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.

---

[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

---

[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. The New Executive Order

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

---

[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).

---

[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. The State Has Standing

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

---

[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

---

> 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,

[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

---

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).

---

[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

---

[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

---

[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

---

[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

---

(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

---

[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

---

[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

FILED

MAR 15 2017

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

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.

Case: 17 35105, 03/15/2017, ID: 10358462, DktEntry: 190 2, Page 1 of 26

FILED

MAR 15 2017

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

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).

---

[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.

---

[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]

---

[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

[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

---

[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

---

[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.

Case: 17 35105, 03/15/2017, ID: 10358462, DktEntry: 190 3, Page 1 of 2

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

---

[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,

---

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

[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).

---

[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

---

[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

---

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,

---

[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.").

---

[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

---

[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).

---

[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."

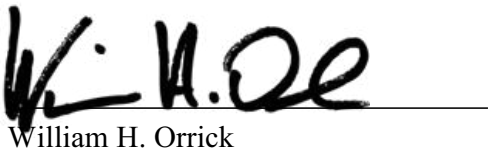
I conclude that an injunction against the President is not appropriate. The Counties seek to enjoin the Executive Order which directs the Attorney General and the Secretary to carry out the provisions of Section 9. The President has no role in implementing Section 9. It is not clear how an injunction 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