PRACTICE ADVISORY

President Trump's Travel Ban (Executive Order 13769) Hits Judicial Road Blocks:

How the courts may delay and eventually block President Trump's travel ban and what recent developments mean for legal service programs' clients

February 2017

About the Center for Human Rights and Constitutional Law

The Center for Human Rights & Constitutional Law is a nonprofit, public interest law office dedicated to furthering the legal, civil, and human rights of immigrants, refugees, children, prisoners, and the poor.

Since its incorporation in 1980, under the leadership of a board of directors comprising civil rights attorneys, community advocates and religious leaders, the Center has provided a wide range of legal services to vulnerable low-income victims of human and civil rights violations and technical support and training to hundreds of legal aid attorneys and paralegals in the areas of immigration law, constitutional law, and complex and class action litigation.

The Center has achieved major victories in numerous major cases in the courts of the United States and before international bodies that have directly benefited hundreds of thousands of disadvantaged persons**.** We have expertise in complex and class action litigation and in constitutional law. A partial list of the Center's major litigation includes *Plyler v. Doe* , 457 U.S. 202 (1982) (challenge to state statute excluding undocumented children from public elementary schools); *Reno v. Catholic Social Services* , 509 U.S. 43 (1993) (national class action for persons unlawfully denied legalization under the Immigration Reform and Control Act of 1986); *Reno v. Flores* , 507 U.S. 292 (1993) (national class action on behalf of children denied release on bail pending the outcome of deportation proceedings); *League of United Latin American Citizens v. Wilson* , 131 F.3d 1297 (9th Cir. 1997) (state-wide class action challenging constitutionality of state proposition denying health care, social services and education to suspected undocumented immigrants); and *Perez-Olano v. Gonzalez* , 248 F.R.D. 248 (C.D. Cal. 2008) (nationwide class action enjoining policies and practices blocking abused, abandoned, and neglected immigrant children's access to protective services and lawful permanent residence).

CHRCL provides qualified legal services providers with technical support on individual cases (through face-to-face meetings, telephone and email communications), in-person and webinar training programs, and the distribution of manuals and routine updates on issues relating to the provision of legal assistance to low-income California immigrants.

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I. Executive Order 13769: Protecting the Nation from Foreign Terrorist Entry into the United States

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

Section 1. Purpose. The visa-issuance process plays a crucial role in detecting individuals with terrorist ties and stopping them from entering the United States. Perhaps in no instance was that more apparent than the terrorist attacks of September 11, 2001, when State Department policy prevented consular officers from properly scrutinizing the visa applications of several of the 19 foreign nationals who went on to murder nearly 3,000 Americans. And while the visa-issuance process was reviewed and amended after the September 11 attacks to better detect would-be terrorists from receiving visas, these measures did not stop attacks by foreign nationals who were admitted to the United States.

Numerous foreign-born individuals have been convicted or implicated in terrorism-related crimes since September 11, 2001, including foreign nationals who entered the United States after receiving visitor, student, or employment visas, or who entered through the United States refugee resettlement program. Deteriorating conditions in certain countries due to war, strife, disaster, and civil unrest increase the likelihood that terrorists will use any means possible to enter the United States. The United States must be vigilant during the visa-issuance process to ensure that those approved for admission do not intend to harm Americans and that they have no ties to terrorism.

In order to protect Americans, the United States must ensure that those admitted to this country do not bear hostile attitudes toward it and its founding principles. The United States cannot, and should not, admit those who do not support the Constitution, or those who would place violent ideologies over American law. In addition, the United States should not admit those who engage in acts of bigotry or hatred (including "honor" killings, other forms of violence against women, or the persecution of those who practice religions different from their own) or those who would oppress Americans of any race, gender, or sexual orientation.

Sec. 2. Policy. It is the policy of the United States to protect its citizens from foreign nationals who intend to commit terrorist attacks in the United States; and to prevent the admission of foreign nationals who intend to exploit United States immigration laws for malevolent purposes.

Sec. 3. Suspension of Issuance of Visas and Other Immigration Benefits to Nationals of Countries of Particular Concern.

(a) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall immediately conduct a review to determine the

information needed from any country to adjudicate any visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual seeking the benefit is who the individual claims to be and is not a security or public-safety threat.

(b) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall submit to the President a report on the results of the review described in subsection (a) of this section, including the Secretary of Homeland Security's determination of the information needed for adjudications and a list of countries that do not provide adequate information, within 30 days of the date of this order. The Secretary of Homeland Security shall provide a copy of the report to the Secretary of State and the Director of National Intelligence.

(c) To temporarily reduce investigative burdens on relevant agencies during the review period described in subsection (a) of this section, to ensure the proper review and maximum utilization of available resources for the screening of foreign nationals, and to ensure that adequate standards are established to prevent infiltration by foreign terrorists or criminals, pursuant to section 212(f) of the INA, 8 U.S.C. 1182(f), I hereby proclaim that the immigrant and nonimmigrant entry into the United States of aliens from countries referred to in section 217(a)(12) of the INA, 8 U.S.C. 1187(a)(12), would be detrimental to the interests of the United States, and I hereby suspend entry into the United States, as immigrants and nonimmigrants, of such persons for 90 days from the date of this order (excluding those foreign nationals traveling on diplomatic visas, North Atlantic Treaty Organization visas, C-2 visas for travel to the United Nations, and G-1, G-2, G-3, and G-4 visas).

(d) Immediately upon receipt of the report described in subsection (b) of this section regarding the information needed for adjudications, the Secretary of State shall request all foreign governments that do not supply such information to start providing such information regarding their nationals within 60 days of notification.

(e) After the 60-day period described in subsection (d) of this section expires, the Secretary of Homeland Security, in consultation with the Secretary of State, shall submit to the President a list of countries recommended for inclusion on a Presidential proclamation that would prohibit the entry of foreign nationals (excluding those foreign nationals traveling on diplomatic visas, North Atlantic Treaty Organization visas, C-2 visas for travel to the United Nations, and G-1, G-2, G-3, and G-4 visas) from countries that do not provide the information requested pursuant to subsection (d) of this section until compliance occurs.

(f) At any point after submitting the list described in subsection (e) of this section, the Secretary of State or the Secretary of Homeland Security may submit to the President the names of any additional countries recommended for similar treatment.

(g) Notwithstanding a suspension pursuant to subsection (c) of this section or pursuant to a Presidential proclamation described in subsection (e) of this section, the Secretaries of State and Homeland Security may, on a case-by-case basis, and when in the national interest, issue visas or other immigration benefits to nationals of countries for which visas and benefits are otherwise blocked.

(h) The Secretaries of State and Homeland Security shall submit to the President a joint report on the progress in implementing this order within 30 days of the date of this order, a second report within 60 days of the date of this order, a third report within 90 days of the date of this order, and a fourth report within 120 days of the date of this order.

Sec. 4. Implementing Uniform Screening Standards for All Immigration Programs.

(a) The Secretary of State, the Secretary of Homeland Security, the Director of National Intelligence, and the Director of the Federal Bureau of Investigation shall implement a program, as part of the adjudication process for immigration benefits, to identify individuals seeking to enter the United States on a fraudulent basis with the intent to cause harm, or who are at risk of causing harm subsequent to their admission. This program will include the development of a uniform screening standard and procedure, such as in-person interviews; a database of identity documents proffered by applicants to ensure that duplicate documents are not used by multiple applicants; amended application forms that include questions aimed at identifying fraudulent answers and malicious intent; a mechanism to ensure that the applicant is who the applicant claims to be; a process to evaluate the applicant's likelihood of becoming a positively contributing member of society and the applicant's ability to make contributions to the national interest; and a mechanism to assess whether or not the applicant has the intent to commit criminal or terrorist acts after entering the United States.

(b) The Secretary of Homeland Security, in conjunction with the Secretary of State, the Director of National Intelligence, and the Director of the Federal Bureau of Investigation, shall submit to the President an initial report on the progress of this directive within 60 days of the date of this order, a second report within 100 days of the date of this order, and a third report within 200 days of the date of this order.

Sec. 5. Realignment of the U.S. Refugee Admissions Program for Fiscal Year 2017.

(a) The Secretary of State shall suspend the U.S. Refugee Admissions Program (USRAP) for 120 days. During the 120-day period, the Secretary of State, in conjunction with the Secretary of Homeland Security and in consultation with the Director of National Intelligence, shall review the USRAP application and adjudication process to determine what additional procedures should be taken to ensure that those approved for refugee admission do not pose a threat to the security and welfare of the United States, and shall implement such additional procedures. Refugee applicants who are already in the USRAP process may be admitted upon the initiation and completion of these revised procedures. Upon the date that is 120 days after the date of this order, the Secretary of State shall resume USRAP admissions only for nationals of countries for which the Secretary of State, the Secretary of Homeland Security, and the Director of National Intelligence have jointly determined that such additional procedures are adequate to ensure the security and welfare of the United States.

(b) Upon the resumption of USRAP admissions, the Secretary of State, in consultation with the Secretary of Homeland Security, is further directed to make changes, to the extent permitted by law, to prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality. Where necessary and appropriate, the Secretaries of State

and Homeland Security shall recommend legislation to the President that would assist with such prioritization.

(c) Pursuant to section 212(f) of the INA, 8 U.S.C. 1182(f), I hereby proclaim that the entry of nationals of Syria as refugees is detrimental to the interests of the United States and thus suspend any such entry until such time as I have determined that sufficient changes have been made to the USRAP to ensure that admission of Syrian refugees is consistent with the national interest.

(d) Pursuant to section 212(f) of the INA, 8 U.S.C. 1182(f), I hereby proclaim that the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States, and thus suspend any such entry until such time as I determine that additional admissions would be in the national interest.

(e) Notwithstanding the temporary suspension imposed pursuant to subsection (a) of this section, the Secretaries of State and Homeland Security may jointly determine to admit individuals to the United States as refugees on a case-by-case basis, in their discretion, but only so long as they determine that the admission of such individuals as refugees is in the national interest -- including when the person is a religious minority in his country of nationality facing religious persecution, when admitting the person would enable the United States to conform its conduct to a preexisting international agreement, or when the person is already in transit and denying admission would cause undue hardship -- and it would not pose a risk to the security or welfare of the United States.

(f) The Secretary of State shall submit to the President an initial report on the progress of the directive in subsection (b) of this section regarding prioritization of claims made by individuals on the basis of religious-based persecution within 100 days of the date of this order and shall submit a second report within 200 days of the date of this order.

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

Sec. 6. Rescission of Exercise of Authority Relating to the Terrorism Grounds of Inadmissibility. The Secretaries of State and Homeland Security shall, in consultation with the Attorney General, consider rescinding the exercises of authority in section 212 of the INA, 8 U.S.C. 1182, relating to the terrorism grounds of inadmissibility, as well as any related implementing memoranda.

Sec. 7. Expedited Completion of the Biometric Entry-Exit Tracking System.

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

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

Sec. 8. Visa Interview Security.

(a) The Secretary of State shall immediately suspend the Visa Interview Waiver Program and ensure compliance with section 222 of the INA, 8 U.S.C. 1222, which requires that all individuals seeking a nonimmigrant visa undergo an in-person interview, subject to specific statutory exceptions.

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

Sec. 9. Visa Validity Reciprocity. The Secretary of State shall review all nonimmigrant visa reciprocity agreements to ensure that they are, with respect to each visa classification, truly reciprocal insofar as practicable with respect to validity period and fees, as required by sections 221(c) and 281 of the INA, 8 U.S.C. 1201(c) and 1351, and other treatment. If a country does not treat United States nationals seeking nonimmigrant visas in a reciprocal manner, the Secretary of State shall adjust the visa validity period, fee schedule, or other treatment to match the treatment of United States nationals by the foreign country, to the extent practicable.

Sec. 10. Transparency and Data Collection.

(a) To be more transparent with the American people, and to more effectively implement policies and practices that serve the national interest, the Secretary of Homeland Security, in consultation with the Attorney General, shall, consistent with applicable law and national security, collect and make publicly available within 180 days, and every 180 days thereafter:

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

or any other national security reasons since the date of this order or the last reporting period, whichever is later;

(ii) information regarding the number of foreign nationals in the United States who have been radicalized after entry into the United States and engaged in terrorism-related acts, or who have provided material support to terrorism-related organizations in countries that pose a threat to the United States, since the date of this order or the last reporting period, whichever is later; and

(iii) information regarding the number and types of acts of gender-based violence against women, including honor killings, in the United States by foreign nationals, since the date of this order or the last reporting period, whichever is later; and

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

(b) The Secretary of State shall, within one year of the date of this order, provide a report on the estimated long-term costs of the USRAP at the Federal, State, and local levels.

Sec. 11. General Provisions.

(a) Nothing in this order shall be construed to impair or otherwise affect:

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

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

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

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

DONALD J. TRUMP

Available at: https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states

A. Section 3: Barring the entry of Foreign Nationals from 7 Muslim Countries for 90 days.

The order bans immigrant and nonimmigrant entries, for at least 90 days, for nationals of Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen [by reference to INA §217(a)(12)]. Other countries may be added and adjudications of other immigration benefits could be impacted. As described in Section 1, the order also calls for the exclusion of people who "would place violent ideologies over American law" or "who engage in acts of bigotry or hatred (including 'honor' killings, other forms of violence against women, or the persecution of those who practice religions different from their own)...." This language is vague and appears highly susceptible to discriminatory abuse against people of Muslim faith. (p. 1-2)

https://pennstatelaw.psu.edu/sites/default/files/AILA%20Summary%20of%20EO3.pdf

Specifically, President Trump states:

> …I hereby proclaim that the immigrant and nonimmigrant entry into the United States of aliens from countries referred to in section 217(a)(12) of the INA, 8 U.S.C. 1187(a)(12), would be detrimental to the interests of the United States, and I hereby suspend entry into the United States, as immigrants and nonimmigrants, of such persons for 90 days from the date of this order (excluding those foreign nationals traveling on diplomatic visas, North Atlantic Treaty Organization visas, C-2 visas for travel to the United Nations, and G-1, G-2, G-3, and G-4 visas)… Exec. Order §3(c)

Interestingly, the Obama Administration appears to be responsible for the selection of these 7 countries. On December 18, 2015 President Obama signed into law the Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015, which among other things established new eligibility requirements for travel under the Visa Waiver Program. The ace, codified in 8 U.S.C. 1187, sets the criteria for the Visa Waiver program for certain applicants for admission. Included in that criteria are certain classes of aliens that are not eligible for the program. Namely aliens who have been present in Iraq, Syria, Iran Sudan and any country, "that is designated by the Secretary of State… as a country, the government of which has repeatedly provided support of acts of international terrorism." 8 U.S.C. 1187(a)(12)(A)(i)(II) The Secretary's determination of what countries fall under this criteria is subject to annual review. 8 U.S.C. 1187(a)(12)(D)(iii). On February 18, 2016 DHS, still under control of the Obama administration, announced that upon further review it would be adding Libya, Somalia and Yemen as three countries of concern, bringing the total to 7. See "DHS Announces Further Travel Restrictions for the Visa Waiver Program," February 18, 2016, available at https://www.dhs.gov/news/2016/02/18/dhs-announces-further-travel-restrictions-visa-waiver-program.

1. Section 3(a) Required Review

"The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall immediately conduct a review to determine the information needed from any country to adjudicate any visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual seeking the benefit is who the individual claims to be and is not a security or public-safety threat." Exec. Order §3(a)

B. Section 5(a): Suspending the Refugee Admissions Program for 120 Days and all Syrian Refugees Indefinitely

Section 5(a) of the Executive Order requires that the "Secretary of State… suspend the U.S. Refugee Admissions Program (USRAP) for 120 days." Exec. Order §5(a)

In conjunction with other provisions, this provision acts to ban individuals from certain Muslim countries that could be expanded to additional countries. Nothing about being a refugee justifies a complete suspension of the refugee program. Delaying critical protections to refugees for 120 days can be life-threatening. http://immigrationforum.org/blog/president-trumps-executive-order-restricting-refugee-resettlement-and-visa-processing-summary/

Trumps Order also places an indefinite ban on the admission of Syrian Refugees. More specifically he states that "the entry of nationals of Syria as refugees is detrimental to the interests of the United States and thus suspend any such entry until such time as I have determined that sufficient changes have been made to the USRAP to ensure that admission of Syrian refugees is consistent with the national interest." Exec. Order §5(c).

1. Required Review of USRAP

In a similar fashion to the Executive Order at §3(a), §5(a) requires that while the Refugee ban is in effect, "the Secretary of State, in conjunction with the Secretary of Homeland Security and in consultation with the Director of National Intelligence, shall review the USRAP application and adjudication process to determine what additional procedures should be taken to ensure that those approved for refugee admission do not pose a threat to the security and welfare of the United States, and shall implement such additional procedures." Exec. Order §5(a)

2. Current Refugee Vetting Processes

Refugees are already subject to the highest level of security checks of any category of traveler to the United States. International organizations such as the United Nations refugee agency conduct an initial screening. The federal government conducts extensive screening of each refugee, involving the State Department, intelligence agencies and the Department of Homeland Security. Refugees are interviewed by specially trained interviewers, and fingerprints are checked against government databases. Overall, nearly 48 percent of refugees who arrived to the U.S. in 2015 were female and about 40 percent were children under age of 17. Syrian refugees already receive enhanced screening from the Department of Homeland Security. While the United States resettled about 12,500 Syrian refugees in 2016, another 5 million Syrians are estimated to be in

need of humanitarian assistance. In prior years, we have resettled far fewer Syrian refugees: almost 1,700 in 2015 and only about 100 in 2014.

http://immigrationforum.org/blog/president-trumps-executive-order-restricting-refugee-resettlement-and-visa-processing-summary/

The current screening process for all refugees involves many layers of security checks before entry into the country, and Syrians were subject to an additional layer of checks. Sometimes, the process, shown below, takes up to two years.

https://www.nytimes.com/interactive/2017/01/29/us/refugee-vetting-process.html

For a helpful infographic that outlines the many steps refugees go through in order to be admitted to the U.S. see https://obamawhitehouse.archives.gov/blog/2015/11/20/infographic-screening-process-refugee-entry-united-states

See also http://www.migrationpolicy.org/research/ten-facts-about-us-refugee-resettlement?gclid=CJXpnqashNICFZCcfgodK3gLZQ

C. Discretion for Exceptions

For both the Visa and Refugee suspensions the Trump Administration added language that allows them to provide exceptions to individuals on a case-by-case basis.

With regard to **exceptions granted to the suspension of visas and other immigration benefits to nationals of the 7 selected countrie**s, "the Secretaries of State and Homeland Security may, on a case-by-case basis, and when in the national interest, issue visas or other immigration benefits to nationals of countries for which visas and benefits are otherwise blocked." Exec. Order §3(g)

The language regarding the the **grant of exceptions to the suspension of Refugee Admissions Program** is slightly different, however. It states that, "the Secretaries of State and Homeland Security may jointly determine to admit individuals to the United States as refugees on a case-by-case basis, in their discretion, but only so long as they determine that the admission of such individuals as refugees is in the national interest -- including when the person is a religious minority in his country of nationality facing religious persecution, when admitting the person would enable the United States to conform its conduct to a preexisting international agreement,

or when the person is already in transit and denying admission would cause undue hardship -- and it would not pose a risk to the security or welfare of the United States." §5(e)

II. Initial Issues with the Executive Order

A. The Administration's Confusion Over the Order's Interpretation

"The Trump administration had the order go into effect immediately after it was signed. This is quite rare for orders that affect private individuals, according to Rudalevige. He said it's much more common for administrative directives, such as when President Obama changed the order of succession in the Environmental Protection Agency before leaving office.

This immediate implementation left little time for the affected agencies, such as Customs and Border Protection, to make sense of the order and plan its application.

Chaos ensued. People who boarded flights with valid visas were detained at U.S. airports when they landed. According to lawsuits, some were denied access to lawyers, and were instructed to sign away their right to the visa and then were sent back to their home countries. Protests at international arrival terminals around the nation swelled."

- Kim Soffen and Darla Cameron, Washington Post, https://www.washingtonpost.com/graphics/politics/trump-travel-ban-process/

1. The Order's Application to Legal Permanent Residents

Memorandum to the Acting Secretary of State, the Acting Attorney General, and the Secretary of Homeland Security issued February 1, 2017

From Donald F. McGahn II – Counsel to the President

> "I understand that there has been reasonable uncertainty about whether those provisions apply to lawful permanent residents of the United States. Accordingly, to remove any confusion, I now clarify that Sections 3(c) and 3(e) do not apply to such individuals. Please immediately convey this interpretative guidance to all individuals responsible for the administration and implementation of the Executive Order."

[The 9th Circuit would later indicate a memo from counsel insufficient to guarantee the Order's inapplicability to LPR's]

B. Not properly vetted or legally promulgated

"Once an executive order is proposed, it is required to be sent to the Office of Management and Budget, an executive branch agency, for review. The OMB sends it along to affected agencies — here, those could be within the State Department, Department of Homeland Security and Department of Justice — for comments, which it compiles into a report and returns to the president. Because the agencies are the ones that will eventually carry out the order and the employees are experts in their field, this step ensures the order is effective and realistic to implement.

There is no evidence that Trump went through this process, according to Rudalevige — OMB never released a report. On Jan. 31, Homeland Security Secretary John F. Kelly, told Congress he had some lead time before the order was issued, but it was unclear if he was aware of the details.

This process is legally required by an executive order put in place by President John F. Kennedy. Although Trump is technically in violation, he will probably see no consequences, according to Rudalevige. The executive branch is charged with enforcing executive orders, so Trump can simply choose not to enforce it in this case. He also has the option to revoke Kennedy's order, allowing him to bypass OMB in the future without breaking the law."

- Kim Soffen and Darla Cameron, Washington Post, https://www.washingtonpost.com/graphics/politics/trump-travel-ban-process/

III. Nationwide Legal Challenges: *The States of Washington and Minnesota v. Donald Trump et al.* and others

More than 50 lawsuits were filed within first week of Order being signed. The States of Washington and Minnesota sought a TRO blocking the Executive Order in the United States District Court for the Western District of Washington.

A. *The States of Washington and Minnesota v. Donald Trump et al.* (Case 2:17-cv-00141-JLR)

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Doc. # 1 01/30/2017 District Court Complaint

- "According to the most current American Community Survey data from the U.S. Census Bureau, as of 2015 approximately 7,280 non-citizen immigrants from Iran, Iraq, Syria, Somalia, Sudan, Libya, and Yemen reside in the state of Washington-1,409 Iranian immigrants, 2,2,75 Iraqi immigrants, 360 Libyan immigrants, 2,883 Somalian immigrants, 165 Sudanese immigrants, and 187 Syrian immigrants. (¶ 10)
- "Immigrant and refugee-owned businesses employ 140,000 people in Washington." (¶11)
- "The technology industry relies heavily on the H-1B visa program, through which highly skilled workers like software engineers are permitted to work in the United States." (¶12)
- "At least 76 employees at Microsoft are citizens of Iran, Iraq, Syria, Somalia, Sudan, Libya, or Yemen and hold U.S. temporary work visas." (¶14)
- "Bellevue-based company Expedia operates a domestic and foreign travel business. At the time of this filing, Expedia has approximately 1,000 customers with existing flight reservations in or out of the United States who hold passports from Iran, Iraq, Syria, Somalia, Sudan, Libya, or Yemen." (¶16)
- "More than 95 students from Iran, Iraq, Syria, Somalia, Sudan, Libya, or Yemen attend the University of Washington, based in Seattle. More than 135 students from those countries attend Washington State University, based in Pullman." (¶17).
- "…Washington residents have been separated from their families." (¶20)
- "The Due Process Clause of the Fifth Amendment prohibits the federal government from denying equal protection of the laws." (¶42)
- "Sections 3 and 5 of the Executive Order, together with statements made by Defendants concerning their intent and application, target individuals for discriminatory treatment based on their country of origin and/or religion, without lawful jurisdiction." (¶43)

- "The Executive Order was motivated by animus and a desire to harm a particular group." (¶44)
- "The discriminatory terms and application of the Executive Order are arbitrary and cannot be sufficiently justified by federal interests." (¶45)
- "… Defendants have violated the equal protection guarantee of the Fifth Amendment." (¶46)
- "Defendants' violation causes ongoing harm to Washington residents." (¶47)
- "The Establishment Clause of the First Amendment prohibits the federal government from officially preferring one religion over another." (¶49)
- "Sections 3 and 5 of the Executive Order conflict with the statutory rights and procedures directed by Congress. In issuing and implementing the Executive Order, Defendants have violated the procedural due process guarantees of the Fifth Amendment." (¶56)
- "Sections 3 and 5 of the Executive Order, together with statements made by Defendants concerning their intent and application, discriminate on the basis of race, nationality, place of birth, and/or place of residence in the issuance of visas, in violation of the22 Immigration and Nationality Act." (¶60)
- "As implemented, the Executive Order suspends all immigrant and nonimmigrant entry into Washington by individuals from seven countries and forecloses their ability to apply for asylum and withholding of removal." (¶64)
- **"**As implemented, the Executive Order suspends all immigrant and nonimmigrant entry into Washington by individuals from seven countries and forecloses their ability to apply for relief under the Convention Against Torture." (¶68)
- "Section 3 of the Executive Order, if implemented, will result in substantial burdens on the exercise of religion by non-citizen immigrants by, for example, preventing them from exercising their religion while in detention, returning to their religious communities in Washington, and/or taking upcoming, planned religious travel abroad. Such burdens on religion violate the Religious Freedom Restoration Act." (¶72)
- **"**In implementing Sections 3 and 5 of the Executive Order, federal agencies have changed the substantive criteria by which individuals from affected countries may enter the United States. Federal agencies did not follow the procedures required by the Administrative Procedure Act before taking action impacting these substantive rights." (¶76)
- **"**In implementing Sections 3 and 5 of the Executive Order, federal agencies have taken unconstitutional and unlawful action, as alleged herein, in violation of the Administrative Procedure Act." (¶81).

B. Seattle Judge Issues TRO

Doc. # 52 02-03-17 District Court Temporary Restraining Order

- "The States have satisfied the *Winter* test because they have shown that they are likely to succeed on the merits of the claims that would entitle them to relief; the States are likely to

suffer irreparable harm in the absence of preliminary relief; the balance of the equities favor the States; and a TRO is in the public interest. The court also finds that the States have satisfied the 'alternative' *Cottrell* test because they have established at least serious questions going to the merits of their claims and that the balance of the equities tips sharply in their favor." (p. 4)

- "The Executive Order adversely affects the States' residents in areas of employment, education, business, family relations, and freedom to travel. These harms extend to the States by virtue of their roles as *parens patriae* of the residents living within their bodies. In addition, the States themselves are harmed by virtue of the damage that implementation of the Executive Order has inflicted upon the operations and missions of their public universities and other institutions of higher learning, as well as the injury to the States' operations, tax bases, and public funds." (p. 5).

C. Government files Emergency Motion for Stay in 9th Circuit Court of Appeals

Doc. # 14 02/04/17 Governments' Emergency Motion for Stay

- As another district court recently concluded in a thorough, well-reasoned opinion, the Order is a lawful exercise of the political branches' plenary control over the admission of alien into the United States. Louhghalam v. Trump, Civ. No. 17-10154-NMG, Order 11 (D. Mass. Feb. 3, 2017)" (p. 1-2)
- "The district court's sweeping injunction should be stayed pending appeal. It conflicts with the basic principle that "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." Landon v. Plasencia, 459 U.S. 21, 32 (1982). It also contravenes the considered judgment of Congress that the President should have the unreviewable authority to suspend the admission of any class of aliens." (p. 2)
- "Congress expressly granted the President broad discretionary authority, whenever he "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," to "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)." (p. 3-4)
- "In addition to that statutory authority, the President has expansive constitutional authority under Article II over foreign affairs, national security, and immigration. "The exclusion of aliens is a fundamental act of sovereignty * * *inherent in the executive power to control the foreign affairs of the nation." Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950)." (p. 4)

WA Lacks Standing

- "But a State cannot bring a parens patriae action against federal defendants. In dismissing Massachusetts' challenge to a federal statute designed to "protect the health of mothers and infants" in Massachusetts v. Mellon, the Supreme Court explained that "it is no part of [a State's] duty or power to enforce [its citizens'] rights in respect of their relations with the

federal government." 262 U.S. 447, 478, 485-86 (1923); accord South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966)." (p. 9)

- "With respect to Washington's public universities, most if not all of the students and faculty members the State identifies are not prohibited from entering the United States, and others' alleged difficulties are hypothetical or speculative.3 That is particularly true given the Order's waiver authority. See Executive Order§§ 3(g), 5(e). Furthermore, any assertion of harm to the universities' reputations and ability to attract students is insufficiently concrete for standing. Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)." (p. 10)
- "Under longstanding principles exemplified by the doctrine of consular nonreviewability, an alien abroad cannot obtain judicial review of the denial of a visa (or his failure to be admitted as a refugee). Brownell v. Tom We Shung, 352U.S. 180, 184 n.3, 185 n.6 (1956). It follows that a third party, like Washington, has no "judicially cognizable interest," Linda R.S. v. Richard D., 410 U.S. 614, 619(1973), in such a denial." (p. 11)

Order is a Valid Exercise of Executive's Constitutional and Statutory Power

- "The Order falls squarely within Congress' delegation in 8 U.S.C. § 1182(f) of the "power to prevent the entry of any alien or groups of aliens into this country as well as * * * to grant entry to such person or persons with any restriction on their entry as he may deem to be appropriate." Mow Sun Wong v. Campbell, 626 F.2d739, 744 n.9 (9th Cir. 1980); accord Haitian Refugee Ctr., Inc. v. Baker, 953 F.2d1498, 1507 (11th Cir. 1992). "Pursuant to, and without exceeding, that grant of discretionary authority, the President * * * suspended entry of aliens from the seven subject countries." Louhghalam, Order 17." (p 12-13)
- "Washington argued in district court that the President's authority under§ 1182(f) is limited by 8 U.S.C. § 1152(a)(1)(A), which provides, with certain exceptions, that "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." But this restriction does not address the President's authority under § 1182(f) to "suspend the entry" of aliens, which is an entirely different act under the immigration laws. An immigrant visa does not entitle an alien to admission to the United States, and even if an alien is issued a valid visa, he is subject to being denied admission to this country when he arrives at the border. See, e.g., Khan v. Holder, 608 F.3d 325, 330 (7th Cir. 2010)." (p. 14)

District Court Improperly Second-Guessed President's National Security Determinations

- "Courts are particularly ill-equipped to second-guess the President's prospective judgment about future risks, as decisions about how best to "confront evolving threats" are "an area where information can be difficult to obtain and the impact of certain conduct difficult to assess." Holder v. Humanitarian Law Project, 561 U.S. 1, 34 (2010)." (p. 16)
- "Here, as another district court has recognized, the Executive Order undeniably states a facially legitimate and bona fide reason—ensuring "the "proper review and maximum utilization of available resources for the screening of foreign nationals" and "that adequate standards are established to prevent infiltration by foreign terrorists." Order, §§ 3(c), 5(a), (c); see Louhghalam, Order 18-19. The Order does so in part by incorporating a list of seven

countries that were identified by Congress—and by the Executive in 2016—as raising terrorism-related concerns." (p. 17)

The State's Constitutional Challenges are Without Merit

- "As an initial matter, "[t]he word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot * * * be expanded to encompass the States of the Union." Katzenbach, 383 U.S. at 323; see also Premo v. Martin, 119 F.3d 764, 771 (9th Cir. 1997). Nor can Washington invoke the Fifth Amendment rights of its citizens against the federal government. See Katzenbach, 383 U.S. at 324." (p. 18)
- "Furthermore, the vast majority of the individuals that Washington claims are affected by the Executive Order are aliens outside the United States, but it is "clear" that "an unadmitted and nonresident alien" "had no constitutional right of entry to this country as a nonimmigrant or otherwise." Mandel, 408 U.S. at 762; see Plasencia, 459 U.S. at 32." (p 18)

The District Court Improperly Issued a Nationwide Injunction

- "First, the district court's order contravenes the considered national security judgment of the President that the admission of certain classes of aliens at this time to the United States, under the existing screening and visa-issuance procedures, is not in the national interest."(p. 20)
- "Second, the injunction imposes irreparable harm by barring enforcement of the Executive Order in a manner that intrudes heavily on the constitutional separation of powers." (p. 21)

Doc. # 28-1 02-06-17 States' Response to the Emergency Motion Under Circuit Rule 27-3 for Administrative Stay and Motion for Stay Pending Appeal

Defendants' Appeal is Procedurally Improper

- "Defendants acknowledge that TROs are generally non-appealable. Motion at 8. But they claim a right to appeal here because the order, in their view, is akin to a preliminary injunction. Id. Not so." (p. 5)

If the Court Considers the Appeal, Defendants' Burden is High and the Standard of Review Deferential

Defendants Cannot Show Irreparable Harm from the TRO When it Simply Reinstates the Status Quo

- "First, separation-of-powers concerns do not automatically establish irreparable harm. See, e.g., Lopez v. Heckler, 713 F.2d 1432, 1434 (9th Cir. 1983) (declining to stay district court order "restrain[ing]" the Secretary of Health and Human Services from implementing an announced policy where "separation of powers" was at issue)." (p. 7)
- "Second, Defendants' argument amounts to claiming that returning to the pre-Executive Order status quo would inflict irreparable harm. But that would mean that until the Order was

issued, Defendants were suffering some unspecified, ongoing irreparable harm. That makes no sense. As this court has held, preserving the status quo against sudden disruption is often in the interest of all parties. See Feldman v. Ariz. Sec'y of State's Office, 843 F.3d 366, 369-370 (9th Cir. 2016) (en banc) ("preserv[ing] the status quo" to avoid the "disruption" of a change in law pending review)." (p. 8)

Defendants Are Unlikely to Succeed on Appeal Because the District Court Acted Within its Discretion

- "Defendants concede that to justify a stay they must also prove "a strong likelihood of success on appeal." Motion at 8 (quoting Hilton, 481 U.S. at 776). They cannot. The district court correctly concluded that the States "have shown that they are likely to succeed on the merits of the claims that would entitle them to relief." ECF 52 at 4." (p. 8-9)

  Courts can review the legality of executive action and the executive's true motives

  - "Even "in matters relating to the actual prosecution of a war," the courts "exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims." Hamdi v. Rumsfeld, 542 U.S. 507, 535 (2004) (plurality opinion); see also id. at 545(Souter, J., concurring in the judgment); Boumediene v. Bush, 553 U.S. 723(2008); Korematsu v. United States, 323 U.S. 214, 234 (1944) (Murphy, J., dissenting) ("Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support.")." (p. 8-9)
  - Second, Defendants cite Kleindienst v. Mandel, 408 U.S. 753 (1972),and Kerry v. Din, 135 S. Ct. 2128 (2015), for the proposition that so long as the President gives a facially legitimate reason for excluding an alien, the courts will not look behind that reason. But those cases dealt with the President's power to exclude "an unadmitted and nonresident alien," i.e., someone who had no legal right to be here. Mandel, 408 U.S. at 762; Din, 135 S. Ct. at 2131. This case, by contrast, involves longtime residents who are here and have constitutional rights." (p. 9)
  - "Moreover, Justice Kennedy's controlling opinion in *Din* held that courts should look behind the stated motives for exclusion even as to a nonresident alien if the plaintiff "plausibly alleged with sufficient particularity" "an affirmative showing of bad faith." Id. at 2141. See also Cardenas v. United States, 826 F.3d 1164, 1171 (9th Cir. 2016) (same). Here, the State has plausibly alleged with sufficient particularity that the President acted in bad faith in an effort to target Muslims. ECF 18 ¶¶ 42-61." (p. 9)

The States have standing

- "In establishing standing, states "are not normal litigants," but instead receive "special solicitude." Massachusetts v. EPA, 549 U.S. 497, 518, 520(2007). The States established two independent grounds for Article III standing: (1) harms to their proprietary interests; and (2) harms to their quasi-sovereign interests." (p. 11)

  Proprietary Standing

  - "The States alleged and submitted evidence that that the Order is harming us by stranding our university students and faculty overseas, preventing university-

sponsored faculty and staff from coming here, preventing students and faculty who are here currently from making pre-planned trips for research or scholarship, and decreasing state tax revenue. See infra at 2-3. On this evidence, the district court correctly found that "the States themselves are harmed" by the damage to "their public universities and other institutions of higher learning, as well as injury to the States' operations, tax bases, and public funds." ECF 52 at 5. Defendants show no likelihood that this finding is incorrect." (p. 11-12)

***Parens Patriae* standing**

- "*Mellon* expressly recognized that it did not prohibit state actions—such as this one—seeking to protect quasi-sovereign interests. Seeid. at 481-82, 485; see also Massachusetts, 549 U.S. at 520 n.17 (same). Mellon also pointed out that it did not bar all parens suits challenging the United States' unconstitutional acts. Mellon, 262 U.S. at 487." (p. 12-13)

The States' claims have merit

Defendants are unlikely to prevail against the States' Due Process claim

- "Due process requires that lawful permanent residents and visa holders not be denied re-entry to the United States without "at a minimum, notice and an opportunity to respond." United States v. Raya-Vaca, 771 F.3d 1195, 1204 (9thCir. 2014)." (p. 14)

Defendants are unlikely to prevail against the States' Establishment Clause claim

- "*Larson* applies here. The Order's refugee provisions explicitly distinguish between members of religious faiths. President Trump has made clear that one purpose of the Order is to favor Christian refugees at the expense of Muslims. ECF 18 ¶ 53, Ex. 8." (p. 18).
- "This case thus involves just the sort of discrimination among denominations that failed strict scrutiny in Larson, and must fail here." (p. 19).

Defendants are unlikely to prevail against the States' Equal Protection claim

- "The States need not show that intent to discriminate against Muslims "was the sole purpose of the challenged action, but only that it was a 'motivating factor." Arce v. Douglas, 793 F.3d 968, 977 (9th Cir. 2015)." (p. 20).

Defendants are unlikely to prevail against the States' INA claim

- "Section 1152 was enacted in 1965, thirteen years after Section 1182(f), and it enumerates specific exceptions that do not include Section 1182(f).Congress specified exactly when federal officials could take nationality into account: "as specifically provided in paragraph (2) and in sections 1101(a)(27),1151(b)(2)(A)(i), and 1153 of this title." 8 U.S.C. § 1152(a)(1)(A). None of these narrow exceptions apply here; and by enumerating those few exemptions, Congress made clear it did not intend to authorize others.6 See, e.g., United Dominion Indus. v. United States, 532 U.S. 822, 836 (2001) (describing expressio unius canon)." (p. 22).
- "Further, despite Defendants' references to "plenary" power over immigration, Motion at 4—which actually resides with Congress, see U.S. Const., Article I, § 8—the President's authority under Section 1182(f) is judicially reviewable. See Zadvydas, 533 U.S. at 698 (holding the political branches' power "is subject to important constitutional limitations"); Diouf v. Napolitano, 634 F.3d 1081, 1091 (9th

Cir. 2011) (refusing to defer to DHS's regulations because the regulations "raise[d] serious constitutional concerns")." (p. 22-23)

A nationwide TRO was appropriate

Stay Would Harm the States and the Public Interest

Doc. # 70 02-06-17 Reply in Support of Emergency Motion for Stay Pending Appeal

- "Instead, the Constitution vests the federal government with exclusive power over immigration for the Nation as a whole, and Congress did not create any "procedural right" for States to sue the federal government to challenge its decisions to deny the entry of (or revoke visas held by) third-party aliens." (p. 2)
- "Moreover, Congress has been clear that the issuance of a visa to an alien does not confer upon that alien any right of admission into the United States, 8 U.S.C. § 1201(h), and that the Secretary of State "may, at any time, in his discretion, revoke such visa or other documentation." Id. § 1201(i)." (p. 2)
- "Congress has granted the President broad discretion under 8 U.S.C.§ 1182(f) to suspend the entry of "any class of aliens" into the United States, and independently broad discretion over the refugee program under 8 U.S.C. § 1157." (p. 3)
- "The State continues to argue that Section 3(c)'s temporary suspension of the entry of aliens from seven countries contravenes the restriction on nationality-based distinctions in 8 U.S.C. § 1152(a)(1)(A). But that restriction applies only to "the issuance of an immigrant visa," Id., not to the President's restrictions on the right of entry. It also has no application at all to aliens who hold or seek non-immigrant visas, such as student visas or work visas. And § 1152(a)(1)(B) permits, as here, a temporary suspension of entry pending completion of a review and revision of procedures for processing visa applications." (p. 4)
- "Accordingly, as the district court held in *Louhghalam*, Order 13, the Executive Order is "neutral with respect to religion." And under *Mandel*, the Order's national-security basis for the temporary suspension amply establishes its constitutionality. See also *Louhghalam*, Order 18-19." (p. 8)
- "But as explained above, aliens outside the United States have no due process rights with respect to their attempt to gain entry into this country." (p. 9)
- "At most, the injunction should be limited to the class of individuals on whom the State's claims rest—previously admitted aliens who are temporarily abroad now or who wish to travel and return to the United States in the future." (p. 11)

D. 16 Amicus Briefs Are Submitted in Support of the States' Opposition to the 9th Circuit Stay Motion

Doc. # 19-2 02-05-17 Brief of Technology Companies and Other Businesses as Amicus Curiae in Support of Appellees

AMICI CURIAE FOR TECH COMPANIES ARE COMPRISED OF 97 COMPANIES INCLUDING GOOGLE, APPLE, FACEBOOK, UBER, AND EBAY.

American Innovation and Economic Growth are Intimately Tied to Immigration

The Executive Order Harms the Competitiveness of U.S. Companies

- "The Order make sit more difficult and expensive for U.S. companies to recruit, hire, and retain some of the world's best employees. It disrupts ongoing business operations. And it threatens companies' ability to attract talent, business, and investment to the United States." (p. 8)
- "The Order threatens the long-standing stability of the U.S. immigration laws, which have been marked by clear, settled standards and constrained discretion—introducing sudden changes without notice, unclear standards for implementation, and no standards for the exercise of waiver authority. That shift deprives employees and businesses of the predictability they require." (p. 8)
- "The Order establishes a system of "case-by-case" exceptions, but does not specify any criteria for issuing exceptions. Order §§ 3(g), 5(e)." (p. 9)
- "The Order also could well lead to retaliatory actions by other countries, which would seriously hinder U.S. companies' ability to do business or negotiate business deals abroad." (p. 12).
- "For all of these reasons, the Order will incentivize both immigration to and investment in foreign countries rather than the United States. Highly skilled immigrants will be more interested in working abroad, in places where they and their colleagues can travel freely and with assurance that their immigration status will not suddenly be revoked." (p. 12)

The Executive Order is Unlawful

The Order exercised discretion arbitrarily

- "Moreover, the Due Process Clause demands that every grant of discretion "provide explicit standards" so that officers will not act "on an ad hoc and subjective basis." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). These safe-guards ensure that the immigration laws are not enforced in an "arbitrary and discriminatory" manner, id. at 109, and that immigrants, their families, and their employers are afforded consistent and predictable treatment at the hands of the Federal Government" (p. 17).
- "The Order is not "reasonable" in scope. The Order says that its purpose is to "prevent infiltration by foreign terrorists or criminals." Order § 3(c)." (p. 18)

<u>Other Noteworthy Amicus Briefs Filed in Support of Appellees</u>

- Law Professors and Clinicians from law schools across the country
- Other states harmed by the Executive Order, including: California, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New

Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, and Virginia, and the District of Columbia
- Various non-profits, immigrant rights advocacy organizations, and legal aid institutions including: National Immigrant Justice Center, American Immigration Council, Anti-Defamation League, and the ACLU

E. 9th Circuit denies stay

The 9th Circuit denied the government's emergency motion for a stay. It found that the States do have standing, based on the States' alleged harms to their proprietary interests. The Court also indicated it is within its power to review the constitutionality of executive orders, even if said orders were issued to protect national security in times of war. The Court further stated that the government did not demonstrate a strong showing that it is likely to succeed on the merits or that it will be irreparably injured absent a stay. The Court then reviewed the merits of the case based on the limited evidence currently on the record. The Court notably cited the 5th Circuit case Texas v. United States, (the case regarding the DAPA Executive Order), to indicate that the government "may yet pursue and vindicate its interests in the full course of this litigation. *See*, e.g., *Texas v. United States*, 787 F.3d 733, 767-68 (5th Cir. 2015) ("[I]t is the resolution of the case on the merits, not whether the injunction is stayed pending appeal, that will affect those principles."

<u>134 02-09-17 9th Circuit Order</u>

- "Nevertheless, we hold that the Government has not shown a likelihood of success on the merits of its appeal, nor has it shown that failure to enter a stay would cause irreparable injury, and we therefore deny its emergency motion for a stay." (p. 3)

Standing

- "The States argue that the Executive Order causes a concrete and particularized injury to their public universities, which the parties do not dispute are branches of the States under state law. See, e.g., *Hontz v. State*, 714 P.2d 1176, 1180 (Wash. 1986) (en banc); *Univ. of Minn. v. Raygor*, 620 N.W.2d 680, 683 (Minn. 2001)." (p. 9)
- "Most relevant for our purposes, schools have been permitted to assert the rights of their students. See, e.g., *Runyon v. McCrary*, 427 U.S. 160, 175 & n.13 (1976) ("It is clear that the schools have standing to assert these arguments [asserting free-association rights, privacy rights, and 'a parent's right to direct the education of his children'] on behalf of their patrons."); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 536 (1925) (allowing a school to assert the "right of parents to choose schools where their children will receive appropriate mental and religious training [and] the right of the child to influence the parents' choice of a school"); *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1487-88 (9th Cir. 1995) (citing Pierce and rejecting the argument that the plaintiff school had no standing to assert claims of discrimination against its minority students); see also *Ohio Ass'n of Indep. Sch. v. Goff*, 92

F.3d 419, 422 (6th Cir. 1996) (citing similar authorities). As in those cases, the interests of the States' universities here are aligned with their students. The students' educational success is "inextricably bound up" in the universities' capacity to teach them. *Singleton*, 428 U.S. at 115. And the universities' reputations depend on the success of their professors' research. Thus, as the operators of state universities, the States may assert not only their own rights to the extent affected by the Executive Order but may also assert the rights of their students and faculty members." (p. 11-12)

- "We therefore conclude that the States have alleged harms to their proprietary interests traceable to the Executive Order. 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 Government does not argue otherwise." (p. 12)

Reviewability of the Executive Order

- "Although our jurisprudence has long counseled deference to the political branches on matters of immigration and national security, neither the Supreme Court nor our court has ever held that courts lack the authority to review executive action in those arenas for compliance with the Constitution. To the contrary, the Supreme Court has repeatedly and explicitly rejected the notion that the political branches have unreviewable authority over immigration or are not subject to the Constitution when policymaking in that context." (p. 14)
- "Indeed, federal courts routinely review the constitutionality of—and even invalidate—actions taken by the executive to promote national security, and have done so even in times of conflict." (p. 17)

Legal Standard

- "Our decision is guided by four questions: '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'" (p. 18)
- "We conclude that the Government has failed to clear each of the first two critical steps. We also conclude that the final two factors do not militate in favor of a stay. We emphasize, however, that our analysis is a preliminary one. We are tasked here with deciding only whether the Government has made a strong showing of its likely success in this appeal and whether the district court's TRO should be stayed in light of the relative hardships and the public interest." (p. 19)

Likelihood of Success – Due Process

- "At this point, however, we cannot rely upon the Government's contention that the Executive Order no longer applies to lawful permanent residents. The Government has offered no authority establishing that the White House counsel is empowered to issue an amended order superseding the Executive Order signed by the President and now challenged by the States, and that proposition seems unlikely." (p. 21-22)
- "Even if the claims based on the due process rights of lawful permanent residents were no longer part of this case, the States would continue to have potential claims regarding possible due process rights of other persons who are in the United States, even if unlawfully, see *Zadvydas*, 533 U.S. 693; non-immigrant visaholders who have been in the United States but temporarily departed or wish to temporarily depart, see Landon, 459 U.S. 33-34; refugees, see 8 U.S.C. § 1231 note 8; and applicants who have a relationship with a U.S. resident or an institution that might have rights of its own to assert, see *Kerry v. Din*, 135 S. Ct. 2128, 2139 (2015) (Kennedy, J., concurring in judgment); id. at 2142 (Breyer, J., dissenting); *Kleindienst v. Mandel*, 408 U.S. 753, 762-65 (1972)." (p. 22)
- "We decline to modify the scope of the TRO in either respect." (p. 23)

Likelihood of Success – Religious Discrimination

- "The States' claims raise serious allegations and present significant constitutional questions. In light of the sensitive interests involved, the pace of the current emergency proceedings, and our conclusion that the Government has not met its burden of showing likelihood of success on appeal on its arguments with respect to the due process claim, we reserve consideration of these claims until the merits of this appeal have been fully briefed." (p. 26)

The Balance of Hardships and the Public Interest

- "The Government has pointed to no evidence that any alien from any of the countries named in the Order has perpetrated a terrorist attack in the United States." (p. 26-27).
- "To the extent that the Government claims that it has suffered an institutional injury by erosion of the separation of powers, that injury is not "irreparable." It may yet pursue and vindicate its interests in the full course of this litigation. See, e.g., *Texas v. United States*, 787 F.3d 733, 767-68 (5th Cir. 2015) ("[I]t is the resolution of the case on the merits, not whether the injunction is stayed pending appeal, that will affect those principles.")." (p. 27)
- "The Government suggests that the Executive Order's discretionary waiver provisions are a sufficient safety valve for those who would suffer unnecessarily, but it has offered no explanation for how these provisions would function in practice: how would the "national interest" be determined, who would make that determination, and when? Moreover, as we have explained above, the Government has not otherwise explained how the Executive Order could realistically be administered only in parts such that the injuries listed above would be avoided." (p. 28).
- "We need not characterize the public interest more definitely than this; when considered alongside the hardships discussed above, these competing public interests do not justify a stay." (p. 29)

F. Conflicting Decisions: Analysis Regarding 5th Circuit Decision on Executive Order:

"When a federal judge in Seattle blocked Trump from enforcing his immigration executive order, he gave his stay nationwide effect. Lawyers for the administration argued that the judge's decision should be limited to just the two states which had brought the challenge -- Washington and Minnesota.

But the 9th Circuit Court of Appeals, in deciding to keep Trump's order on hold, rejected that argument. The judge's order should apply across the country, they said, because the government needs to have a "uniform immigration law" in all 50 states.

To support that part of the ruling, the three-judge 9th Circuit panel cited a decision in 2015 from the 5th Circuit. That court had ruled against an Obama administration program that tried to shield from deportation several hundred thousand parents of young people who had arrived in the U.S. illegally while they were children.

Texas, which successfully sued to block Obama's so-called DAPA program, had argued that its suit should have nationwide effect, and the 5th Circuit had agreed, citing the need for uniformity." - LA Times, http://www.latimes.com/politics/la-live-updates-9th-circuit-arguments-conservative-challenge-to-obama-1486685157-htmlstory.html

IV. What's Next in *Washington v. Trump*?

A. Back to the District Court: Plaintiffs' Motion for Preliminary Injunction

On February 7, 2017 the District Court issued an Order setting a briefing schedule regarding Plaintiffs Motion for Preliminary Injunction. Order [Doc. # 57] Plaintiffs were ordered to file their Motion by February 9, 2017 while Defendants Opposition is due February 15th. Plaintiffs were ordered to file their Reply by February 17th. *Id.*

In lieu of filing their Motion for Preliminary Injunction on February 9th Plaintiffs filed a letter with the Court arguing that "[t]he Court of Appeals held that the district court order

"possesses the qualities of an appealable preliminary injunction" and established a briefing schedule for the appeal of the district court order. Washington v. Trump, Case No. 17-35105, slip op. at 8, Dkt. Entry 134 (9th Cir. 2017); id. at Dkt. Entry 135 (ECF Nos. 68, 69). In light of the Court of Appeals decision, the States assume the district court briefing schedule is no longer applicable. The States will not be filing a preliminary injunction motion and brief in the district court tonight, unless we receive contrary guidance from the district court."

1. Re-seeking Stays If a Preliminary Injunction is Granted

B. Nothing

C. Making Changes/Improvements to the Executive Order

D. Potential Supreme Court Appeal Seeking Stay

"The ruling was the first from an appeals court on the travel ban, and it was focused on the narrow question of whether it should be blocked while courts consider its lawfulness. The decision is likely to be quickly appealed to the United States Supreme Court.

That court remains short-handed and could deadlock. A 4-to-4 tie in the Supreme Court would leave the appeals court's ruling in place." - Adam Liptak, NY Times https://www.nytimes.com/2017/02/09/us/politics/appeals-court-trump-travel-ban.html?_r=0

"UC Irvine Law School Dean Erwin Chemerinsky said it was difficult to predict whether the Supreme Court would review the decision. 'They don't want a 4-4 split, but they really like having the last word on high-profile case,' the constitutional law expert said."

- LA Times, http://www.latimes.com/nation/la-na-ninth-circuit-travel-ban-2017-story.html

"Appealing the panel's ruling to the Supreme Court is one of the choices, but a stay of Robart's order would require five votes on an eight-member court—a risky burden.

But even if the government wins, the Supreme Court might not step in at this early stage of what could be a protracted legal battle with many other court rulings on the same issue popping up around the nation.

The high court could let the litigation run its course, which would also give the administration a chance to refine and issue another order or policy that might have a better chance of surviving.

Blackman said the court could also see another advantage in acting slowly. "By waiting, there is a certainty that Justice Neil Gorsuch would be on the bench, thus making it easier to get to five votes," he said." - Tony Mauro, The National Law Journal, http://www.nationallawjournal.com/home/id=1202778647966/Whats-Next-in-HotButton-Travel-Ban-Litigation?mcode=1202615432600&curindex=2&slreturn=20170109202546

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