice without reasoned explanation or justification.

124. Pursuant to 28 U.S.C. § 2201, Plaintiff is entitled to a declaration that the Attorney General's imposition of the Section 1373, advance notification, and jail access conditions is arbitrary and capricious. Plaintiff is also entitled to a permanent injunction preventing the Attorney General from putting those conditions into effect.

COUNT IV
(Spending Clause)

125. Plaintiff incorporates by reference the allegations of the preceding paragraphs.

126. Congress could not have authorized the immigration-related conditions attached the Byrne JAG award here because they do not satisfy the requirements of the Spending Clause of the Constitution.

127. None of the three conditions is "reasonably related" or "germane[]" to the federal interest that underlies the Byrne JAG grant program. *See South Dakota v. Dole*, 483 U.S. 203, 207-08 & n.3 (1987) (conditions must be "reasonably related," or "germane[]," to the particular program); *see also New York v. United States*, 505 U.S. 144, 167 (1992) (the attached "conditions must . . . bear some relationship to the purpose of the federal spending"). The three

conditions all deal with federal civil immigration enforcement, not localities' enforcement of state or local criminal law.

128. The three conditions threaten the federal interest that underlies the Byrne JAG program. They undermine Congress's goals of dispersing funds across the country, targeting funds to combat violent crime, and respecting local judgment in setting law enforcement strategy.

129. The Department's imposition of the conditions also violates the requirement that Spending Clause legislation "impose unambiguous conditions on states, so they can exercise choices knowingly and with awareness of the consequences." *Koslow v. Commonwealth of Pennsylvania*, 302 F.3d 161, 175 (3d Cir. 2002).

130. Moreover, because the conditions are ambiguous, they arguably require cities to infringe on individuals' Fourth and Fifth Amendment rights, violating the prohibition on Spending Clause conditions that "induce unconstitutional action." *Koslow*, 302 F.3d at 175.

131. Pursuant to 28 U.S.C. § 2201, Plaintiff is entitled to a declaration that the imposition of the three immigration-related conditions for the FY 2017 Byrne JAG violates the Constitution's Spending Clause as well as an injunction preventing those conditions from going into effect.

COUNT V
(Tenth Amendment: Commandeering)

132. Plaintiff incorporates by reference the allegations of the preceding paragraphs.

133. The Tenth Amendment prohibits the federal government from "requir[ing]" states and localities "to govern according to Congress's instructions," *New York*, 505 U.S. at 162, and from "command[ing] the States' officers . . . to administer or enforce a federal regulatory program," *Printz v. United States*, 521 U.S. 898, 935 (1997).

134. Where the "whole object" of a provision of a federal statute is to "direct the functioning" of state and local governments, that provision is unconstitutional, *Printz*, 521 U.S. at 932, and must be enjoined, *id*. at 935; *New York*, 505 U.S. at 186-187. That description precisely fits each of the three immigration-related conditions.

135. If Section 1373 is interpreted to extend to information sharing about witnesses, victims, and law-abiding persons in the City, and to require that Philadelphia provide federal authorities unfettered access to immigration status information about such persons, that would hamper Philadelphia's ability to ensure law and order. As a result, Philadelphia's personnel would be "commandeered" to perform federal functions rather than to pursue local priorities, in violation of the Tenth Amendment.

136. The advance notification and jail access conditions, in their most extreme and unreasonable lights, could be construed to require that Philadelphia change its policies concerning the administration of its detention facilities and the providing of advance notification of release to ICE only pursuant to a judicial warrant. That federalization of bedrock local police power functions would violate the Tenth Amendment's anti-commandeering principle.

137. Pursuant to 28 U.S.C. § 2201, Plaintiff is entitled to a declaration that if Section 1373 or the other two grant conditions are construed by the Department to conflict with Philadelphia's local policies, that would result in a violation of the Tenth Amendment. Plaintiff is entitled to a permanent injunction preventing the Department from taking such an interpretation.

COUNT VI
(Declaratory Judgment Act: Philadelphia Complies with 8 U.S.C. § 1373)

138. Plaintiff incorporates by reference the allegations of the preceding paragraphs.

139. Philadelphia certified its compliance with Section 1373 to the Department of Justice in a June 22, 2017 legal opinion signed by the City's Solicitor and describing the basis for the City's certification.

140. Philadelphia complies with Section 1373 to the extent it can be constitutionally enforced vis-a-vis the City.

141. Philadelphia's policies, namely Memorandum 01-06 and the Confidentiality Order, direct City officials and employees not to collect immigration status information unless such collection is required by state or federal law. Because Philadelphia cannot restrict the sharing of information it does not collect, the City's policy of non-collection renders it necessarily compliant with Section 1373 for all cases covered by the non-collection policy.

142. Where City officials or agents do incidentally come to possess immigration status information, the City has no policy prohibiting or restricting the sharing of such information contrary to Section 1373. Both Memorandum 06-01 and the Confidentiality Order contains "saving clauses" that limits the disclosure of an individual's citizenship or immigration status information "unless such disclosure is required by law." Both policies also direct City police officers to cooperate with federal authorities in the enforcement of the criminal law, and to provide identifying information to federal authorities, when requested, about criminals or criminal suspects within the City.

143. Any non-disclosure about immigration status information that the City's policies directs in the case of witnesses of crimes, victims of crimes, and law-abiding individuals seeking City services, is consistent with Section 1373 when read in light of the Constitution.

144. Pursuant to 28 U.S.C. § 2201, Plaintiff is entitled to a declaration that it complies with Section 1373 as properly construed.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays this Court:

a. Declare that all three immigration-related conditions for the FY 2017 Byrne JAG are unlawful;

b. Declare that Philadelphia complies with 8 U.S.C. § 1373 as properly construed;

c. Permanently enjoin the Department of Justice from enforcing the advance notification, jail access, or Section 1373 conditions for the FY 2017 Byrne JAG and retain jurisdiction to monitor the Department's compliance with this Court's judgment;

d. Grant such other relief as this Court may deem proper; and

e. Award Philadelphia reasonable costs and attorneys' fees.

DATED: August 30, 2017

Respectfully submitted,

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

STATE OF HAWAII, ISMAIL ELSHIKH, JOHN DOES 1 & 2, and MUSLIM ASSOCIATION OF HAWAII, INC., Plaintiffs, vs. DONALD J. TRUMP, *et al.*, Defendants.	Civil No. 17-00050 DKW-KSC **ORDER GRANTING MOTION FOR TEMPORARY RESTRAINING ORDER**

INTRODUCTION

Professional athletes mirror the federal government in this respect: they operate within a set of rules, and when one among them forsakes those rules in favor of his own, problems ensue. And so it goes with EO-3.

On June 12, 2017, the Ninth Circuit affirmed this Court's injunction of Sections 2 and 6 of Executive Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017), entitled "Protecting the Nation from Foreign Terrorist Entry into the United States" ("EO-2"). *Hawaii v. Trump,* 859 F.3d 741 (9th Cir. 2017). The Ninth Circuit did so because "the President, in issuing the Executive Order, exceeded the scope of the

authority delegated to him by Congress" in 8 U.S.C. § 1182(f). *Hawaii,* 859 F.3d at 755. It further did so because EO-2 "runs afoul of other provisions of the [Immigration and Nationality Act ('INA'), specifically 8 U.S.C. § 1152,] that prohibit nationality-based discrimination." *Hawaii,* 859 F.3d at 756.

Enter EO-3.[1] Ignoring the guidance afforded by the Ninth Circuit that at least this Court is obligated to follow, EO-3 suffers from precisely the same maladies as its predecessor: it lacks sufficient findings that the entry of more than 150 million nationals from six specified countries[2] would be "detrimental to the interests of the United States," a precondition that the Ninth Circuit determined must be satisfied before the Executive may properly invoke Section 1182(f). *Hawaii,* 859 F.3d at 774. And EO-3 plainly discriminates based on nationality in the manner that the Ninth Circuit has found antithetical to both Section 1152(a) and the founding principles of this Nation. *Hawaii*, 859 F.3d at 776 79.

Accordingly, based on the record before it, the Court concludes that Plaintiffs have met their burden of establishing a strong likelihood of success on the merits of their statutory claims, that irreparable injury is likely if the requested relief is not issued, and that the balance of the equities and public interest counsel in favor of

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[1]Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017) [hereinafter EO-3].
[2]EO-3 § 2 actually bars the nationals of *more than* six countries, and does so indefinitely, but only the nationals from six of these countries are at issue here.

granting the requested relief. Plaintiffs' Motion for a Temporary Restraining Order (ECF No. 368) is GRANTED.

BACKGROUND

I. The President's Executive Orders

On September 24, 2017, the President signed Proclamation No. 9645, entitled "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats." Like its two previously enjoined predecessors, EO-3 restricts the entry of foreign nationals from specified countries, but this time, it does so indefinitely. Plaintiffs State of Hawai'i ("State"), Ismail Elshikh, Ph.D., John Doe 1, John Doe 2, and the Muslim Association of Hawaii, Inc., seek a nationwide temporary restraining order ("TRO") that would prohibit Defendants[3] from enforcing and implementing Sections 2(a), (b), (c), (e), (g), and (h) before EO-3 takes effect. Pls.' Mot. for TRO 1, ECF No. 368.[4] The Court briefly recounts the history of the Executive Orders and related litigation.

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[3]Defendants in the instant action are: Donald J. Trump, in his official capacity as President of the United States; the United States Department of Homeland Security ("DHS"); Elaine Duke, in her official capacity as Acting Secretary of DHS; the United States Department of State; Rex Tillerson, in his official capacity as Secretary of State; and the United States of America.

[4]On October 14, 2017, the Court granted Plaintiffs' unopposed Motion for Leave to File Third Amended Complaint (ECF. No. 367), and, on October 15, 2017, Plaintiffs filed their Third Amended Complaint ("TAC"; ECF No. 381).

A. The Executive Orders and Related Litigation

On January 27, 2017, the President signed an Executive Order entitled "Protecting the Nation From Foreign Terrorist Entry into the United States." Exec. Order 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) [hereinafter EO-1]. EO-1's stated purpose was to "protect the American people from terrorist attacks by foreign nationals admitted to the United States." *Id.* EO-1 took immediate effect and was challenged in several venues shortly after it issued. On February 3, 2017, a federal district court granted a nationwide TRO enjoining EO-1. *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017). On February 9, 2017, the Ninth Circuit denied the Government's emergency motion for a stay of that injunction. *Washington v. Trump*, 847 F.3d 1151, 1161 64 (9th Cir. 2017) (per curiam), *reconsideration en banc denied*, 853 F.3d 933 (9th Cir. 2017). As described by a subsequent Ninth Circuit panel, "[r]ather than continue with the litigation, the Government filed an unopposed motion to voluntarily dismiss the underlying appeal [of EO-1] after the President signed EO2. On March 8, 2017, this court granted that motion, which substantially ended the story of EO1." *Hawaii*, 859 F.3d at 757.

On March 6, 2017, the President issued EO-2, which was designed to take effect on March 16, 2017. 82 Fed. Reg. 13209 (Mar. 6, 2017). Among other

things, EO-2 directed the Secretary of Homeland Security to conduct a global review to determine whether foreign governments provide adequate information about their nationals seeking entry into the United States. *See* EO-2 § 2(a). EO-2 directed the Secretary to report those findings to the President, after which nations identified as "deficient" would have an opportunity to alter their practices, prior to the Secretary recommending entry restrictions. *Id.* §§ 2(d) (f).

During this global review, EO-2 contemplated a temporary, 90-day suspension on the entry of certain foreign nationals from six countries Iran, Libya, Somalia, Sudan, Syria, and Yemen. *Id.* § 2(c). That 90-day suspension was challenged in multiple courts and was preliminarily enjoined by this Court and by a federal district court in Maryland. *See Hawaii v. Trump*, 245 F. Supp. 3d 1227 (D. Haw. 2017)[5]; *Int'l Refugee Assistance Project* ("*IRAP*") *v. Trump*, 241 F. Supp. 3d 539 (D. Md. 2017). Those injunctions were affirmed in relevant part by the respective courts of appeals. *See Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017) (per curiam); *IRAP v. Trump*, 857 F.3d 554 (4th Cir. 2017) (en banc), *as amended* (May 31, 2017). The Supreme Court granted certiorari in both cases and left the injunctions in place pending its review, except as to persons who lacked a "credible

[5]This Court also enjoined the 120-day suspension on refugee entry under Section 6. *Hawaii v. Trump*, 245 F. Supp. 3d at 1238.

claim of a bona fide relationship with a person or entity in the United States." *Trump v. IRAP*, 137 S. Ct. 2080, 2088 (2017).[6]

B. EO-3

The President signed EO-3 on September 24, 2017. EO-3's stated policy is to protect United States "citizens from terrorist attacks and other public-safety threats," by preventing "foreign nationals who may . . . pose a safety threat . . . from entering the United States."[7] EO-3 pmbl. EO-3 declares that "[s]creening and vetting protocols and procedures associated with visa adjudications and other immigration processes play a critical role in implementing that policy." EO-3 § 1(a). Further, because "[g]overnments manage the identity and travel documents of their nationals and residents," it is "the policy of the United States to take all necessary and appropriate steps to encourage foreign governments to improve their information-sharing and identity-management protocols and practices and to regularly share identity and threat information with our immigration screening and vetting systems." *Id.* § 1(b).

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[6]After EO-2's 90-day entry suspension expired, the Supreme Court vacated the *IRAP* injunction as moot. *See Trump v. IRAP*, No. 16-1436, --- S. Ct. ---, 2017 WL 4518553 (Oct. 10, 2017).
[7]EO-3 is founded in Section 2 of EO-2. *See* EO-2 § 2(e) (directing that the Secretary of Homeland Security "shall submit to the President a list of countries recommended for inclusion in a Presidential proclamation that would prohibit the entry of appropriate categories of foreign nationals of [specified] countries").

As a result of the global reviews undertaken by the Secretary of Homeland Security in consultation with the Secretary of State and the Director of National Intelligence, and following a 50-day "engagement period" conducted by the Department of State, the Acting Secretary of Homeland Security submitted a September 15, 2017 report to the President recommending restrictions on the entry of nationals from specified countries. *Id.* § 1(c) (h). The President found that, "absent the measures set forth in [EO-3], the immigrant and nonimmigrant entry in the United States of persons described in section 2 of [EO-3] would be detrimental to the interests of the United States, and that their entry should be subject to certain restrictions, limitations, and exceptions." EO-3 pmbl.

Section 2 of EO-3 indefinitely bans immigration into the United States by nationals of seven countries: Iran, Libya, Syria, Yemen, Somalia, Chad, and North Korea. EO-3 also imposes restrictions on the issuance of certain nonimmigrant visas to nationals of six of those countries. It bans the issuance of all nonimmigrant visas except student (F and M) and exchange (J) visas to nationals of Iran, and it bans the issuance of business (B-1), tourist (B-2), and business/tourist (B-1/B-2) visas to nationals of Chad, Libya, and Yemen. EO-3 §§ 2(a)(ii), (c)(ii), (g)(ii). EO-3 suspends the issuance of business, tourist, and business-tourist visas to specific Venezuelan government officials and their families, and bars the receipt of

nonimmigrant visas by nationals of North Korea and Syria. *Id.* §§ 2(d)(ii), (e)(ii), (f)(ii).

EO-3, like its predecessor, provides for discretionary case-by-case waivers. *Id.* § 3(c). The restrictions on entry became effective immediately for foreign nationals previously restricted under EO-2 and the Supreme Court's stay order, but for all other covered persons, the restrictions become effective on October 18, 2017 at 12:01 a.m. eastern daylight time. EO-3 §§ 7(a), (b).

II. Plaintiffs' Motion For TRO

Plaintiffs' Third Amended Complaint (ECF No. 381) and Motion for TRO (ECF No. 368) contend that portions of the newest entry ban suffer from the same infirmities as the enjoined provisions of EO-2 § 2.[8] They note that the President "has never renounced or repudiated his calls for a ban on Muslim immigration." TAC ¶ 88. Plaintiffs observe that, in the time since this Court examined EO-2, the

[8]Plaintiffs assert the following causes of action in the TAC: (1) violation of 8 U.S.C. § 1152(a)(1)(a) (Count I); (2) violation of 8 U.S.C. §§ 1182(f) and 1185(a) (Count II); (3) violation of 8 U.S.C. § 1157(a) (Count III); (4) violation of the Establishment Clause of the First Amendment (Count IV); (5) violation of the Free Exercise Clause of the First Amendment (Count V); (6) violation of the equal protection guarantees of the Fifth Amendment's Due Process Clause on the basis of religion, national origin, nationality, or alienage (Count VI); (7) substantially burdening the exercise of religion in violation of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 200bb-1(a) (Count VII); (8) substantive violation of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 706(2)(A) (C), through violations of the Constitution, INA, and RFRA (Count VIII); and (9) procedural violation of the APA, 5 U.S.C. § 706(2)(D) (Count IX).

record has only gotten worse. *See* Pls.' Mem. in Supp. 31, ECF. No. 368-1; TAC ¶¶ 84 88.[9]

The State asserts that EO-3 inflicts statutory and constitutional injuries upon its residents, employers, and educational institutions, while Dr. Elshikh alleges injuries on behalf of himself, his family, and members of his Mosque. TAC ¶¶ 14 32. Additional Plaintiffs John Doe 1 and John Doe 2 have family members who will not be able to travel to the United States. TAC ¶¶ 33 41. The Muslim Association of Hawaii is a non-profit entity that operates mosques on three islands in the State of Hawai'i and includes members from Syria, Somalia, Iran, Yemen, and Libya who are naturalized United States citizens or lawful permanent residents. TAC ¶¶ 42 45.

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[9]For example, on June 5, 2017, "the President endorsed the 'original Travel Ban' in a series of tweets in which he complained about how the Justice Department had submitted a 'watered down, politically correct version'" to the Supreme Court. TAC ¶ 86 (quoting Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017, 3:29 AM EDT) https://goo.gl/dPiDBu). He further tweeted: "People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!" TAC ¶ 86 (quoting Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017, 3:25 AM EDT), https://goo.gl/9fsD9K). He later added: "That's right, we need a TRAVEL BAN for certain DANGEROUS countries, not some politically correct term that won't help us protect our people!" TAC ¶ 86 (quoting Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017, 6:20 PM EDT), https://goo.gl/VGaJ7z). Plaintiffs also point to "remarks made on the day that EO-3 was released, [in which] the President stated: 'The travel ban: The tougher, the better.'" TAC ¶ 94 (quoting The White House, Office of the Press Sec'y, *Press Gaggle by President Trump, Morristown Municipal Airport, 9/24/2017* (Sept. 24, 2017), https://goo.gl/R8DnJq).

Plaintiffs ask the Court to temporarily enjoin on a nationwide basis the implementation and enforcement of EO-3 Sections 2(a), (b), (c), (e), (g), and (h) before EO-3 takes effect.[10] For the reasons that follow, the Court orders exactly that.

DISCUSSION

I. Plaintiffs Satisfy Standing and Justiciability

A. Article III Standing

Article III, Section 2 of the Constitution permits federal courts to consider only "cases" and "controversies." *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007). "[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. 167, 180 81 (2000) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 61 (1992)).

"At this very preliminary stage of the litigation, the [Plaintiffs] may rely on the allegations in their Complaint and whatever other evidence they submitted in

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[10]Plaintiffs do not seek to enjoin the entry ban with respect to North Korean or Venezuelan nationals. *See* Mem. in Supp. 10 n.4; ECF. No. 368-1.

support of their TRO motion to meet their burden." *Washington*, 847 F.3d at 1159 (citing *Lujan*, 504 U.S. at 561).

1. The State Has Standing

The State alleges standing based upon injuries to its proprietary and quasi-sovereign interests, *i.e.*, in its role as *parens patriae*. Just as the Ninth Circuit previously concluded in reviewing this Court's order enjoining EO-2, 859 F.3d 741, and a different Ninth Circuit panel found on a similar record in *Washington*, 847 F.3d 1151, the Court finds that the alleged harms to the State's proprietary interests are sufficient to support standing.[11]

The State, as the operator of the University of Hawai'i system, will suffer proprietary injuries stemming from EO-3.[12] The University is an arm of the State. *See* Haw. Const. art. 10, §§ 5, 6; Haw. Rev. Stat. ("HRS") § 304A-103. Plaintiffs allege that EO-3 will hinder the University from recruiting and retaining a

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[11]The Court does not reach the State's alternative standing theory based on the protection of the interests of its citizens as *parens patriae*. *See Washington*, 847 F.3d at 1168 n.5 ("The States have asserted other proprietary interests and also presented an alternative standing theory based on their ability to advance the interests of their citizens as *parens patriae*. Because we conclude that the States' proprietary interests as operators of their public universities are sufficient to support standing, we need not reach those arguments.").

[12]The State has asserted other proprietary interests including the loss of tourism revenue, a leading economic driver in the State. The Court does not reach this alternative argument because it concludes that the State's proprietary interests, as an operator of the University of Hawai'i, are sufficient to confer standing. *See Hawaii*, 859 F.3d at 766 n.6 (concluding that the interests, as an operator of the University of Hawai'i, and its sovereign interests in carrying out its refugee programs and policies, are sufficient to confer standing (citing *Washington*, 847 F.3d at 1161 n.5)).

world-class faculty and student body. TAC ¶¶ 99 102; Decl. of Donald O. Straney ¶¶ 8 15, ECF. No. 370-6. The University has 20 students from the eight countries designated in EO-3, and has already received five new graduate applications from students in those countries for the Spring 2018 Term. Straney Decl. ¶ 13. It also has multiple faculty members and scholars from the designated countries and uncertainty regarding the entry ban "threatens the University's recruitment, educational programming, and educational mission." Straney Decl. ¶ 8. Indeed, in September 2017, a Syrian journalist scheduled to speak at the University was denied a visa and did not attend a planned lecture, another lecture series planned for November 2017 involving a Syrian national can no longer go forward, and another Syrian journalist offered a scholarship will not likely be able to attend the University if EO-3 is implemented. Decl. of Nandita Sharma ¶¶ 4 9, ECF No. 370-8.

These types of injuries are nearly indistinguishable from those found to support standing in the Ninth Circuit's controlling decisions in *Hawaii* and *Washington*. *See Hawaii*, 859 F.3d at 765 ("The State's standing can thus be grounded in its proprietary interests as an operator of the University. EO2 harms the State's interests because (1) students and faculty suspended from entry are deterred from studying or teaching at the University; and (2) students who are unable to attend the University will not pay tuition or contribute to a diverse student

body."); *Washington*, 847 F.3d at 1161 ("The necessary connection can be drawn in at most two logical steps: (1) the Executive Order prevents nationals of seven countries from entering Washington and Minnesota; (2) as a result, some of these people will not enter state universities, some will not join those universities as faculty, some will be prevented from performing research, and some will not be permitted to return if they leave.").

As before, the Court "ha[s] no difficulty concluding that the [Plaintiffs'] injuries would be redressed if they could obtain the relief they ask for: a declaration that the Executive Order violates the [law] and an injunction barring its enforcement." *Washington*, 847 F.3d at 1161. For purposes of the instant Motion for TRO, the State has preliminarily demonstrated that: (1) its universities will suffer monetary damages and intangible harms; (2) such harms can be sufficiently linked to EO-3; and (3) the State would not suffer the harms to its proprietary interests in the absence of implementation of EO-3. Accordingly, at this early stage of the litigation, the State has satisfied the requirements of Article III standing.

2. <u>The Individual Plaintiffs Have Standing</u>

The Court next turns to the three individual Plaintiffs and concludes that they too have standing with respect to the INA-based statutory claims.

a. Dr. Elshikh

Dr. Elshikh is an American citizen of Egyptian descent and has been a resident of Hawai'i for over a decade. Decl. of Ismail Elshikh ¶ 1, ECF No. 370-9. He is the Imam of the Muslim Association of Hawaii and a leader within the State's Islamic community. Elshikh Decl. ¶ 2. Dr. Elshikh's wife is of Syrian descent, and their young children are American citizens. Dr. Elshikh and his family are Muslim. Elshikh Decl. ¶¶ 1, 3. His Syrian mother-in-law recently received an immigrant visa and, in August 2017, came to Hawai'i to live with his family. Elshikh Decl. ¶ 5. His wife's four brothers are Syrian nationals, currently living in Syria, with plans to visit his family in Hawai'i in March 2018 to celebrate the birthdays of Dr. Elshikh's three sons. Elshikh Decl. ¶ 6. On October 5, 2017, one of his brothers-in-law filed an application for a nonimmigrant visitor visa. Elshikh Decl. ¶ 6. Dr. Elshikh attests that as a result of EO-3, his family will be denied the company of close relatives solely because of their nationality and religion, which denigrates their faith and makes them feel they are second-class citizens in their own country. Elshikh Decl. ¶ 7.

Dr. Elshikh seeks to reunite his family members.

> By suspending the entry of nationals from the [eight] designated countries, including Syria, [EO-3] operates to delay or prevent the issuance of visas to nationals from those countries, including Dr. Elshikh's [brother]-in-law. Dr. Elshikh has alleged a

> concrete harm because [EO-3] . . . is a barrier to reunification with his [brother]-in-law.

Hawaii, 859 F.3d at 763. It is also clear that Dr. Elshikh has established causation and redressability. His injuries are fairly traceable to EO-3, satisfying causation, and enjoining EO-3 will remove a barrier to reunification, satisfying redressability. Dr. Elshikh has standing to assert his claims, including statutory INA violations.

b. John Doe 1

John Doe 1 is a naturalized United States citizen who was born in Yemen and has lived in Hawai‘i for almost 30 years. Decl. of John Doe 1 ¶ 1, ECF No. 370-1. His wife and four children, also United States citizens, are Muslim and members of Dr. Elshikh's mosque. Doe 1 Decl. ¶¶ 2 3. One of his daughters, who presently lives in Hawai‘i along with her own child, is married to a Yemeni national who fled the civil war in Yemen and is currently living in Malaysia. Doe 1 Decl. ¶¶ 4-6. In September 2015, his daughter filed a petition to allow Doe 1's son-in-law to immigrate to the United States as the spouse of a United States citizen, and in late June 2017, she learned that her petition had successfully passed through the clearance stage. Doe 1 Decl. ¶¶ 7 9. She has filed a visa application with the National Visa Center and estimates that, under normal visa processing procedures, he would receive a visa within the next three to twelve months. However, in light of EO-3, the issuance of immigrant visas to nationals of Yemen will be effectively

barred, which creates uncertainty for the family. Doe 1 Decl. ¶¶ 9 10. Doe 1's family misses the son-in law and wants him to be able to live in Hawai'i with Doe 1's daughter and grandchild. Doe 1 Decl. ¶¶ 11, 12 ("By singling our family out for special burdens, [EO-3] denigrates us because of our faith and sends a message that Muslims are outsiders and are not welcome in this country.").

Doe 1 alleges a sufficient injury-in-fact. He and his family seek to reunite with his son-in-law and avoid a prolonged separation from him. *See Hawaii*, 859 F.3d at 763 (finding standing sufficient where "Dr. Elshikh seeks to reunite his mother-in-law with his family and similarly experiences prolonged separation from her"); *see also id.* ("This court and the Supreme Court have reviewed the merits of cases brought by U.S. residents with a specific interest in the entry of a foreigner." (collecting authority)). Likewise, Doe 1 satisfies the requirements of causation and redressability. His injuries are fairly traceable to EO-3, and enjoining its implementation will remove a barrier to reunification and redress that injury.

c. <u>John Doe 2</u>

John Doe 2 is a lawful permanent resident of the United States, born in Iran, currently living in Hawai'i and working as a professor at the University of Hawai'i. Decl. of John Doe 2 ¶¶ 1 3, ECF. No. 370-2. His mother is an Iranian national with a pending application for a tourist visa, filed several months ago. Doe 2 Decl. ¶ 4.

Several other close relatives also Iranian nationals living in Iran similarly submitted applications for tourist visas a few months ago and recently had interviews in connection with their applications. They intend to visit Doe 2 in Hawai‘i as soon as their applications are approved. Doe 2 Decl. ¶ 5. If implemented, EO-3 will block the issuance of tourist visas from Iran and separate Doe 2 from his close relatives. If EO-3 persists, Doe 2 is less likely to remain in the United States because he will be indefinitely deprived of the company of his family. Doe 2 Decl. ¶ 8. Because his family cannot visit him in the United States, Doe 2's life has been more difficult, and he feels like an outcast in his own country. Doe 2 Decl. ¶ 8.

Like Dr. Elshikh and Doe 1, Doe 2 sufficiently alleges a concrete harm because EO-3 is a barrier to visitation or reunification with his mother and other close relatives. It prolongs his separation from his family members due to their nationality. The final two aspects of Article III standing causation and redressability are also satisfied. Doe 2's injuries are traceable to EO-3, and if Plaintiffs prevail, a decision enjoining portions of EO-3 would redress that injury.

3. The Muslim Association of Hawaii Has Standing

The Muslim Association of Hawaii is the only formal Muslim organization in Hawai‘i and serves 5,000 Muslims statewide. Decl. of Hakim Ouansafi ¶¶ 4 5,

ECF. No. 370-1. The Association draws upon new arrivals to Hawai‘i to add to its membership and "community of worshippers, including persons immigrating as lawful permanent residents and shorter-term visitors coming to Hawaii for business, professional training, university studies, and tourism." Ouansafi Decl. ¶ 11. Current members of the Association include "foreign-born individuals from Syria, Somalia, Iran, Yemen, and Libya who are now naturalized U.S. citizens or lawful permanent residents." Ouansafi Decl. ¶ 12. EO-3 will decrease the Association's future membership from the affected countries and deter current members from remaining in Hawai‘i. Ouansafi Decl. ¶¶ 13, 18; *see also id.* at ¶ 14 ("EO-3 will deter our current members from remaining . . . because they cannot receive visits from their family members and friends from the affected countries if they do. I personally know of at least one family who made that difficult choice and left Hawaii and I know others who have talked about doing the same.").

According to the Association's Chairman, EO-3 will likely result in a decrease in the Association's membership and in visitors to its mosques, which in turn, will directly harm the Association's finances. Ouansafi Decl. ¶¶ 18 19. Members of the Association have experienced fear and feelings of national-origin discrimination because of the prior and current entry bans. Ouansafi Decl. ¶¶ 21 22 ("That fear has led to, by way of example, children wanting to change their

Muslim names and parents wanting their children not to wear head coverings to avoid being victims of violence. Some of our young people have said they want to change their names because they are afraid to be Muslims. There is real fear within our community especially among our children and American Muslims who were born outside the United States."); *id.* ¶ 23 ("Especially because it is permanent, EO-3 has even more so than its predecessor bans caused tremendous fear, anxiety, and grief for our members.").

The Association, by its Chairman Hakim Oaunsafi, has sufficiently demonstrated standing in its own right, at this stage. *See Warth v. Seldin*, 422 U.S. 490, 511 (1975) ("[A]n association may have standing [to sue] "in its own right . . . to vindicate whatever rights and immunities the association itself may enjoy[, and in doing so,] [m]ay assert the rights of its members, at least so long as the challenged infractions adversely affect its members' associational ties." (citations omitted)). In order to establish organizational standing, the Association must "meet the same standing test that applies to individuals." *Envtl. Prot. Info. Ctr. v. Pac. Lumber Co.*, 469 F. Supp. 2d 803, 813 (N.D. Cal. 2007) (citation omitted). The Association satisfies the injury-in-fact requirement. It alleges a "concrete and demonstrable injury to the organization's activities with a consequent drain on the organization's resources constituting more than simply a setback to the

organization's abstract social interests." *Envtl. Prot. Info. Ctr.*, 469 F. Supp. 2d at 813 (quoting *Common Cause v. Fed. Election Comm'n*, 108 F.3d 413, 417 (D.C. Cir. 1997)). The Association further satisfies the causation and redressability prongs. *See* Ouansafi Decl. ¶¶ 18 22.

Having determined that Plaintiffs each satisfy Article III's standing requirements, the Court turns to whether Plaintiffs are within the "zone of interests" protected by the INA.

B. Statutory Standing

Because Plaintiffs allege statutory claims based on the INA, the Court examines whether they meet the requirement of having stakes that "fall within the zone of interests protected by the law invoked." *Hawaii*, 859 F.3d at 766 (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014)). Like the Ninth Circuit, this Court has little trouble determining that Dr. Elshikh, Doe 1 and Doe 2 do so. *Hawaii*, 859 F.3d at 766. Each sufficiently asserts that EO-3 prevents them from reuniting with close family members. *See Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State, Bureau of Consular Affairs*, 45 F.3d 469, 471 72 (D.C. Cir. 1995) ("In originally enacting the INA, Congress implemented the underlying intention of our immigration laws regarding the preservation of the family unit. Given the nature and purpose of the

statute, the resident appellants fall well within the zone of interest Congress intended to protect." (citations, alterations, and internal quotation marks omitted)), *vacated on other grounds*, 519 U.S. 1 (1996). Similarly, the Association and its members are "at least *arguably* with in the zone of interests that the INA protects." *See Hawaii*, 859 F.3d at 767 (quoting *Bank of Am. Corp. v. City of Miami, Fla.*, 137 S. Ct. 1296, 1303 (2017)). The Association's interest in facilitating the religious practices of its members "to visit each other to connect [and] for the upholding of kinship ties," which are negatively impacted by EO-3, Ouansafi Decl. ¶ 10, and its interest in preventing harm to members who "cannot receive visits from family members from the affected countries," Ouansafi Decl. ¶ 15, fall within the same zone of interests.

Equally important, "the State's efforts to enroll students and hire faculty members who are nationals from [the list of] designated countries fall within the zone of interests of the INA." *Hawaii*, 859 F.3d at 766 (citing relevant INA provisions relating to nonimmigrant students, teachers, scholars, and aliens with extraordinary abilities). Thus, the "INA leaves no doubt that the State's interests in student- and employment-based visa petitions for its students and faculty are related to the basic purposes of the INA." *Hawaii*, 859 F.3d at 766.

In sum, Plaintiffs fall within the zone of interests and have standing to challenge EO-3 based on their INA claims.

C. Ripeness

Plaintiffs' claims are also ripe for review. "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co*., 473 U.S. 568, 580 81 (1985)). The Government advances that assertion here because none of the aliens abroad identified by Plaintiffs has yet been refused a visa based on EO-3. Mem. in Opp'n 14 15, ECF No. 378.

The Government's premise is not true. Plaintiffs allege current, concrete injuries to themselves and their close family members, injuries that have already occurred and that will continue to occur once EO-3 is fully implemented and enforced.[13] Moreover, the Ninth Circuit has previously rejected materially identical ripeness contentions asserted by the Government. *Hawaii*, 859 F.3d at 767 68 ("declin[ing] the Government's invitation to wait until Plaintiffs identify a visa applicant who was denied a discretionary waiver," and instead, "conclud[ing] that the claim is ripe for review").

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[13] *See, e.g.*, Sharma Decl. ¶¶ 4 9, ECF No. 370-8 (describing denial of visa to Syrian journalist and cancellation of University lecture since signing of EO-3)

Plaintiffs' INA-based statutory claims are therefore ripe for review on the merits.

D. Justiciability

Notwithstanding the Ninth Circuit's recent rulings to the contrary, the Government persists in its contention that Plaintiffs' statutory claims are not reviewable. "[C]ourts may not second-guess the political branches' decisions to exclude aliens abroad where Congress has not authorized review, which it has not done here." Mem. in Opp'n 4. In doing so, the Government again invokes the doctrine of consular nonreviewability in an effort to circumvent judicial review of seemingly any Executive action denying entry to an alien abroad. *See* Mem. in Opp'n 12 13 (citing *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950); *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999)).

The Government's contentions are troubling. Not only do they ask this Court to overlook binding precedent issued in the specific context of the various executive immigration orders authored since the beginning of 2017, but they ask this Court to ignore its fundamental responsibility to ensure the legality and constitutionality of EO-3. Following the Ninth Circuit's lead, this Court declined such an invitation before and does so again. *See Washington*, 847 F.3d at 1163 (explaining that courts are empowered to review statutory and constitutional

"challenges to the substance and implementation of immigration policy" (quoting *Alperin v. Vatican Bank*, 410 F.3d 532, 559 n.17 (9th Cir. 2005)); *Hawaii*, 859 F.3d 768 69 ("We reject the Government's argument that [EO-2] is not subject to judicial review. Although '[t]he Executive has broad discretion over the admission and exclusion of aliens, [] that discretion is not boundless. It extends only as far as the statutory authority conferred by Congress and may not transgress constitutional limitations. It is the duty of the courts, in cases properly before them, to say where those statutory and constitutional boundaries lie.'" (quoting *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987)).

Because Plaintiffs have standing and present a justiciable controversy, the Court turns to the merits of the Motion for TRO.

II. Legal Standard: Preliminary Injunctive Relief

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

The standard for issuing a temporary restraining order is substantially identical to the standard for issuing a preliminary injunction. *See Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). A

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

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

III. Analysis of TRO Factors: Likelihood of Success on the Merits

Following the Ninth Circuit's direction, the Court begins with Plaintiffs' statutory claims. *Hawaii*, 859 F.3d at 761. Finding that Plaintiffs are likely to prevail on the merits because EO-3 violates multiple provisions of the INA, the Court declines to reach the constitutional claims alternatively relied on by Plaintiffs.

A. Plaintiffs Are Likely to Succeed on the Merits of Their Section 1182(f) and 1185(a) Claims

EO-3 indefinitely suspends the entry of nationals from countries the President and Acting Secretary of Homeland Security identified as having "inadequate identity-management protocols, information sharing practices, and risk factors." EO-3 § 1(g). As discussed herein, because EO-3's findings are inconsistent with and do not fit the restrictions that the order actually imposes, and because EO-3 improperly uses nationality as a proxy for risk, Plaintiffs are likely to prevail on the merits of their statutory claims.

Section 1182(f) provides, in relevant part

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

8 U.S.C. § 1182(f). Section 1185(a)(1) similarly provides that "[u]nless otherwise ordered by the President, it shall be unlawful for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe." 8 U.S.C. § 1185(a)(1).

Under the law of this Circuit, these provisions do not afford the President unbridled discretion to do as he pleases. An Executive Order promulgated pursuant to INA Sections 1182(f) and 1185(a) "requires that the President *find* that the entry of a class of aliens into the United States *would be detrimental* to the interests of the United States." *Hawaii*, 859 F.3d at 770. Further, the INA "*requires* that the President's *findings support the conclusion* that entry of all nationals from the [list of] designated countries . . . would be harmful to the national interest."[14] *Id.*

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[14]The Government insists that, consistent with historical practice, the President may "restrict[] entry pursuant to §§ 1182(f) and 1185(a)(1) without detailed public justifications or findings," citing to prior Executive Orders that "have discussed the President's rationale in one or two

(emphasis added) (footnote omitted); *see also id.* at 783 ("the President must exercise his authority under § 1182(f) lawfully by making sufficient findings justifying that entry of certain classes of aliens would be detrimental to the national interest"); *id.* at 770 n.11 (defining "detrimental" as "causing loss or damage, harmful, injurious, hurtful"). While EO-3 certainly contains findings, they fall short of the Ninth Circuit's articulated standards for several reasons.

First, EO-3, like its predecessor, makes "no finding that nationality *alone* renders entry of this broad class of individuals a heightened security risk to the United States." *Hawaii*, 859 F.3d at 772 (emphasis added) (citation omitted). EO-3 "does not tie these nationals in any way to terrorist organizations within the six designated countries," find them "responsible for insecure country conditions," or provide "any link between an individual's nationality and their propensity to commit terrorism or their inherent dangerousness."[15] *Id.* at 772.

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sentences." Mem. in Opp'n 20 21 (citing Exec. Order No. 12,807, pmbl. pt. 4, 57 Fed. Reg. 23133 (May 24, 1992); Exec. Order No. 12,172, § 1-101, 44 Fed. Reg. 67947 (Nov. 26, 1979)). Its argument is misplaced. The Government both ignores the plain language of Section 1182 and infers the absence of a prerequisite from historical orders that were not evidently challenged on that basis. Its examples therefore have little force. By contrast, plainly aware of these historical orders, *see Hawaii*, 859 F.3d at 779, the Ninth Circuit has held otherwise, *e.g.*, *id.* at 772 73 (explaining that Section 1182(f) requires the President to "provide a rationale explaining why permitting entry of nationals from the six designated countries . . . would be detrimental to the interests of the United States").

[15]In fact, "the only concrete evidence to emerge from the Administration on this point to date has shown just the opposite that country-based bans are ineffective. A leaked DHS Office of Intelligence and Analysis memorandum analyzing the ban in EO-1 found that 'country of

The generalized findings regarding each country's performance, *see* EO-3 §§ 1(d) (f), do not support the vast scope of EO-3 in other words, the categorical restrictions on entire populations of men, women, and children, based upon nationality, are a poor fit for the issues regarding the sharing of "public-safety and terrorism-related information" that the President identifies. *See* EO-3 §§ 2(a)(i), (c)(i), (e)(i), (g)(i). Indeed, as the Ninth Circuit already explained with respect to EO-2 in words that are no less applicable here, the Government's "use of nationality as the sole basis for suspending entry means that nationals without significant ties to the six designated countries, such as those who left as children or those whose nationality is based on parentage alone," are suspended from entry. *Hawaii*, 859 F.3d at 773. "Yet, nationals of *other* countries who do have meaningful ties to the six designated countries [and whom the designated countries may or may not have useful threat information about] fall outside the scope of [the entry restrictions]." *Id*. (emphasis added). This leads to absurd results. EO-3 is simultaneously overbroad *and* underinclusive. *See id.*

Second, EO-3 does not reveal why existing law is insufficient to address the President's described concerns. As the Ninth Circuit previously explained with

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citizenship is unlikely to be a reliable indicator of potential terrorist activity.'" Joint Decl. of Former Nat'l Sec. Officials ¶ 10, ECF. 383-1 (quoting *Citizenship Likely an Unreliable Indicator of Terrorist Threat to the United States*, *available at* https://assets.documentcloud.org/documents/3474730/DHS-intelligence-document-on-President-Donald.pdf).

respect to EO-2, "[a]s the law stands, a visa applicant bears the burden of showing that the applicant is eligible to receive a visa . . . and is not inadmissible." *Hawaii,* 859 F.3d at 773 (citing 8 U.S.C. § 1361). "The Government already can exclude individuals who do not meet that burden" on the basis of many criteria, including safety and security. Because EO-2 did not find that such "current screening processes are inadequate," the Ninth Circuit determined that the President's findings offered an insufficient basis to conclude that the "individualized adjudication process is flawed such that permitting entry of an entire class of nationals is injurious to the interests of the United States." *Id.* at 773. The Ninth Circuit's analysis applies no less to EO-3, where the "findings" cited in Section 1(h) and (i) similarly omit any explanation of the inadequacy of individual vetting sufficient to justify the categorical, nationality-based ban chosen by the Executive.

Third, EO-3 contains internal incoherencies that markedly undermine its stated "national security" rationale.[16] Numerous countries fail to meet one or more of the global baseline criteria described in EO-3, yet are not included in the ban.

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[16]As an initial matter, the explanation for how the Administration settled on the list of eight countries is obscured. For example, Section 1 describes 47 countries that Administration officials identified as having an "inadequate" or "at risk" baseline performance, EO-3 §§ 1(e) (f), but does not detail how the President settled on the eight countries actually subject to the ban in Section 2 the majority of which carried over from EO-2. While the September 15, 2017 DHS report cited in EO-3 might offer some insight, the Government objected (ECF. No. 376) to the Court's consideration or even viewing of that classified report, making it impossible to know.

For example, the President finds that Iraq fails the "baseline" security assessment but then omits Iraq from the ban for policy reasons. EO-3 § 1(g) (subjecting Iraq to "additional scrutiny" in lieu of the ban, citing diplomatic ties, positive working relationship, and "Iraq's commitment to combating the Islamic State"). Similarly, after failing to meet the information-sharing baseline, Venezuela also received a pass, other than with respect to certain Venezuelan government officials. EO-3 § 2(f). On the other end, despite meeting the information-sharing baseline that Venezuela failed, Somalia and its nationals were rewarded by being included in the ban. EO-3 § 2(h).

Moreover, EO-3's individualized country findings make no effort to explain why some *types* of visitors from a particular country are banned, while others are not. *See, e.g.*, EO-3 §§ 2(c) (describing Libya as having "significant inadequacies in its identity-management protocols" and therefore deserving of a ban on all tourist and business visitors, but without discussing why student visitors did not meet the same fate); *id.* § 2(g) (describing the same for Yemen); *cf. id.* § 2(b) (describing Iran as "a state sponsor of terrorism," which "regularly fails to cooperate with the United States Government in identifying security risks [and] is the source of significant terrorist threats," yet allowing "entry by [Iranian] nationals under valid student (F

and M) and exchange visitor (J) visas").[17] The nature and scope of these types of inconsistencies and unexplained findings cannot lawfully justify an exercise of Section 1182(f) authority, particularly one of indefinite duration. *See Hawaii*, 859 F.3d at 772 73 (proper exercise of Section 1182(f) authority must "provide a rationale" and "bridge the gap" between the findings and ultimate restrictions).

EO-3's scope and provisions also contradict its stated rationale. As noted above, many of EO-3's structural provisions are unsupported by verifiable evidence, undermining any claim that its findings "support the conclusion" to categorically ban the entry of millions.[18] *Cf. Hawaii*, 859 F.3d at 770. EO-3's aspirational justifications *e.g.*, fostering a "willingness to cooperate and play a substantial role in combatting terrorism" and encouraging additional information-sharing are no more satisfying. EO-3 § 1(h)(3); *see also* Mem. in Opp'n 22 23 ("The utility of entry restrictions as a foreign-policy tool is confirmed by the results of the diplomatic engagement period described in [EO-3] . . . These foreign-relations efforts independently justify [EO-3] and yet they are almost wholly ignored by

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[17] *See also* Joint Decl. of Former Nat'l Sec. Officials ¶ 12 ("[A]lthough for some of the countries, the Ban applies only to certain non-immigrant visas, together those visas are far and away the most frequently used non-immigrant visas from these nations.").

[18] For example, although the order claims a purpose "to protect [United States] citizens from terrorist attacks," EO-3 § 1(a), "the Ban targets a list of countries whose nationals have committed no deadly terrorist attacks on U.S. soil in the last forty years." Joint Decl. of Former Nat'l Sec. Officials ¶ 11 (citing Alex Nowrasteh, *President Trump's New Travel Executive Order Has Little National Security Justification*, Cato Institute: Cato at Liberty, September 25, 2017).

Plaintiffs."). However laudatory they may be, these foreign policy goals do not satisfy Section 1182(f)'s requirement that the President actually "find" that the "entry of any aliens" into the United States "*would be detrimental*" to the interests of the United States, and are thus an insufficient basis on which to invoke his Section 1182(f) authority.

The Government reads in Sections 1182(f) and 1185(a) a grant of limitless power and absolute discretion to the President, and cautions that it would "be inappropriate for this Court to second-guess" the "Executive Branch's national-security judgements," Mem. in Opp'n 22, or to engage in "unwarranted judicial interference in the conduct of foreign policy," Mem. in Opp'n 23 (quoting *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 115 16 (2013)). The Government counsels that deference is historically afforded the President in the core areas of national security and foreign relations, "which involve delicate balancing in the face of ever-changing circumstances, such that the Executive must be permitted to act quickly and flexibly." Mem. in Opp'n 28 (citing *Zemel v. Rusk*, 381 U.S. 1, 17 (1965); *Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 348 (2005)).

These concerns are not insignificant. There is no dispute that national security is an important objective and that errors could have serious consequences. Yet, "[n]ational security is not a 'talismanic incantation' that, once invoked, can

support any and all exercise of executive power under § 1182(f)." *Hawaii*, 859 F.3d at 774 (citation omitted). The Ninth Circuit itself rejected the Government's arguments that it is somehow injured "by nature of the judiciary limiting the President's authority." *Id.* at 783 n.22 (quoting *United States v. Robel*, 389 U.S. 258, 264 (1967) ("[The] concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of . . . power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart.")).

The actions taken by the President in the challenged sections of EO-3 require him to "first [] make sufficient findings that the entry of nationals from the six designated countries . . . would be detrimental to the interests of the United States." *Hawaii*, 859 F.3d at 776. Because the President has not satisfied this precondition in the manner described by the Ninth Circuit before exercising his delegated authority, Plaintiffs have demonstrated a likelihood of success on the merits of their claim that the President exceeded his authority under Sections 1182(f) and 1185(a).

B. Plaintiffs Are Likely to Succeed on the Merits of Their Section 1152(a) Claim

It is equally clear that Plaintiffs are likely to prevail on their claim that EO-3 violates the INA's prohibition on nationality-based discrimination with respect to the issuance of immigrant visas. Section 1152(a)(1)(A) provides that "[e]xcept as

specifically provided" in certain subsections not applicable here, "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence."

By indefinitely and categorically suspending immigration from the six countries challenged by Plaintiffs,[19] EO-3 attempts to do exactly what Section 1152 prohibits. EO-3, like its predecessor, thus "runs afoul" of the INA provision "that prohibit[s] nationality-based discrimination" in the issuance of immigrant visas. *Hawaii*, 859 F.3d at 756.

For its part, the Government contends that Section 1152 cannot restrict the President's Section 1182(f) authority because "the statutes operate in two different spheres." "Sections 1182(f) and 1185(a)(1), along with other grounds in Section 1182(a), limit the universe of individuals eligible to receive visas, and then §1152(a)(1)(A) prohibits discrimination on the basis of nationality *within* that universe of eligible individuals." Mem. in Opp'n 29.

In making this argument, however, the Government completely ignores *Hawaii*. *See* Mem. in Opp'n 29 32. In *Hawaii*, the Ninth Circuit reached the

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[19]EO-3 § 2(a)(ii) ("The entry into the United States of nationals of Chad, as immigrants . . . is hereby suspended."); *id.* §§ 2(b)(ii) (dictating the same for Iran), (c)(ii) (Libya), (e)(ii) (Syria), (g)(ii) (Yemen), (h)(ii) (Somalia).

opposite conclusion: Section "1152(a)(1)(A)'s non-discrimination mandate cabins the President's authority under § 1182(f) [based on several] canons of statutory construction" and that "in suspending the issuance of immigrant visas and denying entry based on nationality, [EO-2] exceeds the restriction of § 1152(a)(1)(A) and the overall statutory scheme intended by Congress." *Hawaii*, 859 F.3d at 778 79. Although asserted now with respect to EO-3, the Government's position untenably contradicts the Ninth's Circuit's holding.

In short, EO-3 plainly violates Section 1152(a) by singling out immigrant visa applicants seeking entry to the United States on the basis of nationality. Having considered the scope of the President's authority under Section 1182(f) and the non-discrimination requirement of Section 1152(a)(1)(A), the Court determines that Plaintiffs have shown a likelihood of success on the merits of their claim that EO-3 "exceeds the restriction of Section 1152(a)(1)(A) and the overall statutory scheme intended by Congress."[20] *Hawaii*, 859 F.3d at 779.

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[20]The Court finds that Plaintiffs have shown a likelihood of success on the merits of their claim that EO-3 violates Section 1152(a), *but only as to the issuance of immigrant visas*. To the extent Plaintiffs ask the Court to enjoin EO-3's "nationality-based restrictions . . . in their entirety," as violative of Section 1152(a)(1)(A), Mem. in Supp. 16 17, the Court declines to do so. *See* Mem. in Supp. 16 17; *see also Hawaii*, 859 F.3d 779 (applying holding to immigrant visas). Such an extension is not consistent with the face of Section 1152. Moreover, the primary case relied upon by Plaintiffs, *Olsen v. Albright*, 990 F. Supp. 31 (D.D.C. 1997), does not support extending the plain text of the statute to encompass nonimmigrant visas. First, *Olsen*'s statutory analysis is thin beyond reciting the text of Section 1152(a), which specifically references only "immigrant visas" the order does not parse the text of Section 1152(a)(1)(A) or acknowledge the distinction

IV. Analysis of TRO Factors: Irreparable Harm

Plaintiffs identify a multitude of harms that are not compensable with monetary damages and that are irreparable among them, prolonged separation from family members, constraints to recruiting and retaining students and faculty members to foster diversity and quality within the University community, and the diminished membership of the Association, which impacts the vibrancy of its religious practices and instills fear among its members. *See, e.g.*, *Hawaii*, 859 F.3d at 782 83 (characterizing similar harms to many of the same actors); *Washington*, 847 F.3d at 1169 (identifying harms such as those to public university employees and students, separated families, and stranded residents abroad); *Regents of Univ. of Cal. v. Am. Broad. Cos., Inc.*, 747 F.2d 511, 520 (9th Cir. 1984) (crediting intangible harms such as the "impairment of their ongoing recruitment programs [and] the dissipation of alumni and community goodwill and support garnered over the years"). The Court finds that Plaintiffs have made a sufficient showing of such irreparable harm in the absence of preliminary relief.

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between immigrant and nonimmigrant visas. 990 F. Supp. at 37 39. Second, *Olsen* is factually distinct, involving review of a grievance board's decision to uphold a foreign service officer's termination because he refused to strictly adhere to a local consular-level policy of determining which visa applicants received interviews based upon "fraud profiles" and to "adjudicate [nonimmigrant] visas on the basis of the applicant's race, ethnicity, national origin, economic class, and physical appearance." *Id.* at 33. The district court in *Olsen* found that the grievance board erred by failing to "address the question of the Consulate's visa policies when it reviewed Plaintiff's termination," and remanded the matter for reconsideration of its decision. *Id.* Thus, the Court does not find its analysis to be particularly relevant or persuasive.

Defendants, on the other hand, are not likely harmed by having to adhere to immigration procedures that have been in place for years that is, by maintaining the status quo. *See Washington*, 847 F.3d at 1168.

V. Analysis of TRO Factors: The Balance of Equities and Public Interest Weigh in Favor of Granting Emergency Relief

The final step in determining whether to grant the Plaintiffs' Motion for TRO is to assess the balance of equities and examine the general public interests that will be affected. Here, the substantial controversy surrounding this Executive Order, like its predecessors, illustrates that important public interests are implicated by each party's positions. *See Washington*, 847 F.3d at 1169. The Ninth Circuit has recognized that Plaintiffs and the public have a vested interest in the "free flow of travel, in avoiding separation of families, and in freedom from discrimination." *Washington*, 847 F.3d at 1169 70.

National security and the protection of our borders is unquestionably also of significant public interest. *See Haig v. Agee*, 453 U.S. 280, 307 (1981). Although national security interests are legitimate objectives of the highest order, they cannot justify the public's harms when the President has wielded his authority unlawfully. *See Hawaii*, 859 F.3d at 783.

In carefully weighing the harms, the equities tip in Plaintiffs' favor. "The public interest is served by 'curtailing unlawful executive action.'" *Hawaii*, 859

F.3d at 784 (quoting *Texas v. United States*, 809 F.3d 134, 187 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016)). When considered alongside the statutory injuries and harms discussed above, the balance of equities and public interests justify granting the Plaintiffs' TRO.

Nationwide relief is appropriate in light of the likelihood of success on Plaintiffs' INA claims. *See Washington*, 847 F.3d at 1166 67 (citing *Texas*, 809 F.3d at 187 88); *see also Hawaii*, 859 F.3d at 788 (finding no abuse of discretion in enjoining on a nationwide basis Sections 2(c) and 6 of EO-2, "which in all applications would violate provisions of the INA").

CONCLUSION

Plaintiffs have satisfied all four *Winter* factors, warranting entry of preliminary injunctive relief. Based on the foregoing, Plaintiffs' Motion for TRO (ECF No. 368) is hereby GRANTED.

TEMPORARY RESTRAINING ORDER

It is hereby ADJUDGED, ORDERED, and DECREED that:

Defendant ELAINE DUKE, in her official capacity as Acting Secretary of Homeland Security; REX W. TILLERSON, in his official capacity as Secretary of State; and all their respective officers, agents, servants, employees, and attorneys, and persons in active concert or participation with them who receive actual notice of

this Order, hereby are enjoined fully from enforcing or implementing Sections 2(a), (b), (c), (e), (g), and (h) of the Proclamation issued on September 24, 2017, entitled "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats" across the Nation. Enforcement of these provisions in all places, including the United States, at all United States borders and ports of entry, and in the issuance of visas is prohibited, pending further orders from this Court.

No security bond is required under Federal Rule of Civil Procedure 65(c).

Pursuant to Federal Rule of Civil Procedure 65(b)(2), the Court intends to set an expedited hearing to determine whether this Temporary Restraining Order should be extended. The parties shall submit a stipulated briefing and hearing schedule for the Court's approval forthwith, or promptly indicate whether they jointly consent to the conversion of this Temporary Restraining Order to a Preliminary Injunction without the need for additional briefing or a hearing.

The Court declines to stay this ruling or hold it in abeyance should an emergency appeal of this order be filed.

IT IS SO ORDERED.

Dated: October 17, 2017 at Honolulu, Hawai‘i.

Derrick K. Watson
United States District Judge

General Assembly

Distr.: General
3 October 2016

Seventy-first session
Agenda items 13 and 117

Resolution adopted by the General Assembly on 19 September 2016

[*without reference to a Main Committee (A/71/L.1)*]

71/1. New York Declaration for Refugees and Migrants

The General Assembly

Adopts the following outcome document of the high level plenary meeting on addressing large movements of refugees and migrants:

New York Declaration for Refugees and Migrants

We, the Heads of State and Government and High Representatives, meeting at United Nations Headquarters in New York on 19 September 2016 to address the question of large movements of refugees and migrants, have adopted the following political declaration.

I. Introduction

1. Since earliest times, humanity has been on the move. Some people move in search of new economic opportunities and horizons. Others move to escape armed conflict, poverty, food insecurity, persecution, terrorism, or human rights violations and abuses. Still others do so in response to the adverse effects of climate change, natural disasters (some of which may be linked to climate change), or other environmental factors. Many move, indeed, for a combination of these reasons.

2. We have considered today how the international community should best respond to the growing global phenomenon of large movements of refugees and migrants.

3. We are witnessing in today's world an unprecedented level of human mobility. More people than ever before live in a country other than the one in which they were born. Migrants are present in all countries in the world. Most of them move without incident. In 2015, their number surpassed 244 million, growing at a rate faster than the world's population. However, there are roughly 65 million forcibly displaced persons, including over 21 million refugees, 3 million asylum seekers and over 40 million internally displaced persons.

4. In adopting the 2030 Agenda for Sustainable Development[1] one year ago, we recognized clearly the positive contribution made by migrants for inclusive growth

[1] Resolution 70/1.

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and sustainable development. Our world is a better place for that contribution. The benefits and opportunities of safe, orderly and regular migration are substantial and are often underestimated. Forced displacement and irregular migration in large movements, on the other hand, often present complex challenges.

5. We reaffirm the purposes and principles of the Charter of the United Nations. We reaffirm also the Universal Declaration of Human Rights[2] and recall the core international human rights treaties. We reaffirm and will fully protect the human rights of all refugees and migrants, regardless of status; all are rights holders. Our response will demonstrate full respect for international law and international human rights law and, where applicable, international refugee law and international humanitarian law.

6. Though their treatment is governed by separate legal frameworks, refugees and migrants have the same universal human rights and fundamental freedoms. They also face many common challenges and have similar vulnerabilities, including in the context of large movements. "Large movements" may be understood to reflect a number of considerations, including: the number of people arriving, the economic, social and geographical context, the capacity of a receiving State to respond and the impact of a movement that is sudden or prolonged. The term does not, for example, cover regular flows of migrants from one country to another. "Large movements" may involve mixed flows of people, whether refugees or migrants, who move for different reasons but who may use similar routes.

7. Large movements of refugees and migrants have political, economic, social, developmental, humanitarian and human rights ramifications, which cross all borders. These are global phenomena that call for global approaches and global solutions. No one State can manage such movements on its own. Neighbouring or transit countries, mostly developing countries, are disproportionately affected. Their capacities have been severely stretched in many cases, affecting their own social and economic cohesion and development. In addition, protracted refugee crises are now commonplace, with long term repercussions for those involved and for their host countries and communities. Greater international cooperation is needed to assist host countries and communities.

8. We declare our profound solidarity with, and support for, the millions of people in different parts of the world who, for reasons beyond their control, are forced to uproot themselves and their families from their homes.

9. Refugees and migrants in large movements often face a desperate ordeal. Many take great risks, embarking on perilous journeys, which many may not survive. Some feel compelled to employ the services of criminal groups, including smugglers, and others may fall prey to such groups or become victims of trafficking. Even if they reach their destination, they face an uncertain reception and a precarious future.

10. We are determined to save lives. Our challenge is above all moral and humanitarian. Equally, we are determined to find long term and sustainable solutions. We will combat with all the means at our disposal the abuses and exploitation suffered by countless refugees and migrants in vulnerable situations.

11. We acknowledge a shared responsibility to manage large movements of refugees and migrants in a humane, sensitive, compassionate and people centred

[2] Resolution 217 A (III).

manner. We will do so through international cooperation, while recognizing that there are varying capacities and resources to respond to these movements. International cooperation and, in particular, cooperation among countries of origin or nationality, transit and destination, has never been more important; "win win" cooperation in this area has profound benefits for humanity. Large movements of refugees and migrants must have comprehensive policy support, assistance and protection, consistent with States' obligations under international law. We also recall our obligations to fully respect their human rights and fundamental freedoms, and we stress their need to live their lives in safety and dignity. We pledge our support to those affected today as well as to those who will be part of future large movements.

12. We are determined to address the root causes of large movements of refugees and migrants, including through increased efforts aimed at early prevention of crisis situations based on preventive diplomacy. We will address them also through the prevention and peaceful resolution of conflict, greater coordination of humanitarian, development and peacebuilding efforts, the promotion of the rule of law at the national and international levels and the protection of human rights. Equally, we will address movements caused by poverty, instability, marginalization and exclusion and the lack of development and economic opportunities, with particular reference to the most vulnerable populations. We will work with countries of origin to strengthen their capacities.

13. All human beings are born free and equal in dignity and rights. Everyone has the right to recognition everywhere as a person before the law. We recall that our obligations under international law prohibit discrimination of any kind on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Yet in many parts of the world we are witnessing, with great concern, increasingly xenophobic and racist responses to refugees and migrants.

14. We strongly condemn acts and manifestations of racism, racial discrimination, xenophobia and related intolerance against refugees and migrants, and the stereotypes often applied to them, including on the basis of religion or belief. Diversity enriches every society and contributes to social cohesion. Demonizing refugees or migrants offends profoundly against the values of dignity and equality for every human being, to which we have committed ourselves. Gathered today at the United Nations, the birthplace and custodian of these universal values, we deplore all manifestations of xenophobia, racial discrimination and intolerance. We will take a range of steps to counter such attitudes and behaviour, in particular with regard to hate crimes, hate speech and racial violence. We welcome the global campaign proposed by the Secretary General to counter xenophobia and we will implement it in cooperation with the United Nations and all relevant stakeholders, in accordance with international law. The campaign will emphasize, inter alia, direct personal contact between host communities and refugees and migrants and will highlight the positive contributions made by the latter, as well as our common humanity.

15. We invite the private sector and civil society, including refugee and migrant organizations, to participate in multi stakeholder alliances to support efforts to implement the commitments we are making today.

16. In the 2030 Agenda for Sustainable Development, we pledged that no one would be left behind. We declared that we wished to see the Sustainable Development Goals and their targets met for all nations and peoples and for all segments of society. We said also that we would endeavour to reach the furthest

behind first. We reaffirm today our commitments that relate to the specific needs of migrants or refugees. The 2030 Agenda makes clear, inter alia, that we will facilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well managed migration policies. The needs of refugees, internally displaced persons and migrants are explicitly recognized.

17. The implementation of all relevant provisions of the 2030 Agenda for Sustainable Development will enable the positive contribution that migrants are making to sustainable development to be reinforced. At the same time, it will address many of the root causes of forced displacement, helping to create more favourable conditions in countries of origin. Meeting today, a year after our adoption of the 2030 Agenda, we are determined to realize the full potential of that Agenda for refugees and migrants.

18. We recall the Sendai Framework for Disaster Risk Reduction 2015–2030[3] and its recommendations concerning measures to mitigate risks associated with disasters. States that have signed and ratified the Paris Agreement on climate change[4] welcome that agreement and are committed to its implementation. We reaffirm the Addis Ababa Action Agenda of the Third International Conference on Financing for Development,[5] including its provisions that are applicable to refugees and migrants.

19. We take note of the report of the Secretary General, entitled "In safety and dignity: addressing large movements of refugees and migrants",[6] prepared pursuant to General Assembly decision 70/539 of 22 December 2015, in preparation for this high level meeting. While recognizing that the following conferences either did not have an intergovernmentally agreed outcome or were regional in scope, we take note of the World Humanitarian Summit, held in Istanbul, Turkey, on 23 and 24 May 2016, the high level meeting on global responsibility sharing through pathways for admission of Syrian refugees, convened by the Office of the United Nations High Commissioner for Refugees on 30 March 2016, the conference on "Supporting Syria and the Region", held in London on 4 February 2016, and the pledging conference on Somali refugees, held in Brussels on 21 October 2015. While recognizing that the following initiatives are regional in nature and apply only to those countries participating in them, we take note of regional initiatives such as the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, the European Union Horn of Africa Migration Route Initiative and the African Union–Horn of Africa Initiative on Human Trafficking and Smuggling of Migrants (the Khartoum Process), the Rabat Process, the Valletta Action Plan and the Brazil Declaration and Plan of Action.

20. We recognize the very large number of people who are displaced within national borders and the possibility that such persons might seek protection and assistance in other countries as refugees or migrants. We note the need for reflection on effective strategies to ensure adequate protection and assistance for internally displaced persons and to prevent and reduce such displacement.

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[3] Resolution 69/283, annex II.

[4] See FCCC/CP/2015/10/Add.1, decision 1/CP.21, annex.

[5] Resolution 69/313, annex.

[6] A/70/59.

Commitments

21. We have endorsed today a set of commitments that apply to both refugees and migrants, as well as separate sets of commitments for refugees and migrants. We do so taking into account different national realities, capacities and levels of development and respecting national policies and priorities. We reaffirm our commitment to international law and emphasize that the present declaration and its annexes are to be implemented in a manner that is consistent with the rights and obligations of States under international law. While some commitments are mainly applicable to one group, they may also be applicable to the other. Furthermore, while they are all framed in the context of the large movements we are considering today, many may be applicable also to regular migration. Annex I to the present declaration contains a comprehensive refugee response framework and outlines steps towards the achievement of a global compact on refugees in 2018, while annex II sets out steps towards the achievement of a global compact for safe, orderly and regular migration in 2018.

II. Commitments that apply to both refugees and migrants

22. Underlining the importance of a comprehensive approach to the issues involved, we will ensure a people centred, sensitive, humane, dignified, gender responsive and prompt reception for all persons arriving in our countries, and particularly those in large movements, whether refugees or migrants. We will also ensure full respect and protection for their human rights and fundamental freedoms.

23. We recognize and will address, in accordance with our obligations under international law, the special needs of all people in vulnerable situations who are travelling within large movements of refugees and migrants, including women at risk, children, especially those who are unaccompanied or separated from their families, members of ethnic and religious minorities, victims of violence, older persons, persons with disabilities, persons who are discriminated against on any basis, indigenous peoples, victims of human trafficking, and victims of exploitation and abuse in the context of the smuggling of migrants.

24. Recognizing that States have rights and responsibilities to manage and control their borders, we will implement border control procedures in conformity with applicable obligations under international law, including international human rights law and international refugee law. We will promote international cooperation on border control and management as an important element of security for States, including issues relating to battling transnational organized crime, terrorism and illicit trade. We will ensure that public officials and law enforcement officers who work in border areas are trained to uphold the human rights of all persons crossing, or seeking to cross, international borders. We will strengthen international border management cooperation, including in relation to training and the exchange of best practices. We will intensify support in this area and help to build capacity as appropriate. We reaffirm that, in line with the principle of non refoulement, individuals must not be returned at borders. We acknowledge also that, while upholding these obligations and principles, States are entitled to take measures to prevent irregular border crossings.

25. We will make efforts to collect accurate information regarding large movements of refugees and migrants. We will also take measures to identify correctly their nationalities, as well as their reasons for movement. We will take measures to identify those who are seeking international protection as refugees.

26. We will continue to protect the human rights and fundamental freedoms of all persons, in transit and after arrival. We stress the importance of addressing the immediate needs of persons who have been exposed to physical or psychological abuse while in transit upon their arrival, without discrimination and without regard to legal or migratory status or means of transportation. For this purpose, we will consider appropriate support to strengthen, at their request, capacity building for countries that receive large movements of refugees and migrants.

27. We are determined to address unsafe movements of refugees and migrants, with particular reference to irregular movements of refugees and migrants. We will do so without prejudice to the right to seek asylum. We will combat the exploitation, abuse and discrimination suffered by many refugees and migrants.

28. We express our profound concern at the large number of people who have lost their lives in transit. We commend the efforts already made to rescue people in distress at sea. We commit to intensifying international cooperation on the strengthening of search and rescue mechanisms. We will also work to improve the availability of accurate data on the whereabouts of people and vessels stranded at sea. In addition, we will strengthen support for rescue efforts over land along dangerous or isolated routes. We will draw attention to the risks involved in the use of such routes in the first instance.

29. We recognize and will take steps to address the particular vulnerabilities of women and children during the journey from country of origin to country of arrival. This includes their potential exposure to discrimination and exploitation, as well as to sexual, physical and psychological abuse, violence, human trafficking and contemporary forms of slavery.

30. We encourage States to address the vulnerabilities to HIV and the specific health care needs experienced by migrant and mobile populations, as well as by refugees and crisis affected populations, and to take steps to reduce stigma, discrimination and violence, as well as to review policies related to restrictions on entry based on HIV status, with a view to eliminating such restrictions and the return of people on the basis of their HIV status, and to support their access to HIV prevention, treatment, care and support.

31. We will ensure that our responses to large movements of refugees and migrants mainstream a gender perspective, promote gender equality and the empowerment of all women and girls and fully respect and protect the human rights of women and girls. We will combat sexual and gender based violence to the greatest extent possible. We will provide access to sexual and reproductive health care services. We will tackle the multiple and intersecting forms of discrimination against refugee and migrant women and girls. At the same time, recognizing the significant contribution and leadership of women in refugee and migrant communities, we will work to ensure their full, equal and meaningful participation in the development of local solutions and opportunities. We will take into consideration the different needs, vulnerabilities and capacities of women, girls, boys and men.

32. We will protect the human rights and fundamental freedoms of all refugee and migrant children, regardless of their status, and giving primary consideration at all times to the best interests of the child. This will apply particularly to unaccompanied children and those separated from their families; we will refer their care to the relevant national child protection authorities and other relevant

authorities. We will comply with our obligations under the Convention on the Rights of the Child.[7] We will work to provide for basic health, education and psychosocial development and for the registration of all births on our territories. We are determined to ensure that all children are receiving education within a few months of arrival, and we will prioritize budgetary provision to facilitate this, including support for host countries as required. We will strive to provide refugee and migrant children with a nurturing environment for the full realization of their rights and capabilities.

33. Reaffirming that all individuals who have crossed or are seeking to cross international borders are entitled to due process in the assessment of their legal status, entry and stay, we will consider reviewing policies that criminalize cross border movements. We will also pursue alternatives to detention while these assessments are under way. Furthermore, recognizing that detention for the purposes of determining migration status is seldom, if ever, in the best interest of the child, we will use it only as a measure of last resort, in the least restrictive setting, for the shortest possible period of time, under conditions that respect their human rights and in a manner that takes into account, as a primary consideration, the best interest of the child, and we will work towards the ending of this practice.

34. Reaffirming the importance of the United Nations Convention against Transnational Organized Crime and the two relevant Protocols thereto,[8] we encourage the ratification of, accession to and implementation of relevant international instruments on preventing and combating trafficking in persons and the smuggling of migrants.

35. We recognize that refugees and migrants in large movements are at greater risk of being trafficked and of being subjected to forced labour. We will, with full respect for our obligations under international law, vigorously combat human trafficking and migrant smuggling with a view to their elimination, including through targeted measures to identify victims of human trafficking or those at risk of trafficking. We will provide support for the victims of human trafficking. We will work to prevent human trafficking among those affected by displacement.

36. With a view to disrupting and eliminating the criminal networks involved, we will review our national legislation to ensure conformity with our obligations under international law on migrant smuggling, human trafficking and maritime safety. We will implement the United Nations Global Plan of Action to Combat Trafficking in Persons.[9] We will establish or upgrade, as appropriate, national and regional anti human trafficking policies. We note regional initiatives such as the African Union Horn of Africa Initiative on Human Trafficking and Smuggling of Migrants, the Plan of Action Against Trafficking in Persons, Especially Women and Children, of the Association of Southeast Asian Nations, the European Union Strategy towards the Eradication of Trafficking in Human Beings 2012 2016, and the Work Plans against Trafficking in Persons in the Western Hemisphere. We welcome reinforced technical cooperation, on a regional and bilateral basis, between countries of origin, transit and destination on the prevention of human trafficking and migrant smuggling and the prosecution of traffickers and smugglers.

[7] United Nations, *Treaty Series*, vol. 1577, No. 27531.

[8] Ibid., vols. 2225, 2237 and 2241, No. 39574.

[9] Resolution 64/293.

37. We favour an approach to addressing the drivers and root causes of large movements of refugees and migrants, including forced displacement and protracted crises, which would, inter alia, reduce vulnerability, combat poverty, improve self reliance and resilience, ensure a strengthened humanitarian development nexus, and improve coordination with peacebuilding efforts. This will involve coordinated prioritized responses based on joint and impartial needs assessments and facilitating cooperation across institutional mandates.

38. We will take measures to provide, on the basis of bilateral, regional and international cooperation, humanitarian financing that is adequate, flexible, predictable and consistent, to enable host countries and communities to respond both to the immediate humanitarian needs and to their longer term development needs. There is a need to address gaps in humanitarian funding, considering additional resources as appropriate. We look forward to close cooperation in this regard among Member States, United Nations entities and other actors and between the United Nations and international financial institutions such as the World Bank, where appropriate. We envisage innovative financing responses, risk financing for affected communities and the implementation of other efficiencies such as reducing management costs, improving transparency, increasing the use of national responders, expanding the use of cash assistance, reducing duplication, increasing engagement with beneficiaries, diminishing earmarked funding and harmonizing reporting, so as to ensure a more effective use of existing resources.

39. We commit to combating xenophobia, racism and discrimination in our societies against refugees and migrants. We will take measures to improve their integration and inclusion, as appropriate, and with particular reference to access to education, health care, justice and language training. We recognize that these measures will reduce the risks of marginalization and radicalization. National policies relating to integration and inclusion will be developed, as appropriate, in conjunction with relevant civil society organizations, including faith based organizations, the private sector, employers' and workers' organizations and other stakeholders. We also note the obligation for refugees and migrants to observe the laws and regulations of their host countries.

40. We recognize the importance of improved data collection, particularly by national authorities, and will enhance international cooperation to this end, including through capacity building, financial support and technical assistance. Such data should be disaggregated by sex and age and include information on regular and irregular flows, the economic impacts of migration and refugee movements, human trafficking, the needs of refugees, migrants and host communities and other issues. We will do so consistent with our national legislation on data protection, if applicable, and our international obligations related to privacy, as applicable.

III. Commitments for migrants

41. We are committed to protecting the safety, dignity and human rights and fundamental freedoms of all migrants, regardless of their migratory status, at all times. We will cooperate closely to facilitate and ensure safe, orderly and regular migration, including return and readmission, taking into account national legislation.

42. We commit to safeguarding the rights of, protecting the interests of and assisting our migrant communities abroad, including through consular protection, assistance and cooperation, in accordance with relevant international law. We

reaffirm that everyone has the right to leave any country, including his or her own, and to return to his or her country. We recall at the same time that each State has a sovereign right to determine whom to admit to its territory, subject to that State's international obligations. We recall also that States must readmit their returning nationals and ensure that they are duly received without undue delay, following confirmation of their nationalities in accordance with national legislation. We will take measures to inform migrants about the various processes relating to their arrival and stay in countries of transit, destination and return.

43. We commit to addressing the drivers that create or exacerbate large movements. We will analyse and respond to the factors, including in countries of origin, which lead or contribute to large movements. We will cooperate to create conditions that allow communities and individuals to live in peace and prosperity in their homelands. Migration should be a choice, not a necessity. We will take measures, inter alia, to implement the 2030 Agenda for Sustainable Development, whose objectives include eradicating extreme poverty and inequality, revitalizing the Global Partnership for Sustainable Development, promoting peaceful and inclusive societies based on international human rights and the rule of law, creating conditions for balanced, sustainable and inclusive economic growth and employment, combating environmental degradation and ensuring effective responses to natural disasters and the adverse impacts of climate change.

44. Recognizing that the lack of educational opportunities is often a push factor for migration, particularly for young people, we commit to strengthening capacities in countries of origin, including in educational institutions. We commit also to enhancing employment opportunities, particularly for young people, in countries of origin. We acknowledge also the impact of migration on human capital in countries of origin.

45. We will consider reviewing our migration policies with a view to examining their possible unintended negative consequences.

46. We also recognize that international migration is a multidimensional reality of major relevance for the development of countries of origin, transit and destination, which requires coherent and comprehensive responses. Migrants can make positive and profound contributions to economic and social development in their host societies and to global wealth creation. They can help to respond to demographic trends, labour shortages and other challenges in host societies, and add fresh skills and dynamism to the latter's economies. We recognize the development benefits of migration to countries of origin, including through the involvement of diasporas in economic development and reconstruction. We will commit to reducing the costs of labour migration and promote ethical recruitment policies and practices between sending and receiving countries. We will promote faster, cheaper and safer transfers of migrant remittances in both source and recipient countries, including through a reduction in transaction costs, as well as the facilitation of interaction between diasporas and their countries of origin. We would like these contributions to be more widely recognized and indeed, strengthened in the context of implementation of the 2030 Agenda for Sustainable Development.

47. We will ensure that all aspects of migration are integrated into global, regional and national sustainable development plans and into humanitarian, peacebuilding and human rights policies and programmes.

48. We call upon States that have not done so to consider ratifying, or acceding to, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.[10] We call also upon States that have not done so to consider acceding to relevant International Labour Organization conventions, as appropriate. We note, in addition, that migrants enjoy rights and protection under various provisions of international law.

49. We commit to strengthening global governance of migration. We therefore warmly support and welcome the agreement to bring the International Organization for Migration, an organization regarded by its Member States as the global lead agency on migration, into a closer legal and working relationship with the United Nations as a related organization.[11] We look forward to the implementation of this agreement, which will assist and protect migrants more comprehensively, help States to address migration issues and promote better coherence between migration and related policy domains.

50. We will assist, impartially and on the basis of needs, migrants in countries that are experiencing conflicts or natural disasters, working, as applicable, in coordination with the relevant national authorities. While recognizing that not all States are participating in them, we note in this regard the Migrants in Countries in Crisis initiative and the Agenda for the Protection of Cross Border Displaced Persons in the Context of Disasters and Climate Change resulting from the Nansen Initiative.

51. We take note of the work done by the Global Migration Group to develop principles and practical guidance on the protection of the human rights of migrants in vulnerable situations.

52. We will consider developing non binding guiding principles and voluntary guidelines, consistent with international law, on the treatment of migrants in vulnerable situations, especially unaccompanied and separated children who do not qualify for international protection as refugees and who may need assistance. The guiding principles and guidelines will be developed using a State led process with the involvement of all relevant stakeholders and with input from the Special Representative of the Secretary General on International Migration and Development, the International Organization for Migration, the Office of the United Nations High Commissioner for Human Rights, the Office of the United Nations High Commissioner for Refugees and other relevant United Nations system entities. They would complement national efforts to protect and assist migrants.

53. We welcome the willingness of some States to provide temporary protection against return to migrants who do not qualify for refugee status and who are unable to return home owing to conditions in their countries.

54. We will build on existing bilateral, regional and global cooperation and partnership mechanisms, in accordance with international law, for facilitating migration in line with the 2030 Agenda for Sustainable Development. We will strengthen cooperation to this end among countries of origin, transit and destination, including through regional consultative processes, international organizations, the International Red Cross and Red Crescent Movement, regional economic organizations and local government authorities, as well as with relevant private

[10] United Nations, *Treaty Series*, vol. 2220, No. 39481.

[11] Resolution 70/296, annex.

sector recruiters and employers, labour unions, civil society and migrant and diaspora groups. We recognize the particular needs of local authorities, who are the first receivers of migrants.

55. We recognize the progress made on international migration and development issues within the United Nations system, including the first and second High level Dialogues on International Migration and Development. We will support enhanced global and regional dialogue and deepened collaboration on migration, particularly through exchanges of best practice and mutual learning and the development of national or regional initiatives. We note in this regard the valuable contribution of the Global Forum on Migration and Development and acknowledge the importance of multi stakeholder dialogues on migration and development.

56. We affirm that children should not be criminalized or subject to punitive measures because of their migration status or that of their parents.

57. We will consider facilitating opportunities for safe, orderly and regular migration, including, as appropriate, employment creation, labour mobility at all skills levels, circular migration, family reunification and education related opportunities. We will pay particular attention to the application of minimum labour standards for migrant workers regardless of their status, as well as to recruitment and other migration related costs, remittance flows, transfers of skills and knowledge and the creation of employment opportunities for young people.

58. We strongly encourage cooperation among countries of origin or nationality, countries of transit, countries of destination and other relevant countries in ensuring that migrants who do not have permission to stay in the country of destination can return, in accordance with international obligations of all States, to their country of origin or nationality in a safe, orderly and dignified manner, preferably on a voluntary basis, taking into account national legislation in line with international law. We note that cooperation on return and readmission forms an important element of international cooperation on migration. Such cooperation would include ensuring proper identification and the provision of relevant travel documents. Any type of return, whether voluntary or otherwise, must be consistent with our obligations under international human rights law and in compliance with the principle of non refoulement. It should also respect the rules of international law and must in addition be conducted in keeping with the best interests of children and with due process. While recognizing that they apply only to States that have entered into them, we acknowledge that existing readmission agreements should be fully implemented. We support enhanced reception and reintegration assistance for those who are returned. Particular attention should be paid to the needs of migrants in vulnerable situations who return, such as children, older persons, persons with disabilities and victims of trafficking.

59. We reaffirm our commitment to protect the human rights of migrant children, given their vulnerability, particularly unaccompanied migrant children, and to provide access to basic health, education and psychosocial services, ensuring that the best interests of the child is a primary consideration in all relevant policies.

60. We recognize the need to address the special situation and vulnerability of migrant women and girls by, inter alia, incorporating a gender perspective into migration policies and strengthening national laws, institutions and programmes to combat gender based violence, including trafficking in persons and discrimination against women and girls.

61. While recognizing the contribution of civil society, including non governmental organizations, to promoting the well being of migrants and their integration into societies, especially at times of extremely vulnerable conditions, and the support of the international community to the efforts of such organizations, we encourage deeper interaction between Governments and civil society to find responses to the challenges and the opportunities posed by international migration.

62. We note that the Special Representative of the Secretary General on International Migration and Development, Mr. Peter Sutherland, will be providing, before the end of 2016, a report that will propose ways of strengthening international cooperation and the engagement of the United Nations on migration.

63. We commit to launching, in 2016, a process of intergovernmental negotiations leading to the adoption of a global compact for safe, orderly and regular migration at an intergovernmental conference to be held in 2018. We invite the President of the General Assembly to make arrangements for the determination of the modalities, timeline and other practicalities relating to the negotiation process. Further details regarding the process are set out in annex II to the present declaration.

IV. Commitments for refugees

64. Recognizing that armed conflict, persecution and violence, including terrorism, are among the factors which give rise to large refugee movements, we will work to address the root causes of such crisis situations and to prevent or resolve conflict by peaceful means. We will work in every way possible for the peaceful settlement of disputes, the prevention of conflict and the achievement of the long term political solutions required. Preventive diplomacy and early response to conflict on the part of States and the United Nations are critical. The promotion of human rights is also critical. In addition, we will promote good governance, the rule of law, effective, accountable and inclusive institutions, and sustainable development at the international, regional, national and local levels. Recognizing that displacement could be reduced if international humanitarian law were respected by all parties to armed conflict, we renew our commitment to uphold humanitarian principles and international humanitarian law. We confirm also our respect for the rules that safeguard civilians in conflict.

65. We reaffirm the 1951 Convention relating to the Status of Refugees[12] and the 1967 Protocol thereto[13] as the foundation of the international refugee protection regime. We recognize the importance of their full and effective application by States parties and the values they embody. We note with satisfaction that 148 States are now parties to one or both instruments. We encourage States not parties to consider acceding to those instruments and States parties with reservations to give consideration to withdrawing them. We recognize also that a number of States not parties to the international refugee instruments have shown a generous approach to hosting refugees.

66. We reaffirm that international refugee law, international human rights law and international humanitarian law provide the legal framework to strengthen the protection of refugees. We will ensure, in this context, protection for all who need it. We take note of regional refugee instruments, such as the Organization of African

[12] United Nations, *Treaty Series*, vol. 189, No. 2545.

[13] Ibid., vol. 606, No. 8791.

Unity Convention governing the specific aspects of refugee problems in Africa[14] and the Cartagena Declaration on Refugees.

67. We reaffirm respect for the institution of asylum and the right to seek asylum. We reaffirm also respect for and adherence to the fundamental principle of non refoulement in accordance with international refugee law.

68. We underline the centrality of international cooperation to the refugee protection regime. We recognize the burdens that large movements of refugees place on national resources, especially in the case of developing countries. To address the needs of refugees and receiving States, we commit to a more equitable sharing of the burden and responsibility for hosting and supporting the world's refugees, while taking account of existing contributions and the differing capacities and resources among States.

69. We believe that a comprehensive refugee response should be developed and initiated by the Office of the United Nations High Commissioner for Refugees, in close coordination with relevant States, including host countries, and involving other relevant United Nations entities, for each situation involving large movements of refugees. This should involve a multi stakeholder approach that includes national and local authorities, international organizations, international financial institutions, civil society partners (including faith based organizations, diaspora organizations and academia), the private sector, the media and refugees themselves. A comprehensive framework of this kind is annexed to the present declaration.

70. We will ensure that refugee admission policies or arrangements are in line with our obligations under international law. We wish to see administrative barriers eased, with a view to accelerating refugee admission procedures to the extent possible. We will, where appropriate, assist States to conduct early and effective registration and documentation of refugees. We will also promote access for children to child appropriate procedures. At the same time, we recognize that the ability of refugees to lodge asylum claims in the country of their choice may be regulated, subject to the safeguard that they will have access to, and enjoyment of, protection elsewhere.

71. We encourage the adoption of measures to facilitate access to civil registration and documentation for refugees. We recognize in this regard the importance of early and effective registration and documentation, as a protection tool and to facilitate the provision of humanitarian assistance.

72. We recognize that statelessness can be a root cause of forced displacement and that forced displacement, in turn, can lead to statelessness. We take note of the campaign of the Office of the United Nations High Commissioner for Refugees to end statelessness within a decade and we encourage States to consider actions they could take to reduce the incidence of statelessness. We encourage those States that have not yet acceded to the 1954 Convention relating to the Status of Stateless Persons[15] and the 1961 Convention on the Reduction of Statelessness[16] to consider doing so.

73. We recognize that refugee camps should be the exception and, to the extent possible, a temporary measure in response to an emergency. We note that 60 per cent

[14] Ibid., vol. 1001, No. 14691.

[15] Ibid., vol. 360, No. 5158.

[16] Ibid., vol. 989, No. 14458.

of refugees worldwide are in urban settings and only a minority are in camps. We will ensure that the delivery of assistance to refugees and host communities is adapted to the relevant context. We underline that host States have the primary responsibility to ensure the civilian and humanitarian character of refugee camps and settlements. We will work to ensure that this character is not compromised by the presence or activities of armed elements and to ensure that camps are not used for purposes that are incompatible with their civilian character. We will work to strengthen security in refugee camps and surrounding local communities, at the request and with the consent of the host country.

74. We welcome the extraordinarily generous contribution made to date by countries that host large refugee populations and will work to increase the support for those countries. We call for pledges made at relevant conferences to be disbursed promptly.

75. We commit to working towards solutions from the outset of a refugee situation. We will actively promote durable solutions, particularly in protracted refugee situations, with a focus on sustainable and timely return in safety and dignity. This will encompass repatriation, reintegration, rehabilitation and reconstruction activities. We encourage States and other relevant actors to provide support through, inter alia, the allocation of funds.

76. We reaffirm that voluntary repatriation should not necessarily be conditioned on the accomplishment of political solutions in the country of origin.

77. We intend to expand the number and range of legal pathways available for refugees to be admitted to or resettled in third countries. In addition to easing the plight of refugees, this has benefits for countries that host large refugee populations and for third countries that receive refugees.

78. We urge States that have not yet established resettlement programmes to consider doing so at the earliest opportunity. Those which have already done so are encouraged to consider increasing the size of their programmes. It is our aim to provide resettlement places and other legal pathways for admission on a scale that would enable the annual resettlement needs identified by the Office of the United Nations High Commissioner for Refugees to be met.

79. We will consider the expansion of existing humanitarian admission programmes, possible temporary evacuation programmes, including evacuation for medical reasons, flexible arrangements to assist family reunification, private sponsorship for individual refugees and opportunities for labour mobility for refugees, including through private sector partnerships, and for education, such as scholarships and student visas.

80. We are committed to providing humanitarian assistance to refugees so as to ensure essential support in key life saving sectors, such as health care, shelter, food, water and sanitation. We commit to supporting host countries and communities in this regard, including by using locally available knowledge and capacities. We will support community based development programmes that benefit both refugees and host communities.

81. We are determined to provide quality primary and secondary education in safe learning environments for all refugee children, and to do so within a few months of the initial displacement. We commit to providing host countries with support in this regard. Access to quality education, including for host communities, gives fundamental protection to children and youth in displacement contexts, particularly in situations of conflict and crisis.

82. We will support early childhood education for refugee children. We will also promote tertiary education, skills training and vocational education. In conflict and crisis situations, higher education serves as a powerful driver for change, shelters and protects a critical group of young men and women by maintaining their hopes for the future, fosters inclusion and non discrimination and acts as a catalyst for the recovery and rebuilding of post conflict countries.

83. We will work to ensure that the basic health needs of refugee communities are met and that women and girls have access to essential health care services. We commit to providing host countries with support in this regard. We will also develop national strategies for the protection of refugees within the framework of national social protection systems, as appropriate.

84. Welcoming the positive steps taken by individual States, we encourage host Governments to consider opening their labour markets to refugees. We will work to strengthen host countries' and communities' resilience, assisting them, for example, with employment creation and income generation schemes. In this regard, we recognize the potential of young people and will work to create the conditions for growth, employment and education that will allow them to be the drivers of development.

85. In order to meet the challenges posed by large movements of refugees, close coordination will be required among a range of humanitarian and development actors. We commit to putting those most affected at the centre of planning and action. Host Governments and communities may need support from relevant United Nations entities, local authorities, international financial institutions, regional development banks, bilateral donors, the private sector and civil society. We strongly encourage joint responses involving all such actors in order to strengthen the nexus between humanitarian and development actors, facilitate cooperation across institutional mandates and, by helping to build self reliance and resilience, lay a basis for sustainable solutions. In addition to meeting direct humanitarian and development needs, we will work to support environmental, social and infrastructural rehabilitation in areas affected by large movements of refugees.

86. We note with concern a significant gap between the needs of refugees and the available resources. We encourage support from a broader range of donors and will take measures to make humanitarian financing more flexible and predictable, with diminished earmarking and increased multi year funding, in order to close this gap. United Nations entities such as the Office of the United Nations High Commissioner for Refugees and the United Nations Relief and Works Agency for Palestine Refugees in the Near East and other relevant organizations require sufficient funding to be able to carry out their activities effectively and in a predictable manner. We welcome the increasing engagement of the World Bank and multilateral development banks and improvements in access to concessional development financing for affected communities. It is clear, furthermore, that private sector investment in support of refugee communities and host countries will be of critical importance over the coming years. Civil society is also a key partner in every region of the world in responding to the needs of refugees.

87. We note that the United States of America, Canada, Ethiopia, Germany, Jordan, Mexico, Sweden and the Secretary General will host a high level meeting on refugees on 20 September 2016.

V. Follow-up to and review of our commitments

88. We recognize that arrangements are needed to ensure systematic follow up to and review of all of the commitments we are making today. Accordingly, we request the Secretary General to ensure that the progress made by Member States and the United Nations in implementing the commitments made at today's high level meeting will be the subject of periodic assessments provided to the General Assembly with reference, as appropriate, to the 2030 Agenda for Sustainable Development.

89. In addition, a role in reviewing relevant aspects of the present declaration should be envisaged for the periodic High level Dialogues on International Migration and Development and for the annual report of the United Nations High Commissioner for Refugees to the General Assembly.

90. In recognition of the need for significant financial and programme support to host countries and communities affected by large movements of refugees and migrants, we request the Secretary General to report to the General Assembly at its seventy first session on ways of achieving greater efficiency, operational effectiveness and system wide coherence, as well as ways of strengthening the engagement of the United Nations with international financial institutions and the private sector, with a view to fully implementing the commitments outlined in the present declaration.

3rd plenary meeting
19 September 2016

Annex I

Comprehensive refugee response framework

1. The scale and nature of refugee displacement today requires us to act in a comprehensive and predictable manner in large scale refugee movements. Through a comprehensive refugee response based on the principles of international cooperation and on burden and responsibility sharing, we are better able to protect and assist refugees and to support the host States and communities involved.

2. The comprehensive refugee response framework will be developed and initiated by the Office of the United Nations High Commissioner for Refugees, in close coordination with relevant States, including host countries, and involving other relevant United Nations entities, for each situation involving large movements of refugees. A comprehensive refugee response should involve a multi stakeholder approach, including national and local authorities, international organizations, international financial institutions, regional organizations, regional coordination and partnership mechanisms, civil society partners, including faith based organizations and academia, the private sector, media and the refugees themselves.

3. While each large movement of refugees will differ in nature, the elements noted below provide a framework for a comprehensive and people centred refugee response, which is in accordance with international law and best international practice and adapted to the specific context.

4. We envisage a comprehensive refugee response framework for each situation involving large movements of refugees, including in protracted situations, as an integral and distinct part of an overall humanitarian response, where it exists, and which would normally contain the elements set out below.

Reception and admission

5. At the outset of a large movement of refugees, receiving States, bearing in mind their national capacities and international legal obligations, in cooperation, as appropriate, with the Office of the United Nations High Commissioner for Refugees, international organizations and other partners and with the support of other States as requested, in conformity with international obligations, would:

(*a*) Ensure, to the extent possible, that measures are in place to identify persons in need of international protection as refugees, provide for adequate, safe and dignified reception conditions, with a particular emphasis on persons with specific needs, victims of human trafficking, child protection, family unity, and prevention of and response to sexual and gender based violence, and support the critical contribution of receiving communities and societies in this regard;

(*b*) Take account of the rights, specific needs, contributions and voices of women and girl refugees;

(*c*) Assess and meet the essential needs of refugees, including by providing access to adequate safe drinking water, sanitation, food, nutrition, shelter, psychosocial support and health care, including sexual and reproductive health, and providing assistance to host countries and communities in this regard, as required;

(*d*) Register individually and document those seeking protection as refugees, including in the first country where they seek asylum, as quickly as possible upon their arrival. To achieve this, assistance may be needed, in areas such as biometric technology and other technical and financial support, to be coordinated by the Office of the United Nations High Commissioner for Refugees with relevant actors and partners, where necessary;

(*e*) Use the registration process to identify specific assistance needs and protection arrangements, where possible, including but not exclusively for refugees with special protection concerns, such as women at risk, children, especially unaccompanied children and children separated from their families, child headed and single parent households, victims of trafficking, victims of trauma and survivors of sexual violence, as well as refugees with disabilities and older persons;

(*f*) Work to ensure the immediate birth registration for all refugee children born on their territory and provide adequate assistance at the earliest opportunity with obtaining other necessary documents, as appropriate, relating to civil status, such as marriage, divorce and death certificates;

(*g*) Put in place measures, with appropriate legal safeguards, which uphold refugees' human rights, with a view to ensuring the security of refugees, as well as measures to respond to host countries' legitimate security concerns;

(*h*) Take measures to maintain the civilian and humanitarian nature of refugee camps and settlements;

(*i*) Take steps to ensure the credibility of asylum systems, including through collaboration among the countries of origin, transit and destination and to facilitate the return and readmission of those who do not qualify for refugee status.

Support for immediate and ongoing needs

6. States, in cooperation with multilateral donors and private sector partners, as appropriate, would, in coordination with receiving States:

(*a*) Mobilize adequate financial and other resources to cover the humanitarian needs identified within the comprehensive refugee response framework;

(*b*) Provide resources in a prompt, predictable, consistent and flexible manner, including through wider partnerships involving State, civil society, faith based and private sector partners;

(*c*) Take measures to extend the finance lending schemes that exist for developing countries to middle income countries hosting large numbers of refugees, bearing in mind the economic and social costs to those countries;

(*d*) Consider establishing development funding mechanisms for such countries;

(*e*) Provide assistance to host countries to protect the environment and strengthen infrastructure affected by large movements of refugees;

(*f*) Increase support for cash based delivery mechanisms and other innovative means for the efficient provision of humanitarian assistance, where appropriate, while increasing accountability to ensure that humanitarian assistance reaches its beneficiaries.

7. Host States, in cooperation with the Office of the United Nations High Commissioner for Refugees and other United Nations entities, financial institutions and other relevant partners, would, as appropriate:

(*a*) Provide prompt, safe and unhindered access to humanitarian assistance for refugees in accordance with existing humanitarian principles;

(*b*) Deliver assistance, to the extent possible, through appropriate national and local service providers, such as public authorities for health, education, social services and child protection;

(*c*) Encourage and empower refugees, at the outset of an emergency phase, to establish supportive systems and networks that involve refugees and host communities and are age and gender sensitive, with a particular emphasis on the protection and empowerment of women and children and other persons with specific needs;

(*d*) Support local civil society partners that contribute to humanitarian responses, in recognition of their complementary contribution;

(*e*) Ensure close cooperation and encourage joint planning, as appropriate, between humanitarian and development actors and other relevant actors.

Support for host countries and communities

8. States, the Office of the United Nations High Commissioner for Refugees and relevant partners would:

(*a*) Implement a joint, impartial and rapid risk and/or impact assessment, in anticipation or after the onset of a large refugee movement, in order to identify and prioritize the assistance required for refugees, national and local authorities, and communities affected by a refugee presence;

(*b*) Incorporate, where appropriate, the comprehensive refugee response framework in national development planning, in order to strengthen the delivery of essential services and infrastructure for the benefit of host communities and refugees;

(*c*) Work to provide adequate resources, without prejudice to official development assistance, for national and local government authorities and other service providers in view of the increased needs and pressures on social services. Programmes should benefit refugees and the host country and communities.

Durable solutions

9. We recognize that millions of refugees around the world at present have no access to timely and durable solutions, the securing of which is one of the principal goals of international protection. The success of the search for solutions depends in large measure on resolute and sustained international cooperation and support.

10. We believe that actions should be taken in pursuit of the following durable solutions: voluntary repatriation, local solutions and resettlement and complementary pathways for admission. These actions should include the elements set out below.

11. We reaffirm the primary goal of bringing about conditions that would help refugees return in safety and dignity to their countries and emphasize the need to tackle the root causes of violence and armed conflict and to achieve necessary political solutions and the peaceful settlement of disputes, as well as to assist in reconstruction efforts. In this context, States of origin/nationality would:

(*a*) Acknowledge that everyone has the right to leave any country, including his or her own, and to return to his or her country;

(*b*) Respect this right and also respect the obligation to receive back their nationals, which should occur in a safe, dignified and humane manner and with full respect for human rights in accordance with obligations under international law;

(*c*) Provide necessary identification and travel documents;

(*d*) Facilitate the socioeconomic reintegration of returnees;

(*e*) Consider measures to enable the restitution of property.

12. To ensure sustainable return and reintegration, States, United Nations organizations and relevant partners would:

(*a*) Recognize that the voluntary nature of repatriation is necessary as long as refugees continue to require international protection, that is, as long as they cannot regain fully the protection of their own country;

(*b*) Plan for and support measures to encourage voluntary and informed repatriation, reintegration and reconciliation;

(*c*) Support countries of origin/nationality, where appropriate, including through funding for rehabilitation, reconstruction and development, and with the necessary legal safeguards to enable refugees to access legal, physical and other support mechanisms needed for the restoration of national protection and their reintegration;

(*d*) Support efforts to foster reconciliation and dialogue, particularly with refugee communities and with the equal participation of women and youth, and to ensure respect for the rule of law at the national and local levels;

(*e*) Facilitate the participation of refugees, including women, in peace and reconciliation processes, and ensure that the outcomes of such processes duly support their return in safety and dignity;

(*f*) Ensure that national development planning incorporates the specific needs of returnees and promotes sustainable and inclusive reintegration, as a measure to prevent future displacement.

13. Host States, bearing in mind their capacities and international legal obligations, in cooperation with the Office of the United Nations High Commissioner for Refugees, the United Nations Relief and Works Agency for

Palestine Refugees in the Near East, where appropriate, and other United Nations entities, financial institutions and other relevant partners, would:

(*a*) Provide legal stay to those seeking and in need of international protection as refugees, recognizing that any decision regarding permanent settlement in any form, including possible naturalization, rests with the host country;

(*b*) Take measures to foster self reliance by pledging to expand opportunities for refugees to access, as appropriate, education, health care and services, livelihood opportunities and labour markets, without discriminating among refugees and in a manner which also supports host communities;

(*c*) Take measures to enable refugees, including in particular women and youth, to make the best use of their skills and capacities, recognizing that empowered refugees are better able to contribute to their own and their communities' well being;

(*d*) Invest in building human capital, self reliance and transferable skills as an essential step towards enabling long term solutions.

14. Third countries would:

(*a*) Consider making available or expanding, including by encouraging private sector engagement and action as a supplementary measure, resettlement opportunities and complementary pathways for admission of refugees through such means as medical evacuation and humanitarian admission programmes, family reunification and opportunities for skilled migration, labour mobility and education;

(*b*) Commit to sharing best practices, providing refugees with sufficient information to make informed decisions and safeguarding protection standards;

(*c*) Consider broadening the criteria for resettlement and humanitarian admission programmes in mass displacement and protracted situations, coupled with, as appropriate, temporary humanitarian evacuation programmes and other forms of admission.

15. States that have not yet established resettlement programmes are encouraged to do so at the earliest opportunity. Those that have already done so are encouraged to consider increasing the size of their programmes. Such programmes should incorporate a non discriminatory approach and a gender perspective throughout.

16. States aim to provide resettlement places and other legal pathways on a scale that would enable the annual resettlement needs identified by the Office of the United Nations High Commissioner for Refugees to be met.

The way forward

17. We commit to implementing this comprehensive refugee response framework.

18. We invite the Office of the United Nations High Commissioner for Refugees to engage with States and consult with all relevant stakeholders over the coming two years, with a view to evaluating the detailed practical application of the comprehensive refugee response framework and assessing the scope for refinement and further development. This process should be informed by practical experience with the implementation of the framework in a range of specific situations. The objective would be to ease pressures on the host countries involved, to enhance refugee self reliance, to expand access to third country solutions and to support conditions in countries of origin for return in safety and dignity.

19. We will work towards the adoption in 2018 of a global compact on refugees, based on the comprehensive refugee response framework and on the outcomes of the process described above. We invite the United Nations High Commissioner for Refugees to include such a proposed global compact on refugees in his annual report to the General Assembly in 2018, for consideration by the Assembly at its seventy third session in conjunction with its annual resolution on the Office of the United Nations High Commissioner for Refugees.

Annex II

Towards a global compact for safe, orderly and regular migration

I. Introduction

1. This year, we will launch a process of intergovernmental negotiations leading to the adoption of a global compact for safe, orderly and regular migration.

2. The global compact would set out a range of principles, commitments and understandings among Member States regarding international migration in all its dimensions. It would make an important contribution to global governance and enhance coordination on international migration. It would present a framework for comprehensive international cooperation on migrants and human mobility. It would deal with all aspects of international migration, including the humanitarian, developmental, human rights related and other aspects of migration. It would be guided by the 2030 Agenda for Sustainable Development[17] and the Addis Ababa Action Agenda of the Third International Conference on Financing for Development,[18] and informed by the Declaration of the High level Dialogue on International Migration and Development adopted in October 2013.[19]

II. Context

3. We acknowledge the important contribution made by migrants and migration to development in countries of origin, transit and destination, as well as the complex interrelationship between migration and development.

4. We recognize the positive contribution of migrants to sustainable and inclusive development. We also recognize that international migration is a multidimensional reality of major relevance for the development of countries of origin, transit and destination, which requires coherent and comprehensive responses.

5. We will cooperate internationally to ensure safe, orderly and regular migration involving full respect for human rights and the humane treatment of migrants, regardless of migration status. We underline the need to ensure respect for the dignity of migrants and the protection of their rights under applicable international law, including the principle of non discrimination under international law.

6. We emphasize the multidimensional character of international migration, the importance of international, regional and bilateral cooperation and dialogue in this regard, and the need to protect the human rights of all migrants, regardless of status, particularly at a time when migration flows have increased.

[17] Resolution 70/1.
[18] Resolution 69/313, annex.
[19] Resolution 68/4.

7. We bear in mind that policies and initiatives on the issue of migration should promote holistic approaches that take into account the causes and consequences of the phenomenon. We acknowledge that poverty, underdevelopment, lack of opportunities, poor governance and environmental factors are among the drivers of migration. In turn, pro poor policies relating to trade, employment and productive investments can stimulate growth and create enormous development potential. We note that international economic imbalances, poverty and environmental degradation, combined with the absence of peace and security and lack of respect for human rights, are all factors affecting international migration.

III. Content

8. The global compact could include, but would not be limited to, the following elements:

(*a*) International migration as a multidimensional reality of major relevance for the development of countries of origin, transit and destination, as recognized in the 2030 Agenda for Sustainable Development;

(*b*) International migration as a potential opportunity for migrants and their families;

(*c*) The need to address the drivers of migration, including through strengthened efforts in development, poverty eradication and conflict prevention and resolution;

(*d*) The contribution made by migrants to sustainable development and the complex interrelationship between migration and development;

(*e*) The facilitation of safe, orderly, regular and responsible migration and mobility of people, including through the implementation of planned and well managed migration policies; this may include the creation and expansion of safe, regular pathways for migration;

(*f*) The scope for greater international cooperation, with a view to improving migration governance;

(*g*) The impact of migration on human capital in countries of origin;

(*h*) Remittances as an important source of private capital and their contribution to development and promotion of faster, cheaper and safer transfers of remittances through legal channels, in both source and recipient countries, including through a reduction in transaction costs;

(*i*) Effective protection of the human rights and fundamental freedoms of migrants, including women and children, regardless of their migratory status, and the specific needs of migrants in vulnerable situations;

(*j*) International cooperation for border control, with full respect for the human rights of migrants;

(*k*) Combating trafficking in persons, smuggling of migrants and contemporary forms of slavery;

(*l*) Identifying those who have been trafficked and considering providing assistance, including temporary or permanent residency, and work permits, as appropriate;

(*m*) Reduction of the incidence and impact of irregular migration;

(*n*) Addressing the situations of migrants in countries in crisis;

(*o*) Promotion, as appropriate, of the inclusion of migrants in host societies, access to basic services for migrants and gender responsive services;

(*p*) Consideration of policies to regularize the status of migrants;

(*q*) Protection of labour rights and a safe environment for migrant workers and those in precarious employment, protection of women migrant workers in all sectors and promotion of labour mobility, including circular migration;

(*r*) The responsibilities and obligations of migrants towards host countries;

(*s*) Return and readmission, and improving cooperation in this regard between countries of origin and destination;

(*t*) Harnessing the contribution of diasporas and strengthening links with countries of origin;

(*u*) Combating racism, xenophobia, discrimination and intolerance towards all migrants;

(*v*) Disaggregated data on international migration;

(*w*) Recognition of foreign qualifications, education and skills and cooperation in access to and portability of earned benefits;

(*x*) Cooperation at the national, regional and international levels on all aspects of migration.

IV. The way forward

9. The global compact would be elaborated through a process of intergovernmental negotiations, for which preparations will begin immediately. The negotiations, which will begin in early 2017, are to culminate in an intergovernmental conference on international migration in 2018 at which the global compact will be presented for adoption.

10. As the Third High level Dialogue on International Migration and Development is to be held in New York no later than 2019,[20] a role should be envisaged for the High level Dialogue in the process.

11. The President of the General Assembly is invited to make early arrangements for the appointment of two co facilitators to lead open, transparent and inclusive consultations with States, with a view to the determination of modalities, a timeline, the possible holding of preparatory conferences and other practicalities relating to the intergovernmental negotiations, including the integration of Geneva based migration expertise.

12. The Secretary General is requested to provide appropriate support for the negotiations. We envisage that the Secretariat of the United Nations and the International Organization for Migration would jointly service the negotiations, the former providing capacity and support and the latter extending the technical and policy expertise required.

13. We envisage also that the Special Representative of the Secretary General for International Migration and Development, Mr. Peter Sutherland, would coordinate

[20] See resolution 69/229, para. 32.

the contributions to be made to the negotiation process by the Global Forum on Migration and Development and the Global Migration Group. We envisage that the International Labour Organization, the United Nations Office on Drugs and Crime, the Office of the United Nations High Commissioner for Refugees, the United Nations Development Programme, the Office of the United Nations High Commissioner for Human Rights and other entities with significant mandates and expertise related to migration would contribute to the process.

14. Regional consultations in support of the negotiations would be desirable, including through existing consultative processes and mechanisms, where appropriate.

15. Civil society, the private sector, diaspora communities and migrant organizations would be invited to contribute to the process for the preparation of the global compact.

EXHIBIT 3

MEMORANDUM TO THE PRESIDENT

OCT 23 2017

FROM: Rex W. Tillerson
Secretary
Department of State

Elaine Duke
Acting Secretary
Department of Homeland Security

Daniel Coats
Director
Office of the Director of National Intelligence

RESUMING THE UNITED STATES REFUGEE ADMISSIONS PROGRAM WITH ENHANCED VETTING CAPABILITIES

In section 6(a) of Executive Order 13780 of March 6, 2017 (Protecting the Nation from Foreign Terrorist Entry into the United States), you directed a review to strengthen the vetting process for the U.S. Refugee Admissions Program (USRAP). You instructed the Secretary of State to suspend the travel of refugees into the United States under that program, and the Secretary of Homeland Security to suspend decisions on applications for refugee status, for a temporary, 120-day period, subject to certain exceptions. During the 120-day suspension period, Section 6(a) required the Secretary of State, in conjunction with the Secretary of Homeland Security and in consultation with the Director of National Intelligence, to review the USRAP application and adjudication processes to determine what additional procedures should be used to ensure that individuals seeking admission as refugees do not pose a threat to the security and welfare of the United States, and to implement such additional procedures.

The Secretary of State convened a working group to implement the review process under section 6(a) of Executive Order 13780, which proceeded in parallel with the development of the uniform baseline of screening and vetting standards and procedures for all travelers under section 5 of that Executive Order. The section 6(a) working group then compared the refugee screening and vetting process with the uniform baseline standards and procedures established by the section 5 working group. This helped to inform the section 6(a) working group's identification of a number of additional ways to enhance the refugee screening and vetting processes. The Secretary of State and the Secretary of Homeland Security have begun implementing those improvements.

Pursuant to section 6(a), this memorandum reflects our joint determination that the improvements to the USRAP vetting process identified by the 6(a) working group are generally adequate to ensure the security and welfare of the United States, and therefore that the Secretary

of State may resume travel of refugees into the United States and that the Secretary of Homeland Security may resume making decisions on applications for refugee status for stateless persons and foreign nationals, subject to the conditions described below.

Notwithstanding the additional procedures identified or implemented during the last 120 days, we continue to have concerns regarding the admission of nationals of, and stateless persons who last habitually resided in, 11 particular countries previously identified as posing a higher risk to the United States through their designation on the Security Advisory Opinion (SAO) list. The SAO list for refugees was established following the September 11th terrorist attacks and has evolved over the years through interagency consultations. The current list of countries was established in 2015. To address these concerns, we will conduct a detailed threat analysis and review for nationals of these high risk countries and stateless persons who last habitually resided in those countries, including a threat assessment of each country, pursuant to section 207(c) and applicable portions of section 212(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1157(c) and 1182(a), section 402(4) of the Homeland Security Act of 2002, 6 U.S.C. 202(4), and other applicable authorities. During this review, the Secretary of State and the Secretary of Homeland Security will temporarily prioritize refugee applications from other non-SAO countries. DHS and DOS will work together to take resources that may have been dedicated to processing nationals of, or stateless persons who last habitually resided in, SAO countries and, during the temporary review period, reallocate them to process applicants from non-SAO countries for whom the processing may not be as resource intensive.

While the temporary review is underway, the Secretaries of Homeland Security and State will cooperate to carefully scrutinize the applications of nationals of countries on the SAO list, or of stateless persons who last habitually resided in those countries, and will consider individuals for potential admission whose resettlement in the United States would fulfill critical foreign policy interests, without compromising national security and the welfare of the United States. As such, the Secretary of Homeland Security will admit on a case-by-case basis only refugees whose admission is deemed to be in the national interest and poses no threat to the security or welfare of the United States. We will direct our staff to work jointly and with law enforcement agencies to complete the additional review of the SAO countries no later than 90 days from the date of this memorandum, and to determine what additional safeguards, if any, are necessary to ensure that the admission of refugees from these countries of concern does not pose a threat to the security and welfare of the United States.

Further, it is our joint determination that additional security measures must be implemented promptly for derivative refugees—those who are "following-to-join" principal refugees that have already been resettled in the United States—regardless of nationality.[1] At present, the majority of following-to-join refugees, unlike principal refugees, do not undergo enhanced DHS review, which includes soliciting information from the refugee applicant earlier

[1] When a refugee is processed for admission to the United States, eligible family members located in the same place as the refugee (spouses and/or unmarried children under 21 years of age) typically are also processed at the same time, and they receive the same screening as the principal refugee. Each year, however, resettled principal refugees also petition, through a separate process, for approximately 2,500 family members to be admitted to the United States as following-to-join refugees. The family member may be residing and processed in a different country than where the principal refugee was processed, and while most following-to-join refugees share the nationality of the principal, some may be of a different nationality.

in the process to provide for a more thorough screening process, as well as vetting certain nationals or stateless persons against classified databases. We have jointly determined that additional security measures must be implemented before admission of following-to-join refugees can resume. Based on an assessment of current systems checks, as well as requirements for uniformity identified by Section 5, we will direct our staffs to work jointly to implement adequate screening mechanisms for following-to-join refugees that are similar to the processes employed for principal refugees, in order to ensure the security and welfare of the United States. We will resume admission of following-to-join refugees once those enhancements have been implemented.

Rex W. Tillerson
Secretary
Department of State

Elaine Duke
Acting Secretary
Department of
Homeland Security

Dan Coats
Director
National Intelligence

UNCLASSIFIED

Addendum to Section 6(a) Memorandum

Executive Order 13780, *Protecting the Nation from Foreign Terrorist Entry into the United States*

Section 6(a) of Executive Order 13780 of March 6, 2017 (Protecting the Nation from Foreign Terrorist Entry into the United States), required a review of the United States Refugee Admissions Program (USRAP) application and adjudication process during a 120-day period to determine what additional procedures should be used to ensure that individuals seeking admission as refugees do not pose a threat to the security and welfare of the United States. The Secretary of State (State), in conjunction with the Secretary of Homeland Security (DHS) and in consultation with the Director of National Intelligence (ODNI) established an interagency working group (the Section 6(a) Working Group) to undertake this review.

This addendum provides a summary of the additional procedures that have been and will be implemented. A classified report provides further detail of this review and enhancements. The interagency working group has recommended and implemented enhanced vetting procedures in three areas: ***application, interviews and adjudications, and system checks.***

Interagency Approach to the Review

To conduct the review, the Section 6(a) Working Group conducted a baseline assessment of USRAP application and adjudication processes and developed additional procedures to further enhance the security and welfare of the United States. The Section 6(a) Working Group ensured alignment with other concurrent and relevant reviews undertaken under the Executive Order, such as the review under Section 5, which established uniform baseline screening standards for all travelers to the United States.

All individuals admitted through the USRAP already receive a baseline of extensive security checks. The USRAP also requires additional screening and procedures for certain individuals from 11 specific countries that have been assessed by the U.S. government to pose elevated potential risks to national security; these individuals are subject to additional vetting through Security Advisory Opinions (SAOs)[1]. The SAO list for refugees was established following the September 11th terrorist attacks and has evolved over the years through interagency consultations. The most recent list was updated in 2015. The Section 6(a) Working Group agreed to continue to follow this tiered approach to assessing risk and agreed that these nationalities continued to require additional vetting based on current elevated potential for risk. Each additional procedure identified during the 120-day review was evaluated to determine whether it should apply to stateless persons and refugees of all nationalities or only certain nationalities.[2]

[1] The SAO is a DOS-initiated biographic check conducted by the Federal Bureau of Investigation and intelligence community partners. SAO name checks are initiated for the groups and nationalities designated by the U.S. government as requiring this higher level check.

[2] Stateless persons in this regard means persons without nationality who last habitually resided in one of these countries.

Additional Procedures for Refugee Applicants Seeking Resettlement in the United States

Application Process:

- **Increased Data Collection:** Additional data are being collected from all applicants in order to enhance the effectiveness of biographic security checks. These changes will improve the ability to determine whether an applicant is being truthful about his or her claims, has engaged in criminal or terrorist activity, has terrorist ties, or is otherwise connected to nefarious actors.

- **Enhanced Identity Management:** The electronic refugee case management system has been improved to better detect potential fraud by strengthening the ability to identify duplicate identities or identity documents. Any such matches are subject to further investigation prior to an applicant being allowed to travel. These changes will make it harder for applicants to use deceptive tactics to enter our country.

Interview and Adjudication Process:

- **Fraud Detection and National Security:** DHS's U.S. Citizenship and Immigration Services (USCIS) will forward-deploy specially trained Fraud Detection and National Security (FDNS) officers at refugee processing locations to help identify potential fraud, national security, and public safety issues on certain circuit rides to advise and assist interviewing officers. With FDNS officers on the ground, the United States will be better positioned to detect and disrupt fraud and identify potential national security and public safety threats.

- **New Guidance and Training:** USCIS is strengthening its guidance on how to assess the credibility and admissibility of refugee applicants. This new guidance clarifies how officers should identify and analyze grounds of inadmissibility related to drug offenses, drug trafficking, prostitution, alien smuggling, torture, membership in totalitarian parties, fraud and misrepresentation, certain immigration violations, and other criminal activity. USCIS has also updated guidance for refugee adjudicators to give them greater flexibility in assessing the credibility of refugee applicants, including expanding factors that may be considered in making a credibility determination consistent with the REAL ID Act. This enhanced guidance supplements the robust credibility guidance and training USCIS officers already receive prior to adjudicating refugee cases. Additionally, the updated guidance equips officers with tactics to identify inadequate or improper interpretation.

- **Expanded Information-Sharing:** State and USCIS are exchanging more in-depth information to link related cases so that interviewing officers are able to develop more tailored lines of questioning that will help catch potential fraud, national security threats, or public safety concerns.

System Checks:

- **Updating Security Checks:** Measures have been put in place to ensure that if applicants change or update key data points, including new or altered biographic information, that such data is then subject to renewed scrutiny and security checks. This will add an additional layer of protection to identify fraud and national security issues.

- **Security Advisory Opinions (SAOs):** Departments and agencies have agreed to expand the classes of refugee applicants that are subject to SAOs, thereby ensuring that more refugees receive deeper vetting.

    - USCIS' Fraud Detection and National Security Directorate is also expanding its "enhanced review" process for applicants who meet SAO criteria. This includes checks against certain social media and classified databases.

Additional Review Process for Certain Categories of Refugee Applicants

The Department of Homeland Security continues to have concerns regarding the admission of nationals of, and stateless persons who last habitually resided in, 11 particular countries previously identified as posing a higher risk to the United States through their designation on the SAO list. The SAO list for refugees was established following the September 11th terrorist attacks and has evolved over the years through interagency consultations. The current list of countries was established in 2015.

As such, for countries subject to SAOs, the Secretary of State and the Secretary of Homeland Security, in consultation with the Director of National Intelligence and the Attorney General, will coordinate a review and analysis of each country, pursuant to existing USRAP authorities. This review will include an in-depth threat assessment of each country, to be completed within 90 days. Moreover, it will include input and analysis from the intelligence and law enforcement communities, as well as all relevant information related to ongoing or completed investigations and national security risks and mitigation strategies.

This review will be tailored to each SAO country, and decisions may be made for each country independently. While the temporary review is underway, the Secretaries of Homeland Security and State will cooperate to carefully scrutinize the applications of nationals of, and stateless persons who last habitually resided in, countries on the SAO list and will consider individuals for potential admission whose resettlement in the United States would fulfill critical foreign policy interests, without compromising national security and the welfare of the United States. As such, the Secretary of Homeland Security may admit on a case-by-case basis only refugees whose admission is deemed to be in the national interest and poses no threat to the security or welfare of the United States.

In addition, during this review period, the Secretary of State and the Secretary of Homeland Security will temporarily prioritize refugee applications from non-SAO countries. DHS and DOS will work together to take resources that may have been dedicated to processing nationals of, or stateless persons who last habitually resided in, SAO countries and, during the temporary

review period, reallocate them to process applicants from non-SAO countries for whom the processing may not be as resource intensive. This means that refugee admissions for nationals of, and stateless persons who last habitually resided in, SAO countries will occur at a slower pace, at least during the temporary review period and likely further into the fiscal year, as the deployment of additional screening and integrity measures have historically led to lengthier processing times. While DHS prioritizes its resources in this manner until the additional analysis is completed, DHS will interview refugee applicants as appropriate from SAO countries on a discretionary basis.

Form I-730 Refugee Following-to-Join Processing

A principal refugee applicant may include his or her spouse and unmarried children under 21 years of age as derivative refugee applicants on his or her Form I-590, Registration for Classification as a Refugee. When these family members are co-located with the principal, the derivative applicants generally are processed through the USRAP and, if approved, travel to the United States with the principal refugee applicant. These family members receive the same baseline security checks as the principal refugee and, if found eligible, are admitted as refugees. Alternatively, a principal refugee admitted to the United States may file a Form I-730, Refugee/Asylee Relative Petition, for his or her spouse and unmarried children under 21 years of age, to follow-to-join the principal refugee in the United States. If DHS grants the petition after interview and vetting, the approved spouse or unmarried child is admitted as a refugee and counted toward the annual refugee ceiling. While the vast majority of eligible refugee family members admitted to the United States each year accompany, and are screened with, the principal refugee, principal refugees admitted to the United States file petitions for approximately 2,500 family members to join them in the United States through the following-to-join process. Following-to-join family members may be residing and processed in a different country than where the principal refugee was processed, and while most share the nationality of the principal refugee, some may be of a different nationality. In any given year, DHS receives petitions for beneficiaries representing over 60 different nationalities. In recent years, the nationalities most represented were Iraqi, Somali, Burmese, Congolese, Ethiopian and Eritrean.

The majority of following-to-join refugees do not receive the same, full baseline interagency checks that principal refugees receive. Nor do following-to-join refugees currently undergo enhanced DHS review, which includes soliciting information from the refugee earlier in the process to provide for more thorough screening and vetting of certain nationals or stateless persons against classified databases. DHS and State are expeditiously taking measures to better align the vetting regime for following-to-join refugees with that for principal refugees by 1) ensuring that all following-to-join refugees receive the full baseline interagency checks that principal refugees receive; 2) requesting submission of the beneficiary's I-590 application in support of the Form I-730 petition earlier in the process to provide for more thorough screening; 3) vetting certain nationals or stateless persons against classified databases; and 4) expanding SAO requirements for this population in keeping with the agreed-to expansion for I-590 refugee applicants. These additional security measures must be implemented before admission of following-to-join refugees—regardless of nationality—can resume. Once the security enhancements are in place, admission of following-to-join refugees can resume.

TRANSCRIPT

SENATE COMMITTEE ON THE JUDICIARY

HEARING ON

OVERSIGHT OF THE U.S. DEPARTMENT OF JUSTICE

OCTOBER 18, 2017

10:00 AM ET

HART SENATE OFFICE BUILDING ROOM 216

WITNESS: ATTORNEY GENERAL JEFF SESSIONS

I'm sorry. I was hoping that no republican would come back.

(LAUGHTER)

KLOBUCHAR:

Well, no. , I would like to note for the record that you said that, Mr. Chairman and not me. I'm just trying to be polite.

FLAKE:

Gee, I guess I know where I stand.

GRASSLEY:

Only from the standpoint of this meeting being four or five hours.

FLAKE:

I got you. Got you. I appreciate it. Thank you for enduring here today. I recently filed an amicus brief regarding the 9th Circuit decision in the Sanchez-Gomez case that ended the long standing safety protocols for restraining detainees in a courtroom during pretrial arrangements and hearings.

It's obviously very important for Arizona. We have a very busy docket, particularly as it pertains to immigration.

This amicus brief I filed had the support of the National Sheriffs Association, Western Sheriffs -- State Sheriffs Association and the Arizona Sheriffs Association. As you know, we have a lot of historic courthouses in Arizona that

don't lend themselves well to separation between detainees and the public, often having to share hallways or doorways. And without the longstanding restraint protocols that existed, it makes it impossible to actually bring a number of people through the system and it will really hobble law enforcement in Arizona. Have you looked at this? And how do you believe that this decision, in the 9th circuit, will impact the courtroom?

SESSIONS:
I will be glad to look at it. I'm not that familiar with -- I'm not familiar with it, although the issue's been one out there for a long time. And my experience is that judges decide that fairly day after day. Some people just need to be shackled, I've always thought. But they don't do it unless they feel like it's really necessary. I would think -- is it the 9th circuit -- the case would reverse that...

FLAKE:
Yeah.

SESSIONS:
...longstanding policy?

FLAKE:

That's correct. And it would -- basically, I mean, obviously we have protocols and court decisions with regard to jury trials and the appearance of somebody who is restrained. But this is just arraignments and not before a judge. And it really puts our court officials, security officials, the public at risk in many circumstances, or it ties up our sheriffs and other law enforcement officials from actually going out on the beat and doing what they should do, to actually having to be in the courtroom at all times.

So it's really a problem, particularly with regard to implementation of something like Operation Streamline, which we've spoken about many times. It -- it really inhibits the ability to move the number of people through the system quickly enough because, where we used to be able to have 30 or 40 individuals there arraigned at the same time, now they can only do 6 or 7. And so it simply makes it impossible to move through the docket.

So I appreciate the DOJ's position on this and I hope that U.S. Supreme Court grants cert there.

SESSIONS:

We will review it.

FLAKE:

With regard to sex and human trafficking, earlier this year, the Permanent Subcommittee on Investigations concluded a two-

year investigation on backpage.com, which revealed that the company knowingly facilitated online sex trafficking. In July, the subcommittee, under Senator Portman's leadership, referred the case to your office for criminal investigation. Can you tell us, to the extent that you're able, what the status of that investigation is?

SESSIONS:
I don't believe I can. (OFF-MIKE). I'm not able to now, it would be review as to whether or not I can comment on it and what the status may be.

FLAKE:
OK, well, we'll check back with you on that...

SESSIONS:
Thank you.

FLAKE:
Mr. Chairman, I have letters of support from the Stop Enabling Sex Traffickers Act bill I cosponsored with Senator Portman and several of my colleagues. It would prevent companies like backpage.com from committing online sex trafficking crimes. And there -- these are letters from the National Center for Missing & Exploited Children and other anti-trafficking advocates that I'd like to submit for the record.

GRASSLEY:
Without objection, your letters will be received.

SESSIONS:
Thank you, Senator Flake.
And it is -- this human trafficking is a priority of ours. My deputy attorney general feels strongly about it. The associate attorney general, Rachel Bran, has made that one of her interests and made a couple of speeches on that recently. We can do more and we will do more.

FLAKE:
OK, thank you. One other item. You mentioned in your opening remarks with regard to civil forfeiture, that you'd put some protocols in place in terms of more speedy notification of those whose assets were seized. What other protocols and what are we doing to ensure that we have a better system than we've had in the past? I'm convinced that this has been abused at just about every level of law enforcement, state and -- and federal.

SESSIONS:
Well, we intend to respond to any problems that are out there that we identify in the future. When you make -- when the government has probable cause, and feels able to seize --

money usually -- drug trafficking money, usually. The -- they have a certain period of time to respond. We cut that by at least half -- if not, I believe, a little more than half.

And we have -- we've directed our assistant United States attorneys to monitor the state authorities and the DEA to make sure the systems are working well. We have required that before we adopt a case from the states, that they be trained in proper procedures for a Federal Court system and not just any police officer. So they know what they're supposed to do and I think that will be a big help.

And I believe there's some other things. And then, I don't know if you were here, but I did announce -- send out, Monday, a directive to establish an asset forfeiture accountability officer, who will be in the deputy's office, and who will be monitoring all these cases, complaints that may occur, so that we can respond promptly.

We want this -- this system is really important, Senator Flake. It's a top priority of our -- every law enforcement agency in America, but it's got to be run right. And that's going to be our goal.

FLAKE:

Well, cutting the time in half for notification is cold comfort for some who -- who have this stretch on for months and years. So I -- I hope that we do more than cut the time in half for some of these.

SESSIONS:
The -- that's just one of the things that would happen. We want to take nothing but good cases. And we're winning at the 90 percent level. And most of these cases are pretty open and shut. So -- and I hear what you're saying and I know your concerns. And that's why I am not taking it lightly. We're going to monitor this program.

FLAKE:
Thank you.
Thank you, Mr. Chairman.

GRASSLEY:
Thank you. Senator Flake had seven minutes because he was on his first round.
Now, Senator Klobuchar, five minutes.

KLOBUCHAR:
Thank you.
Attorney General, I'll start where I ended with the election issues and turn to election cybersecurity. As you know, there have been -- now been established by our agencies, 21 states where there was some attempt to hack into their election equipment.

Tucker, Rachael (OAG)

From: Tucker, Rachael (OAG)
Sent: Friday, November 3, 2017 1:52 PM
To: Cutrona, Danielle (OAG)
Subject: Fwd: (b) (5) [redacted]

Has OPA been in touch with you about this?

Begin forwarded message:

(b) (5)

[redacted]

(b) (5)

[redacted]