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Summary of Executive Order on "Sanctuary" or Enhancing Public Safety in the Interior of the United States

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This summary is selective and describes the purpose, enforcement priorities, Section 287 of then INA, Sanctuary Cities, and Termination of the Priorities Enforcement Program. This document should not be a substitute for legal advice nor should it be construed to mean that each provision of this Order is lawful or feasible.

Purpose (Section 1)

The Executive Order begins with an explanation of the reasons for the new policies. It states "many" who enter unlawfully or violate their visas are threats to "national security and public safety." Sanctuary jurisdictions have caused "immeasurable harm" to the people and the "very fabric of our Republic." Lastly, it suggests that the United States has exempted people from removal and by doing so has not "faithfully executed" the laws of the United States. The purpose of the Executive Order is to "employ all lawful means to enforce the immigration laws of the United States."

Enforcement Priorities (Section 5)

The Executive Order also lists which noncitizens are prioritized for removal. Noncitizens who are prioritized for removal include those noncitizens described by INA § 212(a)(2) [criminal grounds for inadmissibility], § 212(a)(3) [security and related grounds for inadmissibility], §212(a)(6)(C) [related to misrepresentation by entrants or prospective entrants into the United States] § 235 [expedited removal], § 237(a)(2) [criminal grounds for deportability], and § 237(a)(4) [security related grounds of deportability]. Remarkably, the Executive Order also prioritizes removable noncitizens who:

(a) were convicted of a crime,
(b) were charged with an unresolved criminal charge,
(c) have committed acts which constitute a chargeable offense,
(d) have "engaged in fraud or willful misrepresentation in connection with any official matter or application before a governmental agency,"
(e) "have abused any program related to receipt of public benefits,"
(f) are present in the United States, but have an order of removal, or
(g) "in the judgment of an immigration officer, otherwise pose a risk to public safety or national security."

Additionally, Section 6 sets forth that the Security of Homeland Security should provide guidance and regulations to ensure that fines and penalties are collected from noncitizens present in the United States. Notably, this list of priorities includes not only convicted noncitizens, but also those who have unresolved charges against them and those who have committed the acts of a crime. Thus, basic guarantees of due process to determine whether the noncitizen committed the alleged conduct is not necessary to be considered an enforcement priority. While this Executive Order does expand upon which noncitizens may become a priority for removal, it is important to note that no prior policy has been rescinded by this Executive Order besides Priority Enforcement Program; thus, the applicability of prior policies such as those concerning victims

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and witnesses is undetermined. For more information about the enforcement priorities, see: http://www.nipnlg.org/PDFs/practitioners/practice_advisories/gen/2017_26Jan-trump-enforce.pdf.

Section 287(g) of the INA (Section 8)
The Executive Order encourages the creation of agreements under INA § 287(g) with local authorities and Governors. Section 287(g) of the INA creates a program which allows any officer or employee of the State as determined by the Attorney General to be qualified to perform the functions of an immigration officer, such as the "investigation, apprehension, or detention" of noncitizens. Such immigration functions are at the expense of the state or political division.

"Sanctuary" Cities (Section 9)
The Executive Order sets forth that "Sanctuary Jurisdictions" will not receive federal grants, "except as deemed necessary for law enforcement purposes by the Attorney General or Secretary." Sanctuary has not been defined; however, the Executive Order sets forth that the Attorney General should take enforcement action against "any entity" who willfully violate 8 USC § 1373 or "which has in effect a statute, policy, or practice that prevents or hinders the enforcement of federal law." Section 1373 of 8 USC provides that state and local authorities cannot prohibit any government entity or official from "sending to, receiving from, [federal immigration authorities] about the citizenship or immigration status, lawful or unlawful, of any individual."

Section 1373 contains no language which affirmatively mandates that state or local municipalities hand over information about an individual's immigration status. Further, the Tenth Amendment prohibits the federal government from "compel[ling] the States to enact or administer a federal regulatory program." *Printz v. United States,* 521 U.S. 898, 935 (1997). Thus, the reach of 8 USC § 1373 is limited.

Termination of the Priority Enforcement Program (PEP) (Section 10)
This Executive Order terminates the Priority Enforcement Program (PEP), and reinstates the Secure Communities program. As described by ICE, the difference between Secure Communities and PEP include:

- PEP did not permit ICE to transfer individuals with civil immigration offenses alone. PEP also did not allow those charged, but not convicted of criminal offenses, to be transferred. Secure Communities, on the other hand, allowed officers to transfer custody when the immigration officer had "reason to believe."
- PEP required local law enforcement officials to provide a copy of the noncitizen's subject to the detainer for the detainer to be effective; whereas, Secure Communities only requested that law enforcement officials provide a copy of the detainer request.
- PEP required that "probable cause" that the noncitizen is removable be indicated on the detainer request; whereas, Secure Communities requested "reason to believe" the noncitizen was removable, which was not indicated on the detainer request.
- PEP did not issue detainers for foreign born individuals who did not have records which match ICE databases; whereas, Secure Communities does issue detainers who did not have records that match with ICE databases.

For more information about policy concerns over the Secure Communities Program, see: https://www.aclu.org/other/aclu-statement-secure-communities?redirect=immigrants-rights/aclu-statement-secure-communities.

OFFICE OF JUSTICE PROGRAMS GUIDANCE REGARDING COMPLIANCE WITH 8 U.S.C. § 1373

1. Q. What does 8 U.S.C. § 1373 require?

A. Title 8, United States Code, Section 1373 (Section 1373) addresses the exchange of information regarding citizenship and immigration status among federal, state, and local government entities and officials. Subsection (a) prevents federal, state and local government entities and officials from "prohibit[ing] or in any way restrict[ing]" government officials or entities from sending to, or receiving from, federal immigration officers information concerning an individual's citizenship or immigration status. Subsection (b) provides that no person or agency may "prohibit, or in any way restrict," a federal, state, or local government entity from (1) sending to, or requesting or receiving from, federal immigration officers information regarding an individual's immigration status, (2) maintaining such information, or (3) exchanging such information with any other federal, state, or local government entity. Section 1373 does not impose on states and localities the affirmative obligation to collect information from private individuals regarding their immigration status, nor does it require that states and localities take specific actions upon obtaining such information. Rather, the statute prohibits government entities and officials from taking action to prohibit or in any way restrict the maintenance or intergovernmental exchange of such information, including through written or unwritten policies or practices.

Your personnel must be informed that notwithstanding any state or local policies to the contrary, federal law does not allow any government entity or official to prohibit the sending or receiving of information about an individual's citizenship or immigration status with any federal, state or local government entity and officials.

2. Q. May a state make a subgrant to a city that the state knows to be violating an applicable law or regulation (e.g. Section 1373), or a programmatic requirement?

A. No. A JAG grantee is required to assure and certify compliance with all applicable federal statues, including Section 1373, as well as all applicable federal regulations, policies, guidelines and requirements. This requirement passes through to any subgrants that may be made and to any subgranteees that receive funds under the grant.

3. Q. Is there a specific report or source BJA is using to determine whether a jurisdiction has violated an applicable Federal law (e.g. Section 1373)?

A. The Office of Justice Programs (OJP) will take seriously credible evidence of a violation of applicable Federal law, including a violation of Section 1373, from any source. In the ordinary course, OJP will refer such evidence to the Department of Justice's Office of the Inspector General for appropriate action.

4. Q. How would a determination that a subgrantee is in violation of federal law affect the state's designation and ability to receive future awards?

A. A grantee is responsible to the federal government for the duration of the award. As the primary recipient of the award, the grantee is responsible for ensuring that subgrantees assure and certify compliance with federal program and grant requirements, laws, or regulations (*e.g.* Section 1373). If a grantee or subgrantee has policies or practices in effect that violate Section 1373, the grantee or subgrantee will be given a reasonable amount of time to remedy or clarify such policies to ensure compliance with applicable law. Failure to remedy any violations could result in the withholding of grant funds or ineligibility for future OJP grants or subgrants, or other administrative, civil, or criminal penalties, as appropriate. Our goal is to ensure that JAG grantees and subgrantees are in compliance with all applicable laws and regulations, including Section 1373, not to withhold vitally important criminal justice funding from states and localities.

5. Q. Does the "JAG Sanctuary Policy Guidance" notice apply to all active grants?

A. The Policy Guidance applies to all JAG grantees and subgrantees.

6. Q. What should a state be doing to ensure that subgrantees are complying with the legal requirements for receiving JAG funds?

A. The state must comply with all of the requirements of 2 C.F.R. § 200.331. See also Section 3.14 (Subrecipient Monitoring) of the Department of Justice Financial Guide.

7. Q. The "JAG Sanctuary Policy Guidance" cited Section 1373. Are there other components of Title 8 of the United States Code that are required for compliance?

A. All grantees are required to assure and certify compliance with all applicable federal statutes, regulations, policies, guidelines, and requirements. States may wish to consult with their legal counsel if they have any questions or concerns as to the scope of this requirement.

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Updated on February 23, 2017

FAQs ON COUNTY OF SANTA CLARA LAWSUIT CHALLENGING EXECUTIVE ORDER ON "SANCTUARY JURISDICTIONS"

On February 3, 2017, the County filed a federal lawsuit against President Donald Trump and members of his administration challenging his January 25, 2017 Executive Order through which he intends to deny all federal funding to any state or local government that he deems fails to comply with his aggressive immigration enforcement plan. The lawsuit challenges the President's authority to unilaterally impose conditions on federal funds—a power the Constitution places exclusively in the hands of Congress—as well as the blanket denial of *all* federal funds, the vast majority of which have no connection to immigration or law enforcement.

On February 23, 2017, the County moved for a preliminary injunction to prevent the Trump Administration from enforcing the Executive Order.

Q: Which Executive Order does the lawsuit challenge?

A: The lawsuit challenges Executive Order 13768, issued on January 25, 2017, entitled "Enhancing Public Safety in the Interior of the United States." This Executive Order targets so-called "sanctuary jurisdictions," and is distinct from an executive order issued two days later regarding travel restrictions for refugees, visa-holders, and other individuals entering the United States from certain Muslim-majority countries.

Q: What does the Executive Order do?

A: The Executive Order declares that it is the policy of the Trump Administration to ensure that "sanctuary jurisdictions" are stripped of *all* federal funds. The Executive Order does not define what entities are "sanctuary jurisdictions." Instead, it seeks to grant executive branch officials unlimited discretion to deny federal funds to states, cities, counties, and other local governments they deem to be "sanctuary jurisdictions," and to also take unspecified enforcement actions against them.

Q: Why is the County bringing a lawsuit now?

A: The County is suing to prevent the Trump Administration from stripping the County of all federal funding, and to enable the County to continue to provide uninterrupted healthcare, public safety and other critical services to its residents. The Executive Order violates the United States

Constitution, directly harms the County's rights as a political subdivision of the State of California, and threatens the loss of nearly $1.7 billion in federal and federally dependent funds that are used to provide essential services. Because the vast majority of the County's federal funding is provided on a reimbursement basis, the County is required to spend its own money first and make fiscal decisions far in advance of receiving federal dollars. President Trump has threatened to withhold federal funds from jurisdictions that do not agree to comply with this illegal Order. Under the Constitution, the President does not have the authority to take away federal funding as a weapon to coerce state and local governments to undertake federal responsibilities. For these reasons, the County Board of Supervisors voted unanimously to bring a lawsuit to protect the County and its residents from this unconstitutional Executive Order.

Q: Who are the parties in the lawsuit?

A: The County is the Plaintiff in the lawsuit. The Defendants are President Trump and his senior officials, including the Secretary of Homeland Security, the Attorney General, and the Director of the Office of Management and Budget (OMB). The lawsuit is being litigated by the Office of the County Counsel in partnership with the law firm of Keker, Van Nest & Peters LLP, which is representing the County pro bono (free of charge).

Q: What is at stake in the lawsuit?

A: Cutting all federal funds currently provided to the County would not only adversely affect all County residents who rely on County medical services, including trauma care, emergency medical services, law enforcement services, but would also have a devastating impact on infants, children, families, and seniors in need of health care, nutritious food, and housing support. The purpose of the lawsuit is to stop the Trump Administration's unconstitutional effort to coerce the County to act as an enforcer of the Trump Administration's federal immigration policy priorities or be stripped of all federal funds.

Q: What federal funds does the County receive?

A: The County receives about $1.7 billion in federal and federally contingent funds each year. These federal funds support a diverse array of essential services and programs for all County residents, including: Santa Clara Valley Medical Center, the only safety net hospital in Santa Clara County; administration of key federal entitlement programs such as Medicaid, Temporary Assistance for Needy Families, and the Supplemental Nutrition Assistance Program; foster care, adoption assistance, and guardianship placements; basic food and nutrition needs for infants, children, families and seniors; housing and community development; highway planning and construction; and security, intelligence, and counter-terrorism efforts.

Q: What are the causes of action in the lawsuit?

A: The lawsuit asserts four causes of action: a violation of the Separation of Powers; two violations of Due Process under the Fifth Amendment; and a violation of the Tenth Amendment.

FAQs On County of Santa Clara Lawsuit Challenging Executive Order on "Sanctuary Jurisdictions"

Q: What remedy is the County seeking in the lawsuit?

A: The County is seeking two forms of relief: (1) a declaration by a federal court that the Executive Order on "Sanctuary Jurisdictions" is unconstitutional; and (2) an injunction prohibiting the Trump Administration from stripping the County of federal funds.

Q: What is a "sanctuary jurisdiction" under the law?

A: There is no clear definition of "sanctuary jurisdiction" in the Executive Order or in any federal statute. In common parlance, "sanctuary jurisdictions" are broadly defined as jurisdictions that do not use local taxpayer funded resources to perform the federal government's function of enforcing federal immigration laws and deportation efforts. Importantly, the term "sanctuary" is a misnomer, however, because no local government can prevent the federal government from using its own resources to enforce federal immigration laws. The County has never sought to do so.

Q: Is Santa Clara County a "sanctuary jurisdiction"?

A: The Executive Order does not clearly define what it means by "sanctuary jurisdiction." And the County certainly does not and cannot prevent federal agents from operating within its borders to enforce federal immigration laws. The U.S. Immigration & Customs Enforcement (ICE) sometimes requests local governments, like the County, to hold immigrants in County jail after their scheduled release dates (ICE detainer requests). The County has a policy of only honoring such requests for individuals with certain serious or violent criminal convictions, and only if ICE will enter into a prior written agreement agreeing to reimburse the County for the costs it incurs in holding immigrants beyond their usual release dates. Currently, the County's jails operate at or near capacity. ICE has refused to enter into a reimbursement agreement with the County.

Q: Why doesn't the County just comply with ICE civil detainer requests and other requests for assistance in apprehending immigrants?

A: Law enforcement agencies in the County believe that participating in federal immigration enforcement makes it much more difficult for them to fulfill their role in protecting the safety of our community. Local law enforcement agencies rely on the trust and respect of the community—including immigrant community members—who provide critical information needed to investigate and solve crimes. That trust and cooperation is seriously compromised when local law enforcement are perceived as federal immigration enforcers. This makes it much more difficult for local law enforcement to do their jobs and undermines public safety.

In addition, several courts around the nation have held that compliance with ICE detainer requests violates the Fourth Amendment of the U.S. Constitution, and may also violate other constitutional provisions. Thus, even if the County complied with ICE detainer requests in an attempt to avoid the Executive Order's provision to strip "sanctuary jurisdictions" of federal funds, the County would expose the taxpayers of Santa Clara County to substantial financial liability.

FAQs On County of Santa Clara Lawsuit Challenging Executive Order on "Sanctuary Jurisdictions"

Q: What is a preliminary injunction?

A: preliminary injunction is a court order, issued in the early stages of a lawsuit, that prevents certain actions from being taken until the court can decide the case. A preliminary injunction is usually granted when the requesting party is likely to succeed at trial and is also likely to be irreparably harmed if the motion is not granted. In effect, a preliminary injunction preserves the status quo until the court has sufficient time to reach a final decision.

Q: Why is the County seeking a preliminary injunction?

A: The County is seeking a preliminary injunction against the Trump Administration because the Executive Order is unconstitutional and is already causing harm to the County and its residents.

The Executive Order threatens to withdraw all federal funding to the County—including reimbursement for services currently being delivered. This threat forces the County to make an impossible choice: (1) continuing to incur hundreds of millions of dollars in service costs that may never be reimbursed by the federal government; (2) slashing these critical health, safety, and welfare services on which all County residents depend; or (3) submitting to the Executive Order's unconstitutional directives to participate in federal immigration enforcement. The County seeks a preliminary injunction that would block the Trump Administration from stripping the County of federal funds, including those funds that the County is entitled to under existing agreements, until there is sufficient time for a trial on the merits.

2017 WL 1011673
Only the Westlaw citation is currently available.
United States District Court,
D. **Hawai'i.**

State of HAWAI'I and **Ismail** Elshikh, Plaintiffs,
v.
Donald J. **TRUMP**, et al., Defendants.

CV. NO. 17–00050 DKW–KSC
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Signed 03/15/2017

Synopsis
Background: State of Hawai'i and state resident brought action against President of the United States and others, alleging that sections of executive order that restricted refugee admissions and entry of aliens from Iran, Libya, Somalia, Sudan, Syria, and Yemen to protect the United States from terrorist attacks violated First and Fifth Amendments, Immigration and Nationality Act (INA), Religious Freedom Restoration Act (RFRA), and Administrative Procedure Act (APA). Plaintiffs moved for temporary restraining order (TRO) prohibiting defendants from enforcing or implementing executive order.

Holdings: The District Court, Derrick K. Watson, J., held that:
[1] State had standing;
[2] resident had standing;
[3] claims by resident were ripe;
[4] State and resident were likely to succeed on merits of their establishment clause claim, weighing in favor of TRO; and
[5] balance of equities and public interest weighed in favor of TRO.

Motion granted.

ORDER GRANTING MOTION FOR TEMPORARY RESTRAINING ORDER

Derrick K. Watson, United States District Judge

INTRODUCTION

*1 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.

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

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No. 2.

*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 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, —— Fed.Appx. ——, 2017 WL 469608 (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. § 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).

*3 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:"

[This list includes foreign nationals who were previously admitted to the United States; who had previously established significant contacts with the United States; seeks to enter for significant business or professional obligation; seeks to enter to visit close family member where denial would cause extreme hardship; is an infant or child or needs urgent medical care; has been employed by U.S> government; is travelling for purpsoes related to an international organization; is a landed Canadian immigrant; or is traveling on U.S. Government-sponsored exchange program.]

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.

*4 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."
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> *5 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."
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> 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

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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.' "

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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."

*6 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)). ***

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

*7 [1] [2]Article III, Section 2 of the Constitution permits federal courts to consider only "cases" and "controversies." *Massachusetts v. EPA*, 549 U.S. 497, 516, 127 S.Ct. 1438, 167 L.Ed.2d 248 (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, 88 S.Ct. 1942, 20 L.Ed.2d 947 (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, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)).

[3]"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, 127 S.Ct. 1438)).

[4]"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, 112 S.Ct. 2130). "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*, —— U.S. ——, 134 S.Ct. 907, 187 L.Ed.2d 778 (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

[5]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 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 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.*

*8 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, 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*, —— U.S. ——, 136 S.Ct. 2271, 195 L.Ed.2d 638 (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).

*9 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]

C. Dr. Elshikh Has Standing

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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 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.

[6] [7]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—

> ***10** [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, 104 S.Ct. 1355, 79 L.Ed.2d 604 (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.").

***

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

[8] [9]"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, 118 S.Ct. 1257, 140 L.Ed.2d 406 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580–81, 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985)).

[10]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.

*11 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 Executive Order is implemented and enforced—the injuries are not contingent ones. ***

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

III. Legal Standard: Preliminary Injunctive Relief

[11]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 v. Brotherhood of Teamsters and Auto Truck Drivers Local No. 70 of Alameda County*, 415 U.S. 423, 439, 94 S.Ct. 1113, 39 L.Ed.2d 435 (1974); *see also Reno Air Racing Ass'n v. McCord*, 452 F.3d 1126, 1130–31 (9th Cir. 2006).

[12] [13]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, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008) (citation omitted).

[14]"[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

[15]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

*12 [16] [17]"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, 102 S.Ct. 1673, 72 L.Ed.2d 33 (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, 91 S.Ct. 2105, 29 L.Ed.2d 745 (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).

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*, —— F.Supp.3d at ——, 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%.[11] 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.

[18] [19]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 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, 113 S.Ct. 2217, 124 L.Ed.2d 472 (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, 102 S.Ct. 1673 (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, 97 S.Ct. 555, 50 L.Ed.2d 450 (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, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005) (citation and quotation signals omitted).[13] "[H]istorical context and 'the specific sequence of events leading up to' " the adoption of a challenged policy are relevant

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considerations. *Id.* at 862, 125 S.Ct. 2722; *see also Aziz*, —— F.Supp.3d at ——, 2017 WL 580855, at *7.

*13 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, 125 S.Ct. 2722). 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.' "

*14 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 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

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religious objective" of temporarily suspending the entry of Muslims. *See McCreary*, 545 U.S. at 864, 125 S.Ct. 2722.[15]

To emphasize these points, Plaintiffs assert that the stated national security reasons for the Executive Order are pretextual. ***

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.***

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, 125 S.Ct. 2722; *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, 104 S.Ct. 1355, 79 L.Ed.2d 604 (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, 125 S.Ct. 2722.[17] ***{C}ontext may change during the course of litigation, and the Court is prepared to respond accordingly.

*16 Last, the Court emphasizes that its preliminary assessment rests on the peculiar circumstances and specific historical record present here. ***

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.

[20]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, 96 S.Ct. 2673, 49 L.Ed.2d 547 (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

[21]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.

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, 96 S.Ct. 2673); *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).

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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*, —— F.Supp.3d ——, 2017 WL 580855, at *10. Nationwide relief is appropriate in light of the likelihood of success on the Establishment Clause claim.

CONCLUSION

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

REFUGEE LAW AND COMPARATIVE ASPECTS OF SOCIAL JUSTICE
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INTERNATIONAL AND REGIONAL DEFINITIONS OF REFUGEE

From the UN 1951 Convention and 1967 Protocol Relating to the Status of Refugees:

The term "refugee" shall apply to any person who:

(2) [O] wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

From the 1984 Cartagena Declaration on Refugees

[T]he definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.

From the Convention Governing the Specific Aspects of Refugee Problems in Africa

[T] he term "refugee" shall mean every person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it.

The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

From the European Union's Standards for the Qualification of Third-country Nationals or Stateless Persons as Beneficiaries of International Protection, Art. 5, Directive 2011/95/EU:

A "beneficiary of international protection" means a person who has been granted refugee status or subsidiary protection status.
A "refugee" means a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a

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particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply;

A "person eligible for subsidiary protection" means a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;

INTERNATIONAL AND REGIONAL DEFINITIONS OF "REFUGEE"

1951 UNITED NATIONS CONVENTION RELATING TO THE STATUS OF REFUGEES, 189 U.N.T.S. 150, entered into force April 22, 1954.

PREAMBLE

The High Contracting Parties,

Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,

Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms,

Considering that it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and the protection accorded by such instruments by means of a new agreement,

Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international- scope and nature cannot therefore be achieved without international co-operation,

Expressing the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States,

Noting that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner,

Have agreed as follows:

CHAPTER I

GENERAL PROVISIONS

Article 1. - Definition of the term "refugee"

A. For the purposes of the present Convention, the term "refugee,, shall apply to any person who:

(1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization;
Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section;

(2) As a result of events occurring before I January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.
In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national; and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

B. (1) For the purposes of this Convention, the words "events occurring before I January 1951" in article 1, section A, shall be understood to mean either (a) "events occurring in Europe before I January 1951"; or (b) "events occurring in Europe or elsewhere before I January 1951"; and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.

(2) Any Contracting State which has adopted alternative (a) may at any time extend its obligations by adopting alternative (b) by means of a notification addressed to the Secretary-General of the United Nations.

C. This Convention shall cease to apply to any person falling under the terms of section A if:

(1) He has voluntarily re-availed himself of the protection of the country of his nationality; or
(2) Having lost his nationality, he has voluntarily reacquired it; or
(3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or
(4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or
(5) He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

Provided that this paragraph shall not apply to a refugee falling under section A (I) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;

(6) Being a person who has no nationality he is, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;

Provided that this paragraph shall not apply to a refugee falling under section A (I) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

D. This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention.

E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
(a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
(c) He has been guilty of acts contrary to the purposes and principles of the United Nations.

....

Article 31. - Refugees unlawfully in the country of refuge

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

Article 32. - Expulsion

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Article 33. - Prohibition of expulsion or return ("refoulement")

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

Protocol Relating to the Status of Refugees
606 U.N.T.S. 267, entered into force Oct. 4, 1967.

The States Parties to the present Protocol,

Considering that the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 (hereinafter referred to as the Convention) covers only those persons who have become refugees as a result of events occurring before I January 1951,

Considering that new refugee situations have arisen since the Convention was adopted and that the refugees concerned may therefore not fall within the scope of the Convention,

Considering that it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline I January 1951,

Have agreed as follows:

Article 1. - General provision

1. The States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined.

2. For the purpose of the present Protocol, the term "refugee" shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article I of the Convention as if the words "As a result of events occurring before 1 January 1951 and..." and the words "...as a result of such events", in article 1 A (2) were omitted.

3. The present Protocol shall be applied by the States Parties hereto without any geographic limitation, save that existing declarations made by States already Parties to the Convention in accordance with article I B (I) (a) of the Convention, shall, unless extended under article I B (2) thereof, apply also under the present Protocol.

....

Cartagena Declaration on Refugees
Adopted at a colloquium entitled "Coloquio Sobre la Protecciíon Internacional de los Refugiados en Américan Central, México y Panamá: Problemas Jurídicos y Humanitarios" held at Cartagena, Colombia from 19 - 22 November 1984

....
The Colloquium adopted the following conclusions:

....

3. To reiterate that, in view of the experience gained from the massive flows of refugees in the Central American area, it is necessary to consider enlarging the concept of a refugee, bearing in mind, as far as appropriate and in the light of the situation prevailing in the region, the precedent of the OAU Convention (article 1, paragraph 2) and the doctrine employed in the reports of the Inter-American Commission on Human Rights. Hence the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.

CONVENTION GOVERNING THE SPECIFIC ASPECTS OF REFUGEE PROBLEMS IN AFRICA

PREAMBLE

We, the Heads of State and Government assembled in the city of Addis Ababa, from 6-10 September 1969, Have agreed as follows:

Article 1

Definition of the term "Refugee"

1. For the purposes of this Convention, the term "refugee" shall mean every person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it.

2. The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

....

DONE in the City of Addis Ababa this 10th day of September 1969.

Excerpts from Guy S. Goodwin-Gill, Introductory Note to 1951 Convention Relating to the Status of Refugees and 1967 Protocol Relating to the Status of Refugees
http://legal.un.org/avl/ha/prsr/prsr.html

Introduction

The 1951 Convention relating to the Status of Refugees, with just one "amending" and updating Protocol adopted in 1967 (on which, see further below), is the central feature in today's international regime of refugee protection, and some 144 States (out of a total United Nations membership of 192) have now ratified either one or both of these instruments (as of August 2008). The Convention, which entered into force in 1954, is by far the most widely ratified refugee treaty, and remains central also to the protection activities of the United Nations High Commissioner for Refugees (UNHCR).

In the aftermath of the Second World War, refugees and displaced persons were high on the international agenda. At its first session in 1946, the United Nations General Assembly recognized not only the urgency of the problem, but also the cardinal principle that "no refugees or displaced persons who have finally and definitely ... expressed valid objections to returning to their countries of origin ... shall be compelled to return ..." (resolution 8 (I) of 12 February 1946). The United Nations' first post-war response was a specialized agency, the International Refugee Organization (IRO, 1946-1952), but notwithstanding its success in providing protection and assistance and facilitating solutions, it was expensive and also caught up in the politics of the Cold War. It was therefore decided to replace it with a temporary, initially non-operational agency, and to complement the new institution with revised treaty provisions on the status of refugees.

The historical context also helps to explain both the nature of the Convention and some of its apparent limitations. Just six years before its conclusion, the Charter of the United Nations had identified the principles of sovereignty, independence, and non-interference within the reserved domain of domestic jurisdiction as fundamental to the success of the Organization (Article 2 of the Charter of the United Nations). In December 1948, the General Assembly adopted the Universal Declaration of Human Rights, article 14, paragraph 1, of which recognizes that, "Everyone has the right to seek and to enjoy in other countries asylum from persecution", but the individual was only then beginning to be seen as the beneficiary of human rights in international law. These factors are important to an understanding of both the manner in which the 1951 Convention is drafted (that is, initially and primarily as an agreement between States as to how they will treat refugees), and the essentially reactive nature of the international regime of refugee protection (that is, the system is triggered by a cross-border movement, so that neither prevention, nor the protection of internally displaced persons come within its range).

The United Nations High Commissioner for Refugees and the 1951 Convention

After extensive discussions in its Third Committee, the General Assembly moved to replace the IRO with a subsidiary organ (under Article 22 of the Charter of the United Nations), and by resolution 428 (V) of 14 December 1950, it decided to set up the Office of the United Nations High Commissioner for Refugees with effect from 1 January 1951. Initially set up for three

years, the High Commissioner's mandate was regularly renewed thereafter for five-year periods until 2003, when the General Assembly decided "to continue the Office until the refugee problem is solved" (resolution 58/153 of 22 December 2003, paragraph 9).

The High Commissioner's primary responsibility, set out in paragraph 1 of the Statute annexed to resolution 428 (V), is to provide "international protection" to refugees and, by assisting Governments, to seek "permanent solutions for the problem of refugees". Its protection functions specifically include "promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto" (paragraph 8 (a) of the Statute).

A year earlier, in 1949, the United Nations Economic and Social Council appointed an Ad Hoc Committee to "consider the desirability of preparing a revised and consolidated convention relating to the international status of refugees and stateless persons and, if they consider such a course desirable, draft the text of such a convention".

The Ad Hoc Committee decided to focus on the refugee (stateless persons were eventually included in a second convention, the 1954 Convention relating to the Status of Stateless Persons), and duly produced a draft convention. Its provisional draft drew on IRO practice under its Constitution, identified a number of categories of refugees, such as the victims of the Nazi or Falangist regimes and those recognized under previous international agreements, and also adopted the general criteria of well-founded fear of persecution and lack of protection (See United Nations doc. E/AC.32/L.6, 23 January 1950).

On July 28 1951, at the Palais des Nations, Geneva, the first twelve nations signed the Convention Relating to the Status of Refugees, drafted by the world Conference of Plenipotentiaries on Refugees and Stateless Persons which met from 2 to 25 July.In August 1950, the Economic and Social Council returned the draft for further review, before consideration by the General Assembly, and then finalized the Preamble and refugee definition. In December 1950, the General Assembly decided to convene a Conference of Plenipotentiaries to finalize the Convention (resolution 429 (V) of 14 December 1950).

The Conference met in Geneva from 2 to 25 July 1951 and took as its basis for discussion the draft which had been prepared by the Ad Hoc Committee on Refugees and Stateless Persons, save that the Preamble was that adopted by the Economic and Social Council, while article 1 (definition) was as recommended by the General Assembly and annexed to resolution 429 (V). On adopting the final text, the Conference also unanimously adopted a Final Act, including five recommendations covering travel documents, family unity, non-governmental organizations, asylum, and application of the Convention beyond its contractual scope.

Notwithstanding the intended complementarity between the responsibilities of the UNHCR and the scope of the new Convention, a marked difference already existed: the mandate of the UNHCR was universal and general, unconstrained by geographical or temporal limitations, while the definition forwarded to the Conference by the General Assembly, reflecting the reluctance of States to sign a "blank cheque" for unknown numbers of future refugees, was restricted to those who became refugees by reason of events occurring before 1 January 1951

(and the Conference was to add a further option, allowing States to limit their obligations to refugees resulting from events occurring in Europe before the critical date).

The Convention Refugee Definition

Article 1A, paragraph 1, of the 1951 Convention applies the term "refugee", first, to any person considered a refugee under earlier international arrangements. Article 1A, paragraph 2, read now together with the 1967 Protocol and without the time limit, then offers a general definition of the refugee as including any person who is outside their country of origin and unable or unwilling to return there or to avail themselves of its protection, on account of a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular group, or political opinion. Stateless persons may also be refugees in this sense, where country of origin (citizenship) is understood as "country of former habitual residence". Those who possess more than one nationality will only be considered as refugees within the Convention if such other nationality or nationalities are ineffective (that is, do not provide protection).

The refugee must be "outside" his or her country of origin, and the fact of having fled, of having crossed an international frontier, is an intrinsic part of the quality of refugee, understood in its ordinary sense. However, it is not necessary to have fled by reason of fear of persecution, or even actually to have been persecuted. The fear of persecution looks to the future, and can also emerge during an individual's absence from their home country, for example, as a result of intervening political change.

Persecution and the Reasons for Persecution

Although the risk of persecution is central to the refugee definition, "persecution" itself is not defined in the 1951 Convention. Articles 31 and 33 refer to those whose life or freedom "was" or "would be" threatened, so clearly it includes the threat of death, or the threat of torture, or cruel, inhuman or degrading treatment or punishment. A comprehensive analysis today will require the general notion to be related to developments within the broad field of human rights (cf. 1984 Convention against Torture, article 7; 1966 International Covenant on Civil and Political Rights, article 3; 1950 European Convention on Human Rights, article 6; 1969 American Convention on Human Rights, article 5; 1981 African Charter of Human and Peoples' Rights).

At the same time, fear of persecution and lack of protection are themselves interrelated elements. The persecuted clearly do not enjoy the protection of their country of origin, while evidence of the lack of protection on either the internal or external level may create a presumption as to the likelihood of persecution and to the well-foundedness of any fear. However, there is no necessary linkage between persecution and Government authority. A Convention refugee, by definition, must be unable or unwilling to avail him- or herself of the protection of the State or Government, and the notion of inability to secure the protection of the State is broad enough to include a situation where the authorities cannot or will not provide protection, for example, against the persecution of non-State actors.

The Convention requires that the persecution feared be for reasons of "race, religion, nationality, membership of a particular social group (added at the 1951 Conference), or political opinion".

This language, which recalls the language of non-discrimination in the Universal Declaration of Human Rights and subsequent human rights instruments, gives an insight into the characteristics of individuals and groups which are considered relevant to refugee protection. Persecution for the stated reasons implies a violation of human rights of particular gravity; it may be the result of cumulative events or systemic mistreatment, but equally it could comprise a single act of torture.

Persecution under the Convention is thus a complex of reasons, interests, and measures. The measures affect or are directed against groups or individuals for reasons of race, religion, nationality, membership of a particular social group, or political opinion. These reasons in turn show that the groups or individuals are identified by reference to a classification which ought to be irrelevant to the enjoyment of fundamental human rights.

The Convention does not just say who is a refugee, however. It goes further and sets out when refugee status comes to an end (article 1C; for example, in the case of voluntary return, acquisition of a new, effective nationality, or change of circumstances in the country of origin). For particular, political reasons, the Convention also puts Palestinian refugees outside its scope (at least while they continue to receive protection or assistance from other United Nations agencies (article 1D)), and excludes persons who are treated as nationals in their State of refuge (article 1E). Finally, the Convention definition categorically excludes from the benefits of refugee status anyone whom there are serious reasons to believe has committed a war crime, a serious non-political offence prior to admission, or acts contrary to the purposes and principles of the United Nations (article 1F). From the very beginning, therefore, the 1951 Convention has contained clauses sufficient to ensure that the serious criminal and the terrorist do not benefit from international protection.

Non-refoulement

Besides identifying the essential characteristics of the refugee, States party to the Convention also accept a number of specific obligations which are crucial to achieving the goal of protection, and thereafter an appropriate solution.

Foremost among these is the principle of non-refoulement. As set out in the Convention, this prescribes broadly that no refugee should be returned in any manner whatsoever to any country where he or she would be at risk of persecution (see also article 3, 1984 Convention against Torture, which extends the same protection where there are substantial grounds for believing that a person to be returned would be in danger of being tortured).

The word non-refoulement derives from the French refouler, which means to drive back or to repel. The idea that a State ought not to return persons to other States in certain circumstances is first referred to in article 3 of the 1933 Convention relating to the International Status of Refugees, under which the contracting parties undertook not to remove resident refugees or keep them from their territory, "by application of police measures, such as expulsions or non-admittance at the frontier (refoulement)", unless dictated by national security or public order. Each State undertook, "in any case not to refuse entry to refugees at the frontiers of their countries of origin".

The 1933 Convention was not widely ratified, but a new era began with the General Assembly's 1946 endorsement of the principle that refugees with valid objections should not be compelled to return to their country of origin (see above, resolution 8 (I)). The Ad Hoc Committee on Statelessness and Related Problems initially proposed an absolute prohibition on refoulement, with no exceptions (United Nations Economic and Social Council, Summary Record of the twentieth meeting, Ad Hoc Committee on Statelessness and Related Problems, First Session, United Nations doc. E/AC.32/SR.20, (1950), 11-12, paras. 54 to 55). The 1951 Conference of Plenipotentiaries qualified the principle, however, by adding a paragraph to deny the benefit of non-refoulement to the refugee whom there are "reasonable grounds for regarding as a danger to the security of the country..., or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country." Apart from such limited situations of exception, however, the drafters of the 1951 Convention made it clear that refugees should not be returned, either to their country of origin or to other countries in which they would be at risk.

The Convention Standards of Treatment

In addition to the core protection of non-refoulement, the 1951 Convention prescribes freedom from penalties for illegal entry (article 31), and freedom from expulsion, save on the most serious grounds (article 32). Article 8 seeks to exempt refugees from the application of exceptional measures which might otherwise affect them by reason only of their nationality, while article 9 preserves the right of States to take "provisional measures" on the grounds of national security against a particular person, but only "pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary ... in the interests of national security".

States have also agreed to provide certain facilities to refugees, including administrative assistance (article 25); identity papers (article 27), and travel documents (article 28); the grant of permission to transfer assets (article 30); and the facilitation of naturalization (article 34).

Given the further objective of a solution (assimilation or integration), the Convention concept of refugee status thus offers a point of departure in considering the appropriate standard of treatment of refugees within the territory of Contracting States. It is at this point, where the Convention focuses on matters such as social security, rationing, access to employment and the liberal professions, that it betrays its essentially European origin; it is here, in the articles dealing with social and economic rights, that one still finds the greatest number of reservations, particularly among developing States.

The Convention proposes, as a minimum standard, that refugees should receive at least the treatment which is accorded to aliens generally. Most-favoured-nation treatment is called for in respect of the right of association (article 15), and the right to engage in wage-earning employment (article 17, paragraph 1). The latter is of major importance to the refugee in search of an effective solution, but it is also the provision which has attracted most reservations. Many States have emphasized that the reference to most-favoured-nation shall not be interpreted as entitling refugees to the benefit of special or regional customs, or economic or political agreements. Other States have expressly rejected most-favoured-nation treatment, limiting their

obligation to accord only that standard applicable to aliens generally, while some view article 17 merely as a recommendation, or agree to apply it "so far as the law allows".

"National treatment", that is, treatment no different from that accorded to citizens, is to be granted in respect of a wide variety of matters, including the freedom to practice religion and as regards the religious education of children (article 4); the protection of artistic rights and industrial property (article 14); access to courts, legal assistance, and exemption from the requirement to give security for costs in court proceedings (article 16); rationing (article 20); elementary education (article 22, paragraph 1); public relief (article 23); labour legislation and social security (article 24, paragraph 1); and fiscal charges (article 29).

Article 26 of the Convention prescribes such freedom of movement for refugees as is accorded to aliens generally in the same circumstances. Eleven States have made reservations, eight of which expressly retain the right to designate places of residence, either generally, or on grounds of national security, public order (ordre public) or the public interest.

....

The 1967 Protocol Relating to the Status of Refugees

The origins of the 1967 Protocol relating to the Status of Refugees, which reflected recognition by UNHCR and the States members of its Executive Committee that there was a disjuncture between the universal, unlimited UNHCR Statute and the scope of the 1951 Convention, were quite different from those of the latter. Instead of an international conference under the auspices of the United Nations, the issues were addressed at a colloquium of some thirteen legal experts which met in Bellagio, Italy, from 21 to 28 April 1965. The Colloquium did not favour a complete revision of the 1951 Convention, but opted instead for a Protocol by way of which States parties would agree to apply the relevant provisions of the Convention, but without necessarily becoming party to that treaty. The approach was approved by the UNHCR Executive Committee and the draft Protocol was referred to the Economic and Social Council for transmission to the General Assembly. The General Assembly took note of the Protocol (the General Assembly commonly "takes note" of, rather than adopts or approves, instruments drafted outside the United Nations system), and requested the Secretary-General to transmit the text to States with a view to enabling them to accede (resolution 2198 (XXI) of 16 December 1966). The Protocol required just six ratifications and it duly entered into force on 4 October 1967.

The Protocol is often referred to as "amending" the 1951 Convention, but in fact, and as noted above, it does no such thing. The Protocol is an independent instrument, not a revision within the meaning of article 45 of the Convention. States parties to the Protocol, which can be ratified or acceded to by a State without becoming a party to the Convention, simply agree to apply articles 2 to 34 of the Convention to refugees defined in article 1 thereof, as if the dateline were omitted (article I of the Protocol). As of August 2008, Cape Verde, Swaziland, the United States of America and Venezuela have acceded only to the Protocol, while Madagascar, Monaco, Namibia and St. Vincent & the Grenadines are party only to the Convention (and the Congo, Madagascar, Monaco, and Turkey have retained the geographical limitation).

Article II on the cooperation of national authorities with the United Nations is equivalent to article 35 of the Convention, while the few remaining articles (just eleven in all) add no substantive obligations to the Convention regime.

Evaluation

The Convention is sometimes portrayed today as a relic of the cold war and as inadequate in the face of "new" refugees from ethnic violence and gender-based persecution. It is also said to be insensitive to security concerns, particularly terrorism and organized crime, and even redundant, given the protection now due in principle to everyone under international human rights law.

The Convention does not deal with the question of admission, and neither does it oblige a State of refuge to accord asylum as such, or provide for the sharing of responsibilities (for example, by prescribing which State should deal with a claim to refugee status). The Convention also does not address the question of "causes" of flight, or make provision for prevention; its scope does not include internally displaced persons, and it is not concerned with the better management of international migration. At the regional level, and notwithstanding the 1967 Protocol, refugee movements have necessitated more focused responses, such as the 1969 OAU/AU Convention on the Specific Aspects of Refugee Problems in Africa and the 1984 Cartagena Declaration; while in Europe, the development of protection doctrine under the 1950 European Convention on Human Rights has led to the adoption of provisions on "subsidiary" or "complementary" protection within the legal system of the European Union.

Nevertheless, within the context of the international refugee regime, which brings together States, UNHCR and other international organizations, the UNHCR Executive Committee, and non-governmental organizations, among others, the Convention continues to play an important part in the protection of refugees, in the promotion and provision of solutions for refugees, in ensuring the security of States, sharing responsibility, and generally promoting human rights. A Ministerial Meeting of States Parties, convened in Geneva in December 2001 by the Government of Switzerland to mark the fiftieth anniversary of the Convention, expressly acknowledged, "the continuing relevance and resilience of this international regime of rights and principles...".

In many States, judicial and administrative procedures for the determination of refugee status have established the necessary legal link between refugee status and protection, contributed to a broader and deeper understanding of key elements in the Convention refugee definition, and helped to consolidate the fundamental principle of non-refoulement. While initially concluded as an agreement between States on the treatment of refugees, the 1951 Convention has inspired both doctrine and practice in which the language of refugee rights is entirely appropriate.

It was no failure in 1951 not to have known precisely how the world would evolve; on the contrary, it may be counted a success that the drafters of the 1951 Convention were in fact able to identify, in the concept of a well-founded fear of persecution, the enduring, indeed universal, characteristics of the refugee, and to single out the essential, though never exclusive, reason for flight. That certainly has not changed, even if the scope and extent of the refugee definition have

matured under the influence of human rights, and even as there is now increasing recognition of the need to enhance and ensure the protection of individuals still within their own country.

Related Materials

A. Legal Instruments

Convention relating to the International Status of Refugees, Geneva, 28 October 1933, League of Nations, Treaty Series, vol. 159, p. 200.

Universal Declaration of Human Rights, General Assembly resolution 217 (III) of 10 December 1948.

Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, United Nations, Treaty Series, vol. 213, p. 221.

International Covenant on Civil and Political Rights, New York, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

OAU/AU Convention Governing the Specific Aspects of Refugee Problems in Africa, Addis Ababa, 10 September 1969, United Nations, Treaty Series, vol. 1001, p. 45.

American Convention on Human rights: "Pact of San José, Costa Rica", San José, 22 November 1969, United Nations, Treaty Series, vol. 1144, p. 123.

African Charter on Human and Peoples' Rights, Nairobi, 27 June 1981, United Nations, Treaty Series, vol. 1520, p. 217.

Cartagena Declaration on Refugees, Adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Cartagena de Indias, Colombia, 22 November 1984.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85.

Convention on the Rights of the Child, New York, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

B. Documents

Statute of the Office of the United Nations High Commissioner for Refugees. General Assembly resolution 428 (v) of 14 December 1950.

Report of the Ad Hoc Committee on Statelessness and Related Problems, Provisional draft of parts of the definition article of the preliminary draft convention relating to the status of refugees,

prepared by the Working Group on this article (E/AC.32/L.6 and Corr. 1 and Rev.1, 23 January 1950).

Ad Hoc Committee on Statelessness and Related Problems, First Session, E/AC.32/SR.20, (1950), 11-12, paras. 54-55.

Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees HCR/IP/4/Eng/REV.1Reedited, Geneva, January 1992, UNHCR 1979.(See also the website of the Office of the United Nations High Commissioner for Refugees for other handbooks and guidelines: http://www.unhcr.org.)

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