GOVERNMENT LAW CENTER

2018
Warren M. Anderson
Legislative Breakfast Seminar Series

"State Power Over Immigration Law"

April 3, 2018

ALBANY LAW SCHOOL

WARREN M. ANDERSON LEGISLATIVE BREAKFAST SEMINAR SERIES

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SPEAKER BIOGRAPHIES

ANDREW AYERS, ESQ., graduated first in his class from Georgetown Law in 2005. He then clerked for the Honorable Sonia Sotomayor, now a US Supreme Court Justice, during her term on the US Court of Appeals for the Second Circuit. He also clerked for the Honorable Gerard Lynch on the US District Court for the Southern District of New York. After clerking, Mr. Ayers worked for nine years in the office of the New York Attorney General, where he was a Senior Assistant Solicitor General. He served both as a supervisor and as lead counsel in various high-profile cases involving immigration law, states' rights, constitutional rights, environmental law, and other issues. Since November 2016, Mr. Ayers has served as Director of the Government Law Center and Visiting Assistant Professor at Albany Law School. Mr. Ayers is the author of *A Student's Guide to Law School*, published by the University of Chicago Press, as well as three articles on legal ethics and an article on immigration law. His undergraduate degree is from Vassar College. He is admitted to practice in New York.

ZAINAB A. CHAUDHRY, ESQ. '98, is an Assistant Solicitor General with the Office of the New York State Attorney General, Appeals Bureau. Ms. Chaudhry joined the AG's Office in 2007, and she has argued numerous appeals before the New York Court of Appeals, the Second Circuit Court of Appeals, and all four departments of the Appellate Division, as well as filed several amicus briefs in the US Supreme Court on behalf of multi-state coalitions led by the New York AG—including in the recent travel ban litigation. Ms. Chaudhry received a JD in 1998 from Albany Law School, where she graduated summa cum laude. After graduation, she worked for several years as a judicial law clerk for the New York Court of Appeals and the Hon. Richard C. Wesley. Ms. Chaudhry serves on the Board of Albany Law School's National Alumni Association and was recently appointed to the Committee on Character and Fitness for the Fourth Judicial District. Ms. Chaudhry is admitted to practice in New York.

GERARD WALLACE, ESQ. '97, is the director of the New York State Kinship Navigator. He also serves as public service professor at the University at Albany School of Social Welfare. From 1999 to 2005, Mr. Wallace was director of Hunter Colleges' Grandparent Caregiver Law Center. From 2005 to 2010, he was the project consultant for the AARP Kincare Project. Mr. Wallace is co-chair of the New York State KinCare Coalition, a member of the Child Welfare League of America's Policy Commission, and past director of the National Committee of Grandparents for Children's Rights. He has written extensively and is a frequent speaker on kinship care policy and practice. In 1997, Mr. Wallace graduated, magna cum laude, from Albany Law School, where he authored a Government Law Center policy report on kinship laws in New York State. In 1999, he authored an *amicus curiae* brief in the US Supreme Court grandparent visitation case *Troxel v. Granville* that was featured in the *Congressional Digest*'s Supreme Court Debate. Mr. Wallace has published in the New York State Bar Association *Elder Law Attorney* quarterly; *Grand* magazine;

the New England child welfare professionals newsletter, *Common Ground*; *Journal of Gerontological Social Work*; West Law's *Elder Adviser*; *The Washington Post*'s op-ed page; the *Journal of Family Social Work*; and *GrandFamilies: The Contemporary Journal of Research, Practice and Policy*. He is a contributor to the 2017 University at Albany kinship summit position paper and the 2015 Child Welfare League of America Kinship Navigator Profiles. He is the editor of four New York State KinCare Summit reports and of a 2011 national kinship summit report. In 2015 and 2017, Mr. Wallace provided the US Senate with the text for its proclamations of September as Kinship Care Month. In 2017, he was producer for the documentary, *The Face of Kinship Care*. He has worked with the New York State legislature on numerous enactments, and with the New York State Office of Children and Families on initiatives to improve child welfare kinship practices. He has received numerous awards for his advocacy. In 2012, the NYS Kinship Navigator program received a Children's Bureau grant to operate a demonstration project, one of only seven awarded nationally. In spring 2017, the Kinship Navigator program received the University at Albany President's Award for Exemplary Public Engagement. Mr. Wallace is admitted to practice in New York.

BARBARA WEINER, ESQ., has spent most of her legal career in legal services programs, first in the Legal Aid Society of Northeastern New York in Albany in 1982. In 1990, she joined the staff of the Greater Upstate Law Project (GULP), a statewide nonprofit public law office. She remained with GULP, which eventually changed its name to the Empire Justice Center, until she retired. Initially concentrating on housing and public benefits, Ms. Weiner began her focus on immigration law after the 1996 welfare legislation, which had severely limited the access of lawfully residing immigrants to public benefit programs. Since then and throughout her years with the Empire Justice Center, Ms. Weiner focused on the impact of immigration status on the eligibility of noncitizens for public benefits. Over the years, she has provided countless hours of technical assistance and given numerous seminars to legal services staff and community groups in this area of the law. In the early 2000's, Ms. Weiner began to work closely with The Legal Project (TLP), a nonprofit legal services provider in Albany that focused on the legal needs of domestic violence victims. Together, Ms. Weiner and the staff of TLP worked to address the special needs of immigrant victims of domestic violence. With the tireless support of TLP's director, Lisa Frisch, this collaboration eventually led to the establishment of an immigrant legal services program within TLP that tackles the great variety of immigrant needs in the Capital District. Since her retirement, Ms. Weiner has become an Attorney Emeritus at both the Empire Justice Center and TLP. With the Empire Justice Center, she is continuing her work on public benefits issues as they impact immigrants. Among other activities, she is continuing as counsel in the case of *Karamalla v. Devine*, a case that established the right of individuals with Temporary Protected Status to have access to the state's public assistance program. With TLP, Ms. Weiner provides general representation for immigrants seeking assistance in a variety of circumstances. Ms. Weiner is a graduate of Golden Gate University College of Law in San Francisco, and she received a BA degree in Philosophy from Brooklyn College. She is admitted to practice in New York.

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MATERIALS

1. Federal Register Part IV, Department of Justice
   Immigration and Naturalization Service, 8 CFR Parts 212 and 237
2. Department of Homeland Security **DRAFT** Notice of Proposed Rulemaking
   8 CFR Parts 103, 212, 213, 214, 245a and 248
   Inadmissibility on Public Charge Grounds
   In the public domain:
   https://wapo.st/2pPgOwv?tid=ss_mail&utm_term=.785076320135
   The Washington Post 3/28/18
3. Kinship Navigator: Parents Facing Deportation (PowerPoint)
4. Legal Fact Sheet: Caregivers Rights to Obtain Vital Documents
5. Legal Fact Sheet: Comparison of Custody and Guardianship
6. Legal Fact Sheet: Parental Designation Form of Children's Caregiver for six months
7. Legal Fact Sheet: Summary of Kinship Navigator Fact Sheets
8. Kinship Care Relevant Legislative Bills as of March 23, 2018
9. U.S. Department of Justice Memo re Grant funding to "sanctuaries"
   Referral of Allegations of Potential Violations of 8 U.S.C. § 1373 by Grant Recipients. September, 2016.
10. Executive Order No. 1-17, April 24, 2017, by Kathy Sheehan, Mayor, City of Albany *City of Albany: Policy Regarding Community Policing and Protection of Immigrants*.
11. *Local Enforcement of Federal Immigration Law: Legal Guidance for Maryland State and Local Law Enforcement Officials* by the Office of the Attorney General of the State of Maryland, May 2017.
12. *Guidance Concerning Local Authority Participation in Immigration Enforcement and Model Sanctuary Provisions* by the Office of the Attorney General of New York State, January and March 2017.
13. Executive Order No. 170, September, 2017, by Andrew M. Cuomo, Governor of the State of New York: *State Policy Concerning Immigrant Access to State Services.*
14. Case No. 2:18-at-00264 Complaint filed March 6, 2018, in U.S. District Court, Eastern District of California.
    The United States of America v. The State of California; Edmund G. Brown, Jr., Governor of California in his Official Capacity; and Xavier Becerra, Attorney General of California in his Official Capacity.
    (Regarding State obstruction of federal immigration officers in carrying out their responsibilities in California.)
15. Amicus Brief in Support of Respondents
    No. 17-965 Supreme Court of the United States Donald J. Trump, President of the United States, et al., Petitioners v Hawaii, et al., Respondents
16. *Hawaii v Trump*, 878 F.3d 662 (2017)
17. *International Refugee Assistance Project v Trump*, 883 F.3d 233 (2018)
18. *Batalla Vidal v Nielsen*, 279 F.Supp.3d 401 (2018)

Federal Register

Wednesday
May 26, 1999

Part IV

Department of Justice

Immigration and Naturalization Service

8 CFR Parts 212 and 237

Inadmissibility and Deportability on Public Charge Grounds; Field Guidance on Deportability and Inadmissibility on Public Charge Grounds; Proposed Rule and Notice

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Parts 212 and 237

[INS No. 1989–99; AG Order No. 2225–99]

RIN 1115–AF45

Inadmissibility and Deportability on Public Charge Grounds

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Proposed rule.

SUMMARY: This rule proposes to amend the Department of Justice's (Department's) regulations to establish clear standards governing a determination that an alien is inadmissible or ineligible to adjust status, or has become deportable, on public charge grounds. This proposed rule is necessary to alleviate growing public confusion over the meaning of the currently undefined term ''public charge'' in immigration law and its relationship to the receipt of Federal, State, or local public benefits. By defining ''public charge,'' the Department seeks to reduce the negative public health consequences generated by the existing confusion and to provide aliens with better guidance as to the types of public benefits that will and will not be considered in public charge determinations.

DATES: Written comments must be submitted on or before July 26, 1999.

ADDRESSES: Please submit written comments, in triplicate, to the Director, Policy Directives and Instructions Branch, Immigration and Naturalization Service, 425 I Street, NW, Room 5307, Washington, DC 20536. To ensure proper handling, please reference INS No. 1989–99 on your correspondence. Comments are available for public inspection at the above address by calling (202) 514–3048 to arrange an appointment.

FOR FURTHER INFORMATION CONTACT: Sophia Cox or Kevin Cummings, Immigration and Naturalization Service, Office of Adjudications, 425 I Street, NW, Washington, DC 20536; telephone (202) 514–4754.

SUPPLEMENTARY INFORMATION:

Background and Necessity for Definition of ''Public Charge''

Recent immigration and welfare reform laws have generated considerable public confusion about whether the receipt of Federal, State, or local public benefits for which an alien may be eligible renders him or her a ''public charge'' under the immigration statutes governing admissibility, adjustment of status, and deportation. (See 8 U.S.C. 1182(a)(4); 8 U.S.C. 1227(a)(5).) (See also Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104–208, Div. C, Title V, 110 Stat. 3009–670 (codified as amended in different sections of 8 U.S.C.) (1996); Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. 104–193, Title IV, 110 Stat. 2260 (codified as amended generally at 8 U.S.C. 1601, *et seq.*) (1996).)

Under section 212(a)(4) of the Immigration and Nationality Act (the Act), the determination of whether an individual alien ''is likely at any time to become a public charge'' is made by a Department of State consular officer at the time the alien's visa application is adjudicated overseas, by an Immigration and Naturalization Service (Service) officer at the time an alien seeks admission into the United States, or by the Service at the time an alien applies for adjustment of status if he or she is already in the United States. 8 U.S.C. 1182(a)(4). The statute further states that the decision shall be ''in the opinion of'' the consular officer or the Attorney General, who has delegated this authority to the Service. Id.; 8 CFR part 2.1. Under section 237(a)(5) of the Act, an alien is also deportable if he or she ''has become a public charge'' within 5 years after his or her ''date of entry'' into the United States for causes not shown to have arisen since entry. 8 U.S.C. 1227(a)(5). An immigration judge will make the determination if any of these issues arise during removal proceedings for an alien.

On August 22, 1996, the President signed PRWORA, known as the welfare reform law. The welfare reform law and its amendments imposed new restrictions on the eligibility of aliens, whether present in the United States legally or illegally, for many Federal, State, and local public benefits. 8 U.S.C. 1601-1646 (as amended). Despite these new restrictions, many legal aliens remain eligible for at least some forms of public assistance, such as Medicaid, Food Stamps, Supplemental Security Income (SSI), Temporary Assistance for Needy Families (TANF), the Children's Health Insurance Program (CHIP), and the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), among other benefits. Congress also chose not to apply the alien eligibility restrictions in the welfare reform law to emergency medical assistance; short-term, in-kind, non-cash emergency disaster relief; public health assistance related to immunizations and to treatment of the symptoms of a communicable disease; certain in-kind services (e.g., soup kitchens, etc.) designated by the Attorney General as necessary for the protection of life and safety; and assistance under certain Department of Housing and Urban Development (HUD) programs. 8 U.S.C. 1611(b)(1).

Numerous states and localities also have funded public benefits, particularly medical and nutrition benefits, for aliens who are now ineligible for certain Federal public benefits. Congress further authorized states to enact laws after August 22, 1996, that affirmatively provide illegal aliens who would otherwise be ineligible for certain State and local benefits under the welfare reform law with such benefits. 8 U.S.C. 1621(d). A complete overview of all the public benefits and programs that remain available to various categories of aliens under the welfare reform law, as amended, is beyond the scope of this discussion.

Although Congress has determined that certain aliens remain eligible for some forms of medical, nutrition, and child care services, and other public assistance, numerous legal immigrants and other aliens are choosing not to apply for these benefits because they fear the negative immigration consequences of potentially being deemed a ''public charge.'' This tension between the immigration and welfare laws is exacerbated by the fact that ''public charge'' has never been defined in statute or regulation. Without a clear definition of the term, aliens have no way of knowing which benefits they may safely access without risking deportation or inadmissibility.

Additionally, the Service has been contacted by many State and local officials, Members of Congress, immigrant assistance organizations, and health care providers who are unable to give reliable guidance to their constituents and clients on this issue. According to Federal and State benefit-granting agencies, this growing confusion is creating significant, negative public health consequences across the country. This situation is becoming particularly acute with respect to the provision of emergency and other medical assistance, children's immunizations, and basic nutrition programs, as well as the treatment of communicable diseases. Immigrants' fears of obtaining these necessary medical and other benefits are not only causing them considerable harm, but are also jeopardizing the general public. For example, infectious diseases may spread as the numbers of immigrants who

decline immunization services increase. Concern over the public charge issue is further preventing aliens from applying for available supplemental benefits, such as child care and transportation vouchers, that are designed to aid individuals in gaining and maintaining employment. In short, the absence of a clear public charge definition is undermining the Government's policies of increasing access to health care and helping people to become self-sufficient. The Department seeks to remedy this problem with this proposed rule.

Overview of the Proposed Rule

First, the proposed rule provides a definition for the ambiguous statutory term ''public charge'' that will be used for purposes of both admissibility and adjustment of status under section 212(a)(4) of the Act and for deportation under section 237(a)(5) of the Act. Second, the proposed rule describes the kinds of public benefits that, if received, could result in a finding that a person is a ''public charge.'' The proposed rule also provides examples of the types of public benefits that will not be considered in public charge determinations. Third, the proposed rule adopts long-standing principles developed by the case law. As discussed below, the cases have established prerequisites and factors to be considered in making public charge determinations. The rule makes clear that the mere receipt of public assistance, by itself, will not lead to a public charge finding without satisfaction of these additional legal requirements.

The Meaning of ''Public Charge'' and Public Benefits That Demonstrate Primary Dependence on the Government for Subsistence

Following extensive consultation with benefit-granting agencies, the Department is proposing to define ''public charge'' to mean an alien who has become (for deportation purposes) or who is likely to become (for admission or adjustment purposes) ''primarily dependent on the Government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or institutionalization for long-term care at Government expense.'' Institutionalization for short periods of rehabilitation does not constitute such primary dependence. This interpretation of ''public charge'' is reasonable because it is based on the plain meaning of the word ''charge,'' the historical context of public dependency when the public charge immigration provisions were first enacted more than a century ago, and the expertise of the benefit-granting agencies that deal with subsistence issues. It is also consistent with factual situations presented in the public charge case law.

When a word is not defined by statute and legislative history does not provide clear guidance, courts often construe it in accordance with its ordinary or natural meaning as contained in the dictionary. (See, e.g., *Sutton* v. *United Air Lines, Inc.,* 130 F.3d 893, 898 (10th Cir. 1997), cert. granted, *119 S.* Ct. 790 (1999) (citations omitted).) The word ''charge'' has many meanings in the dictionary, but the one that can be applied unambiguously to a person and best clarifies the phrase ''become a public charge'' is ''a person or thing committed or entrusted to the care, custody, management, or support of another.'' *Webster's Third New International Dictionary of the English Language* 377 (1986). The dictionary gives the following apt sentence as an example of usage: ''[H]e entered the poorhouse, becoming a county charge.'' Id. (See also 3 *Oxford English Dictionary* 36 (2d ed. 1989) (definition #13 for ''charge''—''The duty or responsibility of taking care of (a person or thing); care, custody, superintendence'').)

This language indicates that a person becomes a public charge when he or she is committed to the care, custody, management, or support of the public. The dictionary definition suggests a complete, or nearly complete, dependence on the Government rather than the mere receipt of some lesser level of financial support. Historically, individuals who became dependent on the Government were institutionalized in asylums or placed in ''almshouses'' for the poor long before the array of limited-purpose public benefits now available existed. This primary dependence model of public assistance was the backdrop against which the ''public charge'' concept in immigration law developed in the late 1800s.

Although no case has specifically identified the types of public benefits that can give rise to a public charge finding, a definition based on primary dependence on the Government is consistent with the facts found in the deportation and admissibility cases. (See, e.g., *Matter of C–R–,* 7 I. & N. Dec. 124 (BIA 1956) (deportation based on public mental hospital institutionalization); *Matter of Harutunian,* 14 I. & N. Dec. 583 (R.C., Int. Dec. 1974) (receipt of old age assistance for principal financial support was an important factor in denying admission).)

The Service has also sought the advice and relied on the expertise of various Federal agencies that administer a wide variety of public benefits. The Service consulted primarily with the Department of Health and Human Services (HHS), the Social Security Administration (SSA), and the Department of Agriculture (USDA). The HHS, which administers TANF, Medicaid, CHIP, and many other benefits, has advised that the best evidence of whether an individual is relying primarily on the Government for subsistence is either the receipt of public cash benefits for income maintenance purposes or institutionalization for long-term care at Government expense. (See letter to INS Commissioner Doris Meissner from HHS Deputy Secretary Kevin Thurm, dated March 25, 1999) (hereinafter ''HHS Letter'' and appearing in an appendix to this document.) The USDA, which administers Food Stamps, WIC, and other nutrition assistance programs, and SSA, which administers SSI and other programs, and other benefit-granting agencies have concurred with the HHS advice to the Service that receipt of cash assistance for income maintenance is the best evidence of primary dependence on the Government. (See letter to INS Commissioner Doris Meissner from Shirley R. Watkins, USDA Under Secretary for Food, Nutrition and Consumer Services, dated April 15, 1999) (hereinafter ''USDA Letter'' and appearing in an appendix to this document); letter to Robert L. Bach, INS Executive Associate Commissioner for Policy and Planning from Susan M. Daniels, SSA Deputy Commissioner for Disability and Income Security Programs, dated May 14, 1999) (hereinafter ''SSA Letter'' and appearing in an appendix to this document.)

Cash assistance for income maintenance includes (1) SSI, (2) cash TANF (other than certain supplemental cash benefits not defined as ''assistance'' under TANF rules, as provided in §§ 212.103 and 237.13 of this proposed rule), and (3) State or local cash benefit programs for income maintenance (often called ''General Assistance'' programs, but which may exist under other names). Acceptance of these forms of public cash assistance is one factor that could be considered in determining whether a person is, or is likely to be, a public charge, provided the additional requirements for deportation or inadmissibility discussed later in this Supplementary Section and in the regulation are also met.

According to HHS and other benefit-granting agencies consulted by the Service, non-cash benefits generally provide supplementary support in the form of vouchers or direct services to

support nutrition, health, and living condition needs. (See HHS Letter.) These benefits are often provided to low-income working families to sustain and improve their ability to remain self-sufficient. A few examples of these non-cash benefits that do not directly provide subsistence are Medicaid, Food Stamps, CHIP, and their related State analogues, WIC, housing benefits, transportation vouchers, and certain kinds of special-purpose non-cash benefits provided under the TANF program. These forms of benefits, and others discussed below and in the proposed regulation, will not be considered for public charge purposes. The HHS further stated that ''* * * it is extremely unlikely that an individual or family could subsist on a combination of non-cash support benefits or services alone. * * * HHS is unable to conceive of a situation where an individual, other than someone who permanently resides in a long-term care institution, could support himself or his family solely on non-cash benefits so as to be primarily dependent on the [G]overnment.'' (See HHS Letter.)

The one exception identified by HHS to the principle that non-cash benefits do not demonstrate primary dependence is the instance where Medicaid or related programs pay for the costs of a person's institutionalization for long-term care (other than imprisonment for conviction of a crime). Such institutionalization costs, therefore, may be considered in public charge determinations. However, the proposed rule makes clear that a short period of institutionalization necessary for rehabilitation purposes does not demonstrate that an individual is, or is likely to become, primarily dependent on the Government for public charge purposes.

This distinction between cash benefits that can lead to primary dependence on the Government and non-cash benefits that do not create such dependence is already applied by the State Department with regard to Food Stamps, a non-cash benefit program. The Foreign Affairs Manual (FAM) for consular officers excludes Food Stamps from public charge admissibility consideration because it is an essentially supplementary benefit that does not make recipients dependent on the Government for subsistence. (See 9 FAM section 40.41, N.9.1.) The proposed definition of ''public charge'' is consistent with this existing State Department policy and that agency's recognition that certain supplemental forms of public assistance should not be considered in a public charge determination.

Receipt of Non-cash Public Benefits That do not Demonstrate Primary Dependence on the Government for Subsistence

It has never been Service policy that the receipt of any public service or benefit must be considered for public charge purposes. The nature of the program is important. For instance, attending public schools, taking advantage of school lunch or other supplemental nutrition programs, such as WIC, obtaining immunizations, and receiving public emergency medical care typically do not make a person inadmissible or deportable. Non-cash benefits, such as these and others, are by their nature supplemental and frequently support the general welfare. By focusing on cash assistance for income maintenance, the Service can identify those individuals who are primarily dependent on the Government for subsistence without inhibiting access to non-cash benefits that serve important public interests. Certain Federal, State, and local benefits are increasingly being made available to families with incomes far above the poverty level, reflecting broad public policy decisions about improving general health and nutrition, promoting education, and assisting working-poor families in the process of becoming self-sufficient. For example, many states provide CHIP to children in families with resources up to 200 percent of the poverty line and sometimes higher. (See HHS Letter at p. 3.) Thus, participation in such programs is not evidence of poverty or dependence.

The proposed rule identifies the major forms of cash benefits that may be considered for public charge purposes and several examples of non-cash benefits that will not be considered. Due to the ever-changing character of the Federal, State, and local public benefits still available to aliens, it is not possible to name every benefit that will or will not be considered for public charge purposes. Aliens and their advisors should carefully consider the nature of the specific public benefits involved. If they could be construed as cash assistance for income maintenance, as distinguished from in-kind services, medical or nutrition benefits, vouchers or other forms of non-cash benefits, then a Service officer may consider their receipt in making a public charge decision, even if the benefit is not specifically addressed by name in the proposed rule. Again, receipt of SSI, cash TANF (except supplemental cash-TANF excluded in the rule), and State or local cash assistance programs for income maintenance (e.g., ''General Assistance'') will be considered as part of the public charge analysis. Although these benefits are the only examples of ''cash assistance for income maintenance'' that the Service and other Federal benefit-granting agencies have been able to identify, public comment is requested on whether there are any other specific forms of public cash assistance for income maintenance that should be mentioned. The Service will also consider public benefits (including Medicaid) for supporting aliens who reside in an institution for long-term care (e.g., a nursing home or mental health institution).

A person's mere receipt of any of these forms of cash assistance for income maintenance, or being institutionalized for long-term care, does not necessarily make him or her inadmissible, ineligible to adjust status, or deportable on public charge grounds. As discussed in detail in the next part of this Supplementary Information section, the law requires that a variety of other factors and prerequisites must be considered as well. These additional requirements have been carefully described in both the admissibility and deportation sections of this proposed rule at §§ 212.104, 212.106, 212.108, 212.109, 237.11, 237.15, 237.16, and 237.18. Every public charge decision will continue to be made on a case-by-case basis. In other words, the proposed rule does not create any blanket requirements that individuals who receive public cash assistance or who are institutionalized for long-term care must be removed from the United States or denied admission or adjustment.

Some cash benefits received by aliens from the Government are not intended for income maintenance, and thus will not be considered for public charge purposes under this rule. Examples of such special-purpose cash benefits that do not lead to primary dependence on the Government include the Low Income Home Energy Assistance Program (LIHEAP), 42 U.S.C. 8621, *et seq.*; the Child Care and Development Block Grant Program (CCDBGP), 42 U.S.C. 9858 *et seq.*; Food Stamp benefits issued in cash (see e.g., 7 U.S.C. 2026(b)); certain educational assistance programs, and non-recurrent, short-term crisis benefits funded in cash by TANF but excluded from the TANF program's definition of ''assistance.'' (See 64 FR 17720, 17880 (April 12, 1999) (codified at 45 CFR 260.31).) In addition, and consistent with existing Service practice, the proposed rule states that cash payments that have been earned, such as benefits under Title II of the Social Security Act, 42 U.S.C. 401 *et seq.*, Government pensions, veterans'

benefits, among other forms of earned benefits, do not support a public charge finding.

Other non-cash public benefits that will not be considered and that are listed in the proposed rule include, but are not limited to: Medicaid; CHIP; emergency medical assistance; other health insurance and health services for the testing and treatment of symptoms of communicable diseases; emergency disaster relief; nutrition programs, such as Food Stamps and WIC; housing benefits; energy benefits; job training programs; child care; and non-cash benefits funded under the TANF program. State and local non-cash benefits of a similar nature also will not be considered. It is the underlying nature of the program, not the name adopted in a particular State, that will determine whether it is relevant for public charge consideration.

Additional Requirements for Public Charge Determinations

After defining ''public charge,'' the separate admissibility and deportation sections of the proposed rule incorporate principles established by case law and statute for each of those public charge determinations.

Admission and Adjustment of Status

The provisions that relate to admission and adjustment of status incorporate the ''totality of the circumstances'' analysis that officers must employ in making a prospective public charge decision. (See, e.g, *Matter of Perez*, 15 I. & N. Dec. 136, 137 (BIA 1974).) Under section 212(a)(4)(B) of the Act, officers are required to consider specific minimum factors in determining whether the alien's circumstances indicate that he or she is likely to become a public charge. These factors include the alien's age, health, family status, assets, resources, financial status, education, and skills. No single factor, other than the lack of an Affidavit of Support as described below, will determine whether an alien is likely to become a public charge, including past or current receipt of public cash benefits.

In addition, most aliens intending to immigrate or adjust status in family-based and certain employment-based categories after December 19, 1997, are required to file the new Form I–864, ''Affidavit of Support Under Section 213A of the Act,'' signed by their sponsor(s). 8 U.S.C. 1182(a)(4)(C–D); 8 U.S.C. 1183a; 8 CFR part 213a.2. The new Affidavit of Support is legally binding and requires sponsors to maintain the sponsored alien at an annual income of not less than 125 percent of the Federal poverty line for the relevant family size. 8 U.S.C. 1183a(a); 8 CFR part 213a.2. If an Affidavit of Support is not filed, the intending immigrant will be denied admission or adjustment on public charge grounds, unless he or she is exempt from the Affidavit of Support requirement under section 212(a)(4)(C–D) of the Act. As one of the circumstances considered in determining whether a person is likely to become a public charge, officers may also consider any Affidavit of Support filed by a sponsor on behalf of an alien under section 213A of the Act and are encouraged to do so. (See 8 U.S.C. 1182(a)(4)(B)(ii).) Certain categories of aliens seeking to become lawful permanent residents are exempt from the Affidavit of Support requirement—including those who qualify as widows or widowers of citizens or as battered spouses, and their children. Id.

In one significant respect, a public charge determination for purposes of inadmissibility differs from the context of deportability. As the next section describes in detail, deportation on public charge grounds requires the Service to prove that the alien or another obligated party has failed to repay a legal demand for the public benefits at issue. The proposed rule adopts the case-developed doctrine that this failure-to-reimburse prerequisite for deportation does not apply to public charge decisions for admissibility or adjustment of status. (See *Matter of Harutunian*, 14 I. & N. Dec. at 589–590.) Applicants for admission or adjustment of status, therefore, could be found inadmissible or ineligible to adjust status on public charge grounds even if there is no duty to reimburse the agency that provides the cash assistance. Again, this receipt of public cash benefits will result in such a finding only if the totality of the alien's circumstances, including the minimum factors in section 212(a)(4)(B) of the Act, indicate that he or she is likely to become a public charge.

The provisions on admissibility and adjustment in the proposed rule conclude with a section that lists categories of aliens to whom the public charge ground contained in section 212(a)(4) of the Act does not apply. These categories include refugees, asylees, Amerasians, and certain Nicaraguans, Central Americans, Haitians, and Cuban/Haitian entrants. Although these statutory exemptions are codified throughout the Act and other laws, the rule collects them in one place for the public's ease of reference.

Deportation

The provisions on deportation in the proposed rule incorporate the Attorney General's decision in the leading case, *Matter of B–*, 3 I. & N. Dec. 323 (AG and BIA 1948), that the Service can prove public charge deportability only if there has been a failure to comply with a legally enforceable duty to reimburse the assistance agency for the costs of care. In addition, the benefit agency's demand for repayment of the specific public benefit must have been made within the alien's initial 5-year period after entry, unless it is shown that demand would have been futile because there was no one against whom payment could be enforced. *Matter of L–*, 6 I. & N. Dec. 349 (BIA 1954). Under the proposed definition for public charge previously discussed, only the failure to meet an agency's demand for repayment of a cash benefit for income maintenance or for the costs of institutionalization for long-term care will be considered for deportation. If the alien can show that the causes for which he or she received one of these types of public cash benefits during his or her initial 5 years after entry arose after entry, he or she will not be deportable on public charge grounds. (See 8 U.S.C. 1227(a)(5).) The requirements and procedures concerning the demand for the repayment of a public benefit are governed by the specific program rules established by law and administered by the benefit granting agencies, or by State or local governments, not by the Service. This rule does not alter those existing procedures. The Service does not make determinations about which public benefits must be repaid. The Federal, State, and local benefit-granting agencies are responsible for those decisions. The Service may only initiate removal proceedings based on the public charge ground after the benefit agency has chosen to seek repayment, obtained a final judgment, taken all steps to collect on that judgment, and been unsuccessful.

The proposed rule also provides that the Affidavit of Support is relevant to the public charge inquiry for deportation purposes. Under the new Affidavit of Support rules, if a sponsored alien obtains Federal, State, or local means-tested public benefits, the sponsor is obligated to repay those benefits if the benefit-granting agency makes a demand for repayment. (See 8 U.S.C. 1183a(b); 8 CFR parts 213a.2, 213a.4.) Various Federal agencies have designated certain assistance programs that they administer to be ''means-tested public benefits.'' For example, SSI, TANF, Medicaid, Food Stamps, and

CHIP have been designated as Federal means-tested public benefits and could give rise to a repayment obligation under the Affidavit of Support. If states designate means-tested public benefits in the future, such benefits also could give rise to such an obligation. However, only demands for the repayment of cash benefits for income maintenance purposes, such as SSI, cash TANF and State General Assistance programs, or the costs of institutionalization for long-term care, will be relevant for deportation determinations under the proposed definition of ''public charge.''

The Department has determined that the existing three-part *Matter of B–* test for public charge deportations also applies to demands for repayment of means-tested benefits under the new Affidavit of Support. The Government entity providing the benefit must have a legal right to seek repayment under the Affidavit of Support; the agency must have made a demand for repayment; and the obligated party or parties must have failed to meet this demand. The rule also requires that, before a deportation action may be initiated, the agency seeking repayment must have taken all steps necessary to obtain and enforce a final judgment requiring the sponsor or other person responsible for the debt to pay. Without such a requirement, an alien could be wrongly deported as a public charge based on a debt that a court might later determine was not legally enforceable. Although the demand for repayment must be made within 5 years of the alien's admission, there is no time limit on obtaining a final judgment as long as it is obtained prior to the public charge proceedings.

Welfare Reform and Other Significant Factors That Limit Potential for Aliens to Become ''Public Charges''

The proposed rule is not expected to alter substantially the number of aliens who will be found deportable or inadmissible as public charges. Deportations on public charge grounds have always been rare due to the strict *Matter of B-* requirements that agencies first must demand repayment, assuming they have a legal right to do so, and the obligated party or parties must have failed to pay. This is unlikely to change.

Several recently enacted welfare and immigration reform measures have also contributed to reducing the possibility that aliens will be found likely to become public charges under section 212(a)(4) of the Act. Due to the increased restrictions of the welfare reform law, as amended, many aliens are no longer eligible to receive some public benefits formerly available to them. For example, one significant new restriction prohibits legal, ''qualified aliens'' from receiving Federal means-tested public benefits, with some exceptions, for 5 years if they arrive after August 22, 1996. 8 U.S.C. 1613. Combined with the 5-year limitation in section 237(a)(5) of the Act, the welfare reform restriction means fewer aliens are likely to become deportable public charges. Under new ''deeming'' rules, some aliens who might otherwise have been able to obtain certain Federal, State, or local means-tested public benefits can no longer do so because their sponsors' resources may now count as resources available to the aliens (*i.e.,* the sponsors' resources are ''deemed'' available to the alien), which would normally raise the alien's income over the benefit eligibility threshold. 8 U.S.C. 1631, 1632. In addition, the requirement of a legally binding Affidavit of Support obligating sponsors to support their immigrating family members above the poverty level before they will be granted admission or adjustment has significantly raised the bar for people who might, in the past, have entered and become public charges. These new laws work together to limit the potential for immigrants to become dependent on the Government. The proposed rule defining ''public charge'' will not change or negatively affect the operation of these provisions.

Conclusion

The Department believes that this rule will provide for better overall administration of the public charge provisions of the Act. It will also help alleviate the increasing, negative public health and nutrition consequences caused by the confusion over the meaning of ''public charge.'' The rule will provide rules of decision that will apply in proceedings before the Executive Office for Immigration Review (EOIR), as well as proceedings before the Service. The Department anticipates, based on the Service's consultations, that the State Department will adopt the same view and will issue guidance to consular officers accordingly.

At a later date, the Department plans to propose additional revised sections for part 212 concerning the other grounds of inadmissibility under section 212 of the Act. Sections 212.100 through 212.112 of this proposed rule are being issued in advance as Subpart G. The Department will amend the labeling of this subpart or section numbers, if necessary, at the time of final publication of any revised sections to this part.

Regulatory Flexibility Act

The Attorney General has determined, in accordance with 5 U.S.C. 605(b), that this rule would not have a significant economic impact on a substantial number of small entities. The factual basis for this determination is that this rule will apply to individual aliens, who are not within the definition of small entities established by 5 U.S.C. 601(6).

Unfunded Mandates Reform Act

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the Unfunded Mandates Reform Act of 1995. 2 U.S.C. 658(7)(A)(ii).

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined in 5 U.S.C. 804. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 12866

This rule is considered by the Department of Justice to be a ''significant regulatory action'' under section 3(f)(4) of E. O. 12866, Regulatory Planning and Review. Accordingly, this proposed rule has been submitted to the Office of Management and Budget for review.

Executive Order 12612

This rule would not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with E. O. 12612, it is determined that this rule would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12988: Civil Justice Reform

This proposed rule meets the applicable standards set forth in subsections 3(a) and 3(b)(2) of E. O. 12988.

Plain Language in Government Writing

The President's June 1, 1998, Memorandum published at 63 FR 31885, concerning Plain Language in Government Writing, applies to this proposed rule.

Paperwork Reduction Act of 1995

This proposed rule does not specifically impose an information collection burden on the public separate from existing provisions of the Act or other regulations. However, the Service anticipates revising the Form I–485, ''Application to Register Permanent Status or Adjust Status,'' as necessary, to make it consistent with the final public charge rule. The Department requests public comment on proposed revisions to the I–485, or any other immigration forms, that may be necessary as a result of this public charge rule.

List of Subjects

8 CFR Part 212

Administrative practice and procedure, Aliens, Admission, Adjustment of status, Public charge determinations.

8 CFR Part 237

Administrative practice and procedure, Aliens, Deportation, Public charge determinations.

Accordingly, chapter I of title 8 of the Code of Federal Regulations, is proposed to be amended as follows:

PART 212—DOCUMENTARY REQUIREMENTS: NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE

1. The authority citation for part 212 is revised to read as follows:

Authority: 8 U.S.C. 1101, 1102, 1103, 1182, 1183, 1183a, 1184, 1187, 1225, 1226, 1227, 1228, 1252, 8 CFR part 2, 8 CFR part 213A.

2. Sections 212.1 through 212.15 are designated as Subpart A.

3. The heading for Subpart A is added to read as follows:

Subpart A—General

4. Part 212 is amended by adding and reserving Subparts B through F.

5. Subpart G is added to read as follows:

Subpart G—Public Charge Inadmissibility

Sec.

Subpart G—Public Charge Inadmissibility

§ 212.100 What issues do §§ 212.100 through 212.112 address?

(a) Sections 212.100 through 212.112 of this part address the public charge grounds of inadmissibility under section 212(a)(4) of the Act. It applies to all aliens seeking admission to the United States or adjustment of status to lawful permanent residency, except for the categories of aliens described in § 212.110 or other categories of aliens who may be exempted by law.

(b) In §§ 212.101 through 212.112 of this part, the terms ''I,'' ''me'' and ''my'' in the section headings and ''you'' and ''your'' in the text of each section refer to an alien who may be inadmissible or ineligible to adjust status on public charge grounds.

§ 212.101 What law governs a determination of whether I am inadmissible on public charge grounds?

The public charge grounds of inadmissibility are found under section 212(a)(4) of the Act. A Department of State (State Department) consular officer makes the public charge determination if you are applying for a visa overseas. A Service officer makes the public charge determination if you are applying for admission at a port-of-entry to the United States or for adjustment of status to that of a lawful permanent resident. Under section 212(a)(4) of the Act, you will be found inadmissible or ineligible to adjust status if, ''in the opinion of'' the consular officer or Service officer making the decision, you are considered ''likely at any time to become a public charge.'' If you have been placed in removal proceedings where issues of your admissibility or eligibility to adjust status arise, an immigration judge will decide whether you are likely to become a public charge.

§ 212.102 What is the meaning of ''public charge'' for admissibility and adjustment of status purposes?

(a) (1) ''Public charge'' for purposes of admissibility and adjustment of status means an alien who is likely to become primarily dependent on the Government for subsistence as demonstrated by either:

(i) The receipt of public cash assistance for income maintenance purposes, or

(ii) Institutionalization for long-term care at Government expense (other than imprisonment for conviction of a crime).

(2) Institutionalization for short periods for rehabilitation purposes does not demonstrate primary dependence on the Government.

(b) For purposes of §§ 212.100 through 212.112 of this part:

(1) The term ''government'' refers to any Federal, State or local government entity or entities.

(2) The term ''cash'' includes not only funds you receive in the form of cash from a government agency, but also funds received from a government agency by check, money order, wire transfer, electronic funds transfer, direct deposit, or any other form that can be legally converted to currency, *provided that* the funds are for purposes of maintaining your income.

(c) As described in §§ 212.103(c) and 212.105 of this part, some forms of public assistance will not be considered for public charge purposes because they do not result in primary dependence on the Government. Immigration officers and immigration judges must also consider many other factors, as described in §§ 212.101–212.112 of this part, before making a final public charge determination.

§ 212.103 What specific benefits are considered to be ''public cash assistance for income maintenance''?

(a) Public benefits considered to be ''public cash assistance for income maintenance'' include:

(1) Supplemental Security Income (SSI), 42 U.S.C. 1381, *et seq.*;

(2) Temporary Assistance for Needy Families (TANF), 42 U.S.C. 601, *et seq.*, but not including supplemental cash benefits excluded from the term ''assistance'' under TANF program rules (see 45 CFR 260.31) or any non-cash benefits and services provided by the TANF program; and

(3) State and local cash assistance programs for income maintenance (often called State ''General Assistance,'' but which may exist under other names).

(b) Due to the constantly changing nature of the numerous Federal, State and local benefits for which you may be eligible, it is not possible to give a complete listing of such benefits that could be considered for public charge purposes. If you are receiving, or contemplate receiving, any public cash assistance (as ''cash'' is described in § 212.102(b)(2)) for purposes of maintaining your income, an immigration officer or immigration judge may consider it as a factor in making a decision as to whether you are likely to become primarily dependent on the Government.

(c) Some forms of cash benefits are not intended for income maintenance and, therefore, will not be considered for public charge purposes under §§ 212.101 through 212.112. Examples of such cash benefits that are supplemental in nature include the Low Income Home Energy Assistance Program (LIHEAP), 42 U.S.C. 8621 *et seq.*; the Child Care and Development Block Grant Program (CCDBGP), 42 U.S.C. 9858 *et seq.*; Food Stamp benefits issued in cash (see, e.g., 7 U.S.C. 2026(b)); certain educational assistance benefits; and non-recurrent, short-term crisis benefits, and other services funded in cash by the TANF program that do not fall within the TANF program's definition of ''assistance,'' as described in paragraph (a)(2) of this section.

(d) Cash benefits that have been earned continue to be irrelevant to the public charge ground of inadmissibility. A few examples of such earned benefits that will not be considered include benefits under Title II of the Social Security Act, 42 U.S.C. 401 *et seq.*, government pension benefits, and veterans' benefits.

§ 212.104 What factors will make me inadmissible or ineligible to adjust status on public charge grounds?

(a) Under section 212(a)(4)(B) of the Act, the immigration officer or consular official must consider, ''at a minimum,'' your age, health, family status, assets, resources, financial status, education, and skills in making a decision on whether you are likely to become a public charge. The decision-maker may also consider any Affidavit of Support filed by your sponsor(s) on your behalf under section 213A of the Act and 8 CFR part 213a. The decision-maker will consider the ''totality of circumstances'' before determining whether you are likely to become a public charge. No single factor, other than the lack of a sufficient Affidavit of Support as required by section 212(a)(4)(C) and (D) of the Act, will control this decision, including past or current receipt of public cash benefits, as described in paragraph (b) of this section.

(b) You are inadmissible or ineligible to adjust status on public charge grounds if, after consideration of your case in light of all of the minimum factors in section 212(a)(4)(B) of the Act, any Affidavit of Support (Form I–864) filed on your behalf under 8 CFR part 213a, and any other facts that may be relevant, the immigration officer, consular officer, or immigration judge determines that it is likely that you will become primarily dependent for your subsistence on the Government, at any time, as demonstrated by:

(1) Receipt of public cash assistance for income maintenance, including SSI, cash TANF (other than cash TANF benefits excluded in § 212.103(a)(2)), or State or local cash benefit programs for income maintenance, such as ''General Assistance''; or

(2) Institutionalization for long-term care (other than imprisonment for conviction of a crime) at Government expense. Institutionalization for short-term rehabilitation purposes does not demonstrate primary dependence on the Government.

§ 212.105 Are there any forms of public assistance that I can receive without becoming inadmissible as a public charge if I should later apply for a visa, admission, or adjustment of status?

(a) The only benefits that are relevant to the public charge decision are public cash assistance for income maintenance and institutionalization for long-term care at Government expense. Institutionalization for short periods for rehabilitation purposes will not be considered. Non-cash public benefits are not considered because they are of a supplemental nature and do not demonstrate primary dependence on the Government.

(b) Although it is not possible to list all of the non-cash public benefits that will not be considered, you will not risk being found inadmissible as an alien likely to become a public charge by receiving non-cash benefits under the following programs or benefit categories:

(1) The Food Stamp program, 7 U.S.C. 2011, *et seq.*,

(2) The Medicaid program, 42 U.S.C. 1396, *et seq.* (other than payments under the Medicaid program for long-term institutional care);

(3) The Children's Health Insurance Program (CHIP), 42 U.S.C. 1397aa, *et seq.*;

(4) Health insurance and health services (other than public benefits for costs of institutionalization for long-term care), including, but not limited to, emergency medical services, public benefits for immunizations and for testing and treatment of symptoms of communicable diseases, and use of health clinics;

(5) Nutrition programs, including, but not limited to, the Special Supplemental Nutrition Program for Women, Infants and Children (WIC), 42 U.S.C. 1786; and programs that operate under the National School Lunch Act, 42 U.S.C. 1751 *et seq.*; the Child Nutrition Act, 42 U.S.C. 1771 *et seq.*; and the Emergency Food Assistance Act, 7 U.S.C. 7501 *et seq.*;

(6) Emergency disaster relief;

(7) Housing benefits;

(8) Child care services;

(9) Energy benefits, such as LIHEAP, 42 U.S.C. 8621 *et seq.*;

(10) Foster care and adoption benefits;

(11) Transportation vouchers or other non-cash transportation services;

(12) Educational benefits, including benefits under the Head Start Act and aid for elementary, secondary, or higher education;

(13) Non-cash benefits or services funded by the TANF program;

(14) Job training programs;

(15) State and local supplemental, non-cash benefits that serve purposes similar to those of the Federal programs listed in this paragraph;

(16) Any other Federal, State, or local public benefit program, under which benefits are provided in-kind, through vouchers, or any other medium of exchange other than payment of cash assistance for income maintenance to the eligible person.

(c) Although the non-cash public benefits described in paragraph (b) of this section will not be considered for admissibility purposes, you may still be inadmissible or ineligible to adjust

status if, in the opinion of the officer making the decision, you are likely to become a public charge following his or her analysis of the totality of the circumstances, as described in § 212.104. This includes consideration of all the minimum statutory factors described in section 212(a)(4)(B) of the Act.

§ 212.106 If I have received public cash assistance for income maintenance, have been institutionalized for long-term care at Government expense, or have been deemed a public charge in the past, will I be inadmissible or ineligible to adjust status on public charge grounds now or in the future?

(a) Such past circumstances do not necessarily mean that you will be found inadmissible or ineligible to adjust status on public charge grounds based on a present application for admission or adjustment. The immigration officer, consular officer, or immigration judge who makes the decision must consider all of the relevant facts of your case. Past receipt of public cash assistance or institutionalization under circumstances that made you a public charge would support a finding that you are inadmissible only if, in light of all the factors listed in § 212.104, it is likely that you will continue to be, or become again, a public charge in the future.

(b) The length of time during which you previously received benefits or were institutionalized at Government expense, as well as the distance in time from your current application for admission or adjustment, are significant to the decision. Public cash benefits received in the recent past are more predictive of your likelihood to become a public charge in the future than benefits received in the more distant past. Similarly, public cash benefits received for longer time periods are more predictive than benefits received in the past for shorter periods. In addition, small amounts of public cash assistance for income maintenance received in the past are weighed less heavily than greater amounts under the ''totality of the circumstances'' analysis. The negative implication of your past receipt of public cash benefits for income maintenance or institutionalization for long-term care, however, may be overcome by positive factors in your case demonstrating that you are unlikely to become primarily dependent on the Government for subsistence.

§ 212.107 Will I be required to pay back any public benefits that I have received before an immigration officer or immigration judge will find me admissible or eligible to adjust status?

Immigration officers and immigration judges do not have the authority to require that you reimburse public benefit-granting agencies for assistance that you have received. However, they may consider your receipt of public cash assistance for income maintenance purposes or your institutionalization for long-term care at Government expense as factors in deciding whether you are likely to become a public charge in the future, regardless of whether the agency granting the benefit has sought reimbursement from you or any other party obligated to pay back the benefit on your behalf. If there is a final judgment against you for failure to repay the costs of public cash benefits or institutionalization that has not been satisfied, immigration officers or judges may also consider this failure to repay as one of the relevant factors in deciding whether you are likely to become a public charge.

§ 212.108 Are there any special requirements for aliens who are seeking to immigrate based on a family relationship or on employment?

Under section 212(a)(4)(C) and (D) of the Act, you must file an ''Affidavit of Support Under Section 213A of the Act'' (Form I–864) from your sponsor(s) in accordance with section 213A of the Act and 8 CFR part 213a if you are seeking to immigrate in certain family-based visa categories or as an employment-based immigrant who will work for a relative or a relative's firm. If you do not file the Affidavit of Support as required, you will be inadmissible or ineligible to adjust status on public charge grounds. Certain widows and widowers, battered spouses and children of U.S. citizens and lawful permanent residents are currently exempt under section 212(a)(4)(C) of the Act from filing an Affidavit of Support.

§ 212.109 Will I be considered likely to become a public charge because my spouse, parent, child, or other relative has become, or is likely to become, a public charge or has received public cash assistance?

(a) The fact that one, or all, of your close relatives has become, or is likely to become, a public charge will not make you inadmissible as a public charge, unless the evidence shows that you, individually, are likely to become a public charge.

(b) Public cash benefits for income maintenance received by your relatives will not be attributed to you for admission or adjustment purposes, unless they also represent your sole support. If such benefits are attributed to you because they are your sole support, they must be considered along with all of the other factors related to your case, as described in § 212.104, before you may be found inadmissible as a public charge.

§ 212.110 Are there any individuals to whom the public charge ground of inadmissibility does not apply?

(a) The Act and various other statutes contain exceptions to the public charge ground of inadmissibility for the following categories of aliens:

(1) Refugees and asylees at the time of admission and adjustment of status to legal permanent residency according to sections 207(c)(3) and 209(c) of the Act;

(2) Amerasian immigrants at admission as described in the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1988, section 584, contained in section 101(e), Public Law 100–202, 101 Stat. 1329–183 (1987) (as amended), 8 U.S.C. 1101 note;

(3) Cuban and Haitian entrants at adjustment as described in the Immigration Reform and Control Act of 1986 (IRCA), Public Law 99–603, Title II, section 202, 100 Stat. 3359 (1986) (as amended), 8 U.S.C. 1255a note;

(4) Nicaraguans and other Central Americans who are adjusting status as described in the Nicaraguan Adjustment and Central American Relief Act (NACARA), Public Law 105–100, section 202(a), 111 Stat. 2193 (1997)(as amended), 8 U.S.C. 1255 note;

(5) Haitians who are adjusting status as described in the Haitian Refugee Immigration Fairness Act of 1998, section 902, Title IX, Public Law 105–277, 112 Stat. 2681 (Oct. 21, 1998), 8 U.S.C. 1255 note;

(6) Aliens who entered the United States prior to January 1, 1972 and who meet the other conditions for being granted lawful permanent residence under section 249 of the Act and 8 CFR part 249.

(b) Other categories of aliens may also be excepted from the public charge provisions in section 212(a)(4) of the Act by subsequent legislation. The list of such aliens in paragraph (a) of this section may not include every excepted category.

(c) In addition, aliens who have been previously admitted for lawful permanent residence (''LPRs'') and who re-enter the United States are not applicants for admission and, therefore, are not subject to the grounds of inadmissibility, unless they are covered by one of the six categories described in

section 101(a)(13)(C) of the Act, including being absent from the United States for over 180 days.

§ 212.111 Are there any waivers for the public charge ground of inadmissibility?

There are no waivers available for the public charge grounds of inadmissibility, except for the waiver for certain aged, blind, or disabled applicants for adjustment of status under section 245A of the Act. (See 8 U.S.C. 1255a(d)(2)(B)(ii)(IV).) However, various laws have exempted certain categories of aliens from the requirements of section 212(a)(4) of the Act. Several of these categories are described in § 212.110(a).

§ 212.112 Is it possible to provide a bond or cash deposit to ensure that I will not become a public charge?

The Service may accept a suitable, legally binding public charge bond or cash deposit on your behalf that meets the conditions set forth in 8 U.S.C. 1183 and in 8 CFR part 213. Acceptance of such a bond or cash deposit is discretionary.

6. Part 237 is added to read as follows:

PART 237—DEPORTABLE ALIENS

Subpart A—Public Charge Deportability

Sec.

Subpart B—[Reserved]

Authority: 8 U.S.C. 1227(a)(5), 8 U.S.C. 1183a, 8 CFR part 213A.

Subpart A—Public Charge Deportability

§ 237.10 What issues do §§ 237.10 through 237.18 address?

(a) Sections 237.10 through 237.18 of this part address the public charge ground of deportation under section 237(a)(5) of the Act.

(b) In §§ 237.10 through 237.18 of this part, the terms ''I,'' ''me'' and ''my'' in the section headings and ''you'' and ''your'' in the text of each section refer to an alien who may be deportable as a public charge.

§ 237.11 What law governs whether I am deportable on public charge grounds?

(a) Section 237(a)(5) of the Act describes which aliens are deportable on public charge grounds. If the Service brings a removal proceeding against you charging that you are subject to deportation on public charge grounds, the Service must prove that you became a public charge within 5 years of your entry to the United States.

(b) If you can prove that the causes that led to your becoming a public charge arose after your entry to the United States, you will not be deported.

§ 237.12 What does it mean to be a ''public charge'' for purposes of removal as a deportable alien?

(a)(1) ''Public charge'' for purposes of removal as a deportable alien means an alien who has become primarily dependent on the Government for subsistence as demonstrated by either:

(i) The receipt of public cash assistance for income maintenance purposes, or

(ii) Institutionalization for long-term care at Government expense (other than imprisonment for conviction of a crime).

(2) Institutionalization for short periods for rehabilitation purposes does not demonstrate primary dependence on the Government.

(b) For purposes of §§ 237.10 through 237.18 of this part:

(1) The term ''government'' refers to any Federal, State or local government entity or entities.

(2) The term ''cash'' includes not only funds you receive in the form of cash from a government agency, but also funds received from a government agency by check, money order, wire transfer, electronic funds transfer, direct deposit, or any other form that can be legally converted to currency, *provided that* the funds are for purposes of maintaining your income.

(c) As described in §§ 237.13(c) and 237.14 of this part, some forms of public assistance will not be considered for public charge purposes because they do not result in primary dependence on the Government. In addition, you will not be found deportable on public charge grounds unless the other conditions in §§ 237.11, 237.15, and 237.16 of this part (if § 237.16 applies to your case) have been met.

§ 237.13 What specific benefits are considered to be ''public cash assistance for income maintenance''?

(a) Public benefits considered to be ''public cash assistance for income maintenance'' include:

(1) Supplemental Security Income (SSI), 42 U.S.C. 1381, *et seq.*;

(2) Temporary Assistance for Needy Families (TANF), 42 U.S.C. 601, *et seq.*, but not including supplemental cash benefits excluded from the term ''assistance'' under TANF program rules (see 45 CFR 260.31) or any non-cash benefits and services provided by the TANF program; and

(3) State and local cash assistance programs for income maintenance (often called State ''General Assistance,'' but which may exist under other names).

(b) Due to the constantly changing nature of the numerous Federal, State and local benefits for which you may be eligible, it is not possible to give a complete listing of such benefits that could be considered for public charge purposes. If, within 5 years of your entry into the United States, you have received any public benefit that is provided in the form of cash (as that term is described in § 237.12(b)(2) of this part) for purposes of maintaining your income, it may serve as a basis for your deportation on public charge grounds, *provided that* all of the requirements of section 237(a)(5) of the Act and the other conditions for deportation described in §§ 237.11, 237.15, and 237.16 of this part (if § 237.16 applies to your case) have been satisfied.

(c) Some forms of cash benefits are not intended for income maintenance, and therefore, will not be considered for public charge purposes under §§ 237.10 through 237.18 of this part. Examples of such cash benefits that are supplemental in nature include the Low Income Home Energy Assistance Program (LIHEAP), 42 U.S.C. 8621 *et seq.*; the Child Care and Development Block Grant Program (CCDBGP), 42 U.S.C. 9858 *et seq.*; Food Stamp benefits issued in cash (see, e.g., 7 U.S.C. 2026(b)); certain educational assistance benefits; and non-recurrent, short-term crisis benefits, and other services funded in cash by the TANF program that do not fall within the TANF program's definition of ''assistance,'' as described in paragraph (a)(2) of this section.

(d) Cash benefits that have been earned continue to be irrelevant to the public charge ground of inadmissibility. A few examples of such earned benefits that will not be considered include benefits under Title II of the Social Security Act, 42 U.S.C. 401 *et seq.*,

government pension benefits, and veterans' benefits.

§ 237.14 Are there any forms of public benefits that I can receive without becoming deportable as a public charge?

(a) The only benefits that are relevant to the public charge decision are public cash assistance for income maintenance and institutionalization for long-term care at Government expense. Institutionalization for short periods for rehabilitation purposes will not be considered. Non-cash public benefits are not considered because they are of a supplemental nature and do not demonstrate primary dependence on the Government for subsistence.

(b) Although it is not possible to list all of the non-cash public benefits that will not be considered, you will not risk being found deportable as a public charge by receiving non-cash benefits under the following programs or benefit categories:

(1) The Food Stamp program, 7 U.S.C. 2011, *et seq.*,

(2) The Medicaid program, 42 U.S.C. 1396, *et seq.* (other than payments under the Medicaid program for long-term institutional care);

(3) The Children's Health Insurance Program (CHIP), 42 U.S.C. 1397aa, *et seq.*;

(4) Health insurance and health services (other than public benefits for costs of institutionalization for long-term care), including, but not limited to, emergency medical services, public benefits for immunizations and for testing and treatment of symptoms of communicable diseases, and use of health clinics;

(5) Nutrition programs, including, but not limited to, the Special Supplemental Nutrition Program for Women, Infants and Children (WIC), 42 U.S.C. 1786; and programs that operate under the National School Lunch Act, 42 U.S.C. 1751 *et seq.*; the Child Nutrition Act, 42 U.S.C. 1771 *et seq.*; and the Emergency Food Assistance Act, 7 U.S.C. 7501 *et seq.*;

(6) Emergency disaster relief;

(7) Housing benefits;

(8) Child care services;

(9) Energy benefits, such as LIHEAP, 42 U.S.C. 8621 *et seq.*;

(10) Foster care and adoption benefits;

(11) Transportation vouchers or other non-cash transportation services;

(12) Educational benefits, including benefits under the Head Start Act and aid for elementary, secondary, or higher education;

(13) Non-cash benefits or services funded by the TANF program;

(14) Job training programs;

(15) State and local supplemental, non-cash benefits that serve purposes similar to those of the Federal programs listed in this paragraph;

(16) Any other Federal, State, or local public benefit program, under which benefits are provided in-kind, through vouchers, or any other medium of exchange other than payment of cash benefits for income maintenance to the eligible person.

§ 237.15 What other conditions must be met for me to be deportable as a public charge?

(a) In addition to the requirements of section 237(a)(5) of the Act, and except as provided in paragraph (b) of this section, you are not deportable as a public charge unless the Service shows that:

(1) The Government entity that provided, or is providing, either the public cash assistance for your income maintenance as described in §§ 237.12 and 237.13 of this part or the costs of institutionalization for your long-term care as described in § 237.12, has a legal right to seek repayment of those benefits against either you or another obligated party, such as a family member or a sponsor; and

(2) Within 5 years of your entry to the United States, the public entity providing the benefit demanded that you or another obligated party repay the benefit; and

(3) You or another obligated party failed to repay the benefit demanded;

(4) There is a final administrative or court judgment obligating you or another party to repay the benefit. (As long as the demand for repayment under paragraph (a)(2) of this section occurred within 5 years of your entry, the final judgment may be rendered against you or another obligated party at any time thereafter);

(5) The benefit-granting agency, or other applicable Government entity, has taken all actions necessary to enforce the judgment, including all collection actions.

(b) If a legal right to seek repayment of the public benefits described in §§ 237.12 and 237.13 of this part is established, but the Service proves that there was no one against whom repayment could be enforced, thereby making a demand for repayment futile, then the Service need not show that a demand was made and a final judgment for repayment of the public benefits rendered.

§ 237.16 Is the ''Affidavit of Support Under Section 213A of the Act'' (Form I–864) relevant to removal on public charge grounds of deportation?

(a) The ''Affidavit of Support Under Section 213A of the Act'' (Form I–864) required under section 213A of the Act and 8 CFR part 213a is relevant to removal on the public charge grounds for deportation in certain circumstances. Section 213A of the Act provides that the Affidavit of Support may support a legally enforceable claim against your sponsor(s) for repayment of certain Federal, State, or local means-tested public benefits provided to you. You may be found deportable on public charge grounds if the Service proves that:

(1) An Affidavit of Support under Section 213A of the Act and 8 CFR part 213a was filed on your behalf and is currently in effect; and

(2) Within 5 years after your admission to the United States, you

(i) Obtained SSI, cash TANF benefits, or other Federal, State, or local public benefits that were cash assistance for income maintenance purposes and that, at the time the Affidavit of Support was signed, had been designated as ''means-tested public benefits'' by the Government entity responsible for administering the benefit; or

(ii) Were institutionalized for long-term care at Government expense (other than imprisonment for conviction of a crime); and

(3) Such benefits have not been repaid as provided in § 237.15.

§ 237.17 Does the 5-year period in section 237(a)(5) of the Act run only from my first entry into the United States?

(a) The 5-year period begins again each time you enter the United States, unless you are a returning alien lawfully admitted for permanent residency (an ''LPR'') who is not considered an applicant for admission as described in paragraph (b) of this section.

(b) If you have been lawfully admitted for permanent residence (LPR status), you are not considered an applicant for admission upon return to the United States after a trip abroad unless you are covered by one of the categories specified in section 101(a)(13)(C) of the Act, including an absence of 180 days or more from the United States. If you are not covered by one of the categories listed in section 101(a)(13)(C) of the Act, the 5-year period for public charge deportation purposes would still be counted from your last entry to the United States.

§ 237.18 Will I be considered a public charge because my spouse, parent, child, or other relative has accepted public benefits or has become a public charge?

(a) The fact that one, or all, of your close relatives has received public cash benefits for income maintenance, or has become a public charge, will not make you deportable as a public charge, unless the evidence shows that you,

individually, have become a public charge.

(b) Public cash benefits for income maintenance received by your relatives will not be attributed to you for deportation purposes, unless they also represent your sole support. If such benefits are attributed to you because they are your sole support, all of the requirements of §§ 237.11, 237.15, and 237.16 of this part (if § 237.16 is applicable to your case) must also be met before you may be found deportable as a public charge.

Subpart B—[Reserved]

Dated: May 20, 1999.

Janet Reno,

Attorney General.

Appendix to Preamble

The following are the texts of letters received by Immigration and Naturalization Service officials from officials from the Department of Health and Human Services, the Social Security Administration, and the Department of Agriculture.

BILLING CODE 4410–10–U

The Deputy Secretary of Health and Human Services

Washington, D.C. 20201

March 25, 1999.

Commissioner Doris Meissner,
Immigration and Naturalization Service, Department of Justice, 425 Eye Street NW., Washington, D.C. 20536

Dear Commissioner Meissner: According to my colleagues at the U.S. Department of Health and Human Services (HHS), I understand that the Immigration and Naturalization Service (INS) plans to issue some form of guidance explaining the public charge ground of inadmissibility to and deportation from the United States. The guidance is critical to clarifying for immigrant families and communities what the potential immigration consequences are of receiving certain government benefits.

Over the past several years, there has been a significant decline in the receipt of welfare, health, and nutrition benefits by immigrant families and their citizen children, even though many of these families (or individuals within these families) are eligible for such benefits. HHS has received numerous reports from state and local government officials, program administrators, and community leaders around the country that a significant factor contributing to this decline in participation is the confusion and fear that immigrant families have in relation to public charge policies. There is particularly concern that this lack of access to critical services may lead to negative health outcomes for immigrant families and children, as well as potentially undermining public health.

HHS supports the efforts of INS and the Department of Justice to clarify the meaning of ''public charge'' in a way that meets the objectives of both the immigration laws and the Administration's health policies. The INS, as we understand it, is proposing to define ''public charge'' to mean an alien who has, or is likely to become, ''primarily dependent on the government for subsistence.'' An important issue that has arisen is receipt of which benefits is evidence of this dependency. HHS agrees that in making such an assessment about an individual, it is important to articulate a principle that distinguishes clearly those public benefits that should be relevant to public charge determinations from those that should not be of any consequence. We further understand that under immigration law, receipt of benefits is only one of many factors that INS and Department of State officers consider in making public charge determinations.

This letter responds to your request for advice from benefit-granting agencies with expertise in subsistence matters about which types of benefit receipt would demonstrate that an individual is primarily dependent on the government for his or her support. The best available evidence of whether someone is primarily dependent on government assistance for subsistence is whether that individual is receiving *cash assistance for income maintenance purposes,* (i.e., cash assistance under the Temporary Assistance to Dependent Families program (TANF)), the Supplemental Security Income (SSI), and state general assistance programs), or is institutionalized in a long-term care facility at government expense.[1]

The receipt of cash benefits or long-term care institutionalization are the most effective proxies for identifying an individual as one who is primarily dependent on government assistance for subsistence.

First, nearly all individuals or families receiving cash assistance for purposes of income maintenance are also receiving other non-cash support benefits and services as well, (e.g., Medicaid, Food Stamps, housing assistance, child care, energy assistance), and they are likely not to be receiving any income from other sources. For example, virtually all of those receiving AFDC cash assistance in 1995 were also receiving Medicaid (97 percent) and Food Stamps (89 percent), (1998 Green Book). By the end of 1997, 82 percent of families receiving TANF reported having no earned income. (AFDC/TANF Quality Control Data). In these cases, the individuals or families receiving cash assistance would meet the standard of ''primarily dependent on government assistance for subsistence.''

Second, it is extremely unlikely that an individual or family could subsist on a *combination* of non-cash support benefits or services alone. Without cash assistance, it is extremely unlikely that the individual or family could meet the basic subsistence requirements related to food, clothing and shelter. These non-cash assistance programs typically provide only supplemental and marginal assistance, (e.g., Food Stamps, housing assistance, energy assistance) or services, (e.g., health insurance coverage, medical care and child care) that do not directly provide subsistence and together are insufficient to provide primary support to an individual or a family absent additional income. Moreover, programs such as Child Care enable parents to work and earn income in order to be self-sufficient. In addition, depending on eligibility rules, some programs such as Medicaid, may or may not be available to all family members or for all periods of time. HHS is unable to conceive of a situation where an individual, other than someone who permanently resides in a long-term care institution, could support himself or his family solely on non-cash benefits so as to be primarily dependent on the government. Thus, virtually all families receiving non-cash support benefits, *but not receiving cash assistance,* must rely on other income (usually earned income) in order to meet their subsistence needs.

Finally, non-cash support benefits and services are generally designed to supplement and support the diet, health, and living conditions of recipients, many of whom are low- to middle-income working families, and are generally provided as vouchers or direct services.[2] Also, these non-cash services often have a primary objective of supporting the overall community or public health, by making services generally available to everyone within a community, providing infrastructure development and support, or providing stable financing for services and systems that benefit entire communities. Compared to cash benefit programs, non-cash support programs generally have more generous eligibility rules so as to be available to individuals and families with incomes well above the poverty line. For example, states have a great deal of flexibility to set income eligibility rules under Medicaid and the Children's Health Insurance Program, and many states cover certain populations, such as children and pregnant women, up to 200 percent of the poverty line and sometimes higher. Moreover, in 1997 nearly half (49 percent) of Medicaid recipients were not receiving any cash assistance (SSI or AFDC/TANF), and two-thirds (64 percent) of adult recipients reported working full or part time. (March 1998 Current Population Survey). Similarly, about one-third of Food Stamp recipients in 1997 did not receive cash assistance and

[1] Note that SSI is administered by the Social Security Administration, and general assistance programs are administered by the several states. However, we believe these are the relevant cash assistance programs that support the analysis in this letter.

[2] Although most support programs provide vouchers or direct services, it should be noted that at HHS some of these programs can also provide cash for the reimbursement of specific costs. For example, the Low Income Home Energy Assistance Program (LIHEAP) and the Child Care Development Fund (CCDF) are authorized to make cash payments, but these payments are for specific purposes other than income maintenance. LIHEAP is authorized to provide cash payments for energy costs, and providers do so in very limited circumstances such as when a vendor (such as a log supplier) does not have an agreement with the administering entity, (i.e., state, county, or nonprofit organization). In the case of CCDF, in FY 1997 that program gave cash payments to recipients in 7% of all cases specifically for the reimbursement of beneficiaries' child care costs. Under the proposal articulated here, cash payments in these programs would not give rise to a public charge determination since such payments are not provided for income maintenance purposes.

reported earnings in 1997. (Characteristics of Food Stamp Recipients, 1998). In these cases the individual or family receiving non-cash benefits, but not receiving cash assistance, would not meet the standard of ''primarily dependent on government assistance for subsistence.''

The one circumstance in which receipt of non-cash benefits would indicate that an individual is primarily dependent on government assistance for subsistence, and therefore potentially a public charge, is the case of an individual permanently residing in a long-term care institution and relying on government assistance for those long-term care services. In this case, all of the individual's basic subsistence needs are assumed by the institution, and the individual has no need for cash assistance. Aside from this narrow instance, the receipt of a non-cash support benefits and services should not be relevant to a public charge determination under INS' proposed definition.

Based on these considerations, HHS recommends that benefit receipt should only be relevant to public charge determinations when an individual receives the benefits defined below:

1. Cash-Assistance for Income Maintenance: Cash assistance under TANF, SSE, and state/local equivalents (including state-only TANF).

2. Long-Term Institutionalized Care: The limited case of an alien who permanently resides in a long-term care institution (e.g., nursing facilities) and whose subsistence is supported substantially by public funds (e.g., Medicaid).

Thank you for your time and consideration. Please let me know if I or HHS staff can be of any further assistance regarding this important policy issue.

Sincerely,

Kevin Thurm,

Deputy Secretary of Health and Human Services.

Social Security

May 14, 1999.

Dr. Robert L. Bach,

Executive Associate Commissioner for Office of Policy and Planning, Immigration and Naturalization Service, 425 I Street, Washington, DC 20536

Dear Dr. Bach: We understand that the Immigration and Naturalization Service (INS) is planning to publish proposed regulations on the definition of ''public charge'' for purposes of determining who can be admitted to and who can be deported from the United States under the provisions in sections 212(a)(4) and 237(a)(5) of the Immigration and Nationality Act (INA). More specifically, INS plans to define ''public charge'' to mean an individual who ''has become'' or is ''likely to be primarily dependent on the government for subsistence.'' You have asked the Federal agencies that administer public benefit programs whether a noncitizen's receipt of the benefits might indicate that the noncitizen primarily relied on these benefits for subsistence. This letter is in response to that request.

We agree that the receipt of Supplemental Security Income (SSI) could show primary dependence on the government for subsistence fitting the INS definition of public charge *provided that* all of the other factors and prerequisites for admission or deportation have been considered or met. We believe, however, that many mitigating factors discussed below, coupled with specific public charge exemptions under immigration law, also discussed, would result in a minimal impact of the public charge provisions on the SSI noncitizen population.

The SSI program is a nationwide Federal means-tested income maintenance program administered by the Social Security Administration (SSA). SSI guarantees a minimum level of income for needy aged, blind, and disabled individuals. The program is designed to provide assistance for individuals' basic needs of food, clothing, and shelter. Individuals eligible for SSI are among the most vulnerable people in the United States. For them, SSI is truly the program of last resort and is the safety net that protects them from complete impoverishment.

Lawful permanent residents and noncitizens permanently residing in the United States under color of law were eligible for SSI when the program began in 1974. The 1996 welfare reform legislation (Public Law 104–193) restricted SSI eligibility for qualified noncitizens to those who were in specific, limited categories, such as refugees and asylees, individuals who served in the U.S. military, and lawful permanent residents who worked in the United States for at least 40 quarters. Subsequent legislation in 1997 and 1998 expanded the categories to include individuals who had received SSI or were in the United States prior to enactment of welfare reform and who are disabled or blind. These later laws added other discrete classes of noncitizens as well. Still, the categories of noncitizens eligible for SSI are limited.

Under INS' proposed rule, the receipt of SSI could lead to a determination that a person is or is likely to be a public charge. As mentioned earlier, only limited, specified categories of noncitizens are eligible for SSI. Our analysis of the proposed INS public charge rule leads us to conclude that many of these SSI-eligible noncitizen categories would either be exempt from the public charge provisions by law, or would not be deemed public charges because of the operation of other factors required under the proposed rule. For example, aged, blind, and disabled refugees, asylees, Amerasian immigrants, Cubans and Haitians may be eligible for SSI benefits after they have been in the United States for 30 consecutive days. We understand that the first three categories and certain Cuban/Haitians are exempt from the proposed public charge policy under other provisions in immigration law. In addition, the public charge provision for deportation under section 237(a)(5) of the INA, applies only in cases in which a noncitizen became a ''public charge from causes not affirmatively shown to have arisen since entry.'' Many individuals who are eligible for SSI are healthy when they first come to the United States but become aged, blind or disabled after they enter. If these conditions occurred after entry giving rise to the use of the public benefits, we understand that they would not be deportable on public charge grounds.

Another mitigating factor in the proposed public charge rule as it applies to SSI beneficiaries involves reimbursement of SSI benefits received. As we understand the proposed rule, in order for a noncitizen to be determined deportable on public charge grounds, there must in part be a legal obligation for the individual or his or her sponsor to repay the benefits received during the first 5 years after entry into the United States. SSA has no authority to require the individual to repay the benefits for which they are entitled. Thus, nonsponsored noncitizens would not be required to reimburse, and the public charge provision for deportation would not apply to them. However, sponsors who have signed a new affidavit of support under section 213A of the INA are required to reimburse SSA for SSI benefits paid to the sponsored noncitizen. Only if the sponsor refuses to repay would the SSI beneficiary potentially be subject to deportation.

Even for those individuals who do not come under one of the exempted categories, the draft rules state that the *mere* receipt of SSI does not automatically make a noncitizen inadmissible, ineligible to adjust status, or subject to deportation. In the admission context, the INS plans to apply a ''totality of circumstances'' test which includes the consideration of several mandatory statutory factors. Examples of such factors include an alien's age, health, family status, assets, resources, financial status, education and skills. No single factor, other than the lack of a sufficient affidavit of support, if required, will determine whether a noncitizen is likely to be a public charge, including past or current receipt of SSI. In the deportation context, mere receipt of benefits also will not make a person deportable. There must also have been a demand for repayment by the benefit agency, failure to meet that demand by the alien or other obligated party, a final judgment, and all steps taken to enforce that judgment. Without the satisfaction of these prerequisites, the alien is not deportable.

Further, we understand that INS will take into account the specific circumstances surrounding the past or current receipt of SSI. For example, if a noncitizen received SSI in a past period of unemployment, but he or she is currently working and is self-supporting, a public charge determination may not be made. Every admission decision is made on a case-by-case basis carefully balancing the totality of the circumstances. We also understand that INS will accord less significance to the receipt of SSI if a noncitizen received SSI sometime ago or a noncitizen received or is receiving a small amount of SSI.

INS' proposed rule concerning deportations on public charge grounds indicates that such deportations are rare since the standards are very strict. We believe that these strict criteria would result in the deportation provision rarely being applied against a noncitizen SSI beneficiary.

Thank you for the opportunity to comment on this important matter.

Sincerely,

Susan M. Daniels,

Deputy Commissioner for Disability and Income Security Programs.

Department of Agriculture

Office of the Secretary, Washington, D.C. 20250

April 15, 1999.

Honorable Doris M. Meissner,
Commissioner, Immigration and Naturalization Service, 425 I Street, NW, Room 7100, Washington, D.C. 20536

Dear Commissioner Meissner: This is in reference to a letter that the Department of Health and Human Services recently sent you suggesting that the receipt of public benefits should only be relevant to a public charge determination when an individual receives cash assistance for income maintenance or long-term institutionalized care. We have reviewed the letter and are in agreement with its contents.

We believe that neither the receipt of food stamps nor nutrition assistance provided under the Special Nutrition Programs administered by this Agency should be considered in making a public charge determination for purposes of admission, deportation, or adjustment of an alien's status.

Please let us know if we can be of any assistance regarding this matter.

Sincerely,

Shirley R. Watkins,

Under Secretary, Food, Nutrition and Consumer Services.

[FR Doc. 99–13188 Filed 5–25–99; 8:45 am]

BILLING CODE 4410–10–M

DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 103, 212, 213, 214, 245a and 248

[CIS No. 2499-10; DHS Docket No. USCIS-2010-0012]

RIN 1615-AA22

Inadmissibility on Public Charge Grounds

AGENCY: U.S. Citizenship and Immigration Services, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Homeland Security (DHS) proposes to add a new regulation that would guide how DHS will determine whether an alien is inadmissible to the United States because he or she is likely at any time to become a public charge under section 212(a)(4) of the Immigration and Nationality Act (INA). Aliens applying for a visa, admission at a port of entry, or adjustment of status must establish that they are not likely at any time to become a public charge. DHS proposes to define the term "public charge" for immigration purposes and provide guidance on the types of public benefits that are considered in public charge determinations. DHS proposes to clarify that it will make public charge determinations based on the totality of an applicant's circumstances. This includes, but is not limited to, the mandatory consideration of statutory factors in section 212(a)(4) of the INA. These factors may be weighed positively or negatively, depending on how the factor impacts the alien's likelihood to become a public charge. Additionally, DHS proposes to clarify the types of public benefits that DHS will consider when determining whether an alien is likely at any time to become a public charge. With the publication of this proposed rule, DHS withdraws the proposed regulation on public

charge that former Immigration and Naturalization Service (INS)[1] published on May 26, 1999.

DATES: Written comments and related material to this proposed rule must be submitted to the online docket via www.regulations.gov, on or before 60 days from date of publication in the *Federal Register*.

ADDRESSES: You may submit comments on this proposed rule, including the proposed information collection requirements, identified by DHS Docket No. USCIS-2010-0012, by any one of the following methods:

- Federal eRulemaking Portal (preferred): www.regulations.gov. Follow the website instructions for submitting comments.
- Mail: Samantha L. Deshommes, Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, N.W., Washington, DC 20529-2140. To ensure proper handling, please reference DHS Docket No. USCIS-2010-0012 in your correspondence. Mail must be postmarked by the comment submission deadline.

FOR FURTHER INFORMATION CONTACT: Mark Phillips, Residence and Naturalization Division Chief, Office of Policy & Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts NW., Washington, DC 20529-2140; telephone 202-272-8377.

SUPPLEMENTARY INFORMATION:

Table of Contents

[1] On March 1, 2003, INS functions were transferred from the Department of Justice to DHS. *See* Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135, 2178, 2192 (Nov. 25, 2002).

Administrative practice and procedure, Aliens, Immigration, Passports and visas, Reporting and recordkeeping requirements.

8 CFR 213

Immigration, Surety bonds.

8 CFR 214

Administrative practice and procedure, Aliens, Cultural exchange programs, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements, Students.

8 CFR 245a

Persons Admitted for Temporary Resident Status Under Section 245A of the Immigration and Nationality Act

8 CFR 248

Aliens, Reporting and recordkeeping requirements.

Accordingly, DHS proposes to amend chapter I of title 8 of the Code of Federal Regulations as follows:

PART 103 – IMMIGRATION BENEFITS; BIOMETRIC REQUIREMENTS; AVAILABILITY OF RECORDS

1. The authority citation for part 103 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1101, 1103, 1304, 1356, 1365b; 31 U.S.C. 9701; Public Law 107-296, 116 Stat. 2135 (6 U.S.C. 1 *et seq.*); E.O. 12356, 47 FR 14874, 15557, 3 CFR, 1982 Comp., p.166; 8 CFR part 2; Pub. L. 112-54.1

2. Section 103.6 is amended by:

a. Revising paragraphs (a), (b) and (c)(1);

b. Adding a new paragraph (d)(3);

Administrative practice and procedure, Aliens, Immigration, Passports and visas, Reporting and recordkeeping requirements.

8 CFR 213

Immigration, Surety bonds.

8 CFR 214

Administrative practice and procedure, Aliens, Cultural exchange programs, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements, Students.

8 CFR 245a

Persons Admitted for Temporary Resident Status Under Section 245A of the Immigration and Nationality Act

8 CFR 248

Aliens, Reporting and recordkeeping requirements.

Accordingly, DHS proposes to amend chapter I of title 8 of the Code of Federal Regulations as follows:

PART 103 – IMMIGRATION BENEFITS; BIOMETRIC REQUIREMENTS; AVAILABILITY OF RECORDS

1. The authority citation for part 103 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1101, 1103, 1304, 1356, 1365b; 31 U.S.C. 9701; Public Law 107-296, 116 Stat. 2135 (6 U.S.C. 1 *et seq.*); E.O. 12356, 47 FR 14874, 15557, 3 CFR, 1982 Comp., p.166; 8 CFR part 2; Pub. L. 112-54.1

2. Section 103.6 is amended by:

a. Revising paragraphs (a), (b) and (c)(1);

b. Adding a new paragraph (d)(3);

c. Revising paragraph (e); and

d. Adding a new paragraph (f).

The revisions and additions read as follows:

§ 103.6 Surety bonds.

(a) *Posting of surety bonds.* (1) *Extension agreements; consent of surety; collateral security.* All surety bonds posted in immigration cases must be executed on the forms designated by the Secretary of Homeland Security, a copy of which, and any rider attached thereto, must be furnished to the obligor. The Secretary is authorized to approve a bond, a formal agreement to extension of liability of surety, a request for delivery of collateral security to a duly appointed and undischarged administrator or executor of the estate of a deceased depositor, and a power of attorney executed on the form designated by the Secretary of Homeland Security. All other matters relating to bonds, including a power of attorney not executed on the form designated by the Secretary of Homeland Security and a request for delivery of collateral security to other than the depositor or his or her approved attorney in fact, will be forwarded to the appropriate office for approval.

(b) Acceptable Sureties. Any company listed on Department of the Treasury's Listing of Approved Sureties (Department Circular 570) in effect on the date the bond is requested.

(2) *Bond riders.* (i) *General.* Bond riders must be prepared on the form designated by the Secretary of Homeland Security, and attached to the submission of the

bond. If a condition to be included in a bond is not on the original bond, a rider containing the condition must be executed.

(c) *Cancellation. (1) Public charge bonds*. A public charge bond posted for an alien must be cancelled when the alien dies, departs permanently from the United States or is naturalized, provided the alien did not become a public charge prior to death, departure, or naturalization. A public charge bond may also be canceled in order to allow the substitution of another bond. A public charge bond must be cancelled by the Secretary upon review following the fifth anniversary of the admission of the immigrant, provided that the alien has filed the form designated by the Secretary of Homeland Security-and the Secretary finds that the alien did not become a public charge prior to the fifth anniversary. If the cancellation request as submitted in the form designated by the Secretary is not filed, the bond must remain in effect until the form is filed, and the Secretary-reviews the evidence supporting the form and renders a decision to breach or cancel the bond.

* * * * *

(d) * * *

(3) *Public charge blanket bonds*. If the sponsored alien is found inadmissible under section 212(a)(4) of the INA based on the totality of circumstances and the alien has no heavily weighted negative factors as described in 8 CFR 212.22(e) the bond amount is not less than $10,000.

(e) *Breach of bond*. A bond is breached when there has been a substantial violation of the stipulated conditions. A final determination that a bond has been

breached creates a claim in favor of the United States which may not be released or discharged. The office having custody of the file containing the immigration bond executed on the form designated by the Secretary determines whether to declare the bond breached or cancelled, and must notify the obligor on-the form designated by the Secretary of the decision. If the bond is declared breached, that office must notify the obligor of the reasons-why, and of the right to appeal in accordance with the provisions of this part.

(f) Breach of public charge bond. Receipt of a public benefit as listed in 8 CFR 212.23 is a breach of a public charge bond.

PART 212 – DOCUMENTARY REQUIREMENTS: NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE

3. The authority citation for part 212 continues to read as follows:

Authority: 6 U.S.C. 111, 202, 236 and 271; 8 U.S.C. 1101 and note, 1102, 1103, 1182 and note, 1184, 1185, 1187, 1223, 1225, 1226, 1227, 1255, 1359; 8 U.S.C. 1185 note (section 7209 of Pub. L. 108-458); 8 CFR part 2.

4. Sections 212.20 through 212.26 are newly added to read as follows:

§ 212.20 Purpose and applicability of public charge inadmissibility.

8 CFR 212.20 through 212.26 address the public charge ground of inadmissibility under section 212(a)(4) of the Act.

(a) Purpose. These subparts implement section 212(a)(4) of the Act as it relates to the statements of Congress on national welfare and immigration policy in 8 U.S.C. 1601:

(1) Self-sufficiency is a basic principle of United States immigration law;

(2) Aliens must rely on their own capabilities and the resources of their families, their sponsors, and private organizations;

(3) The availability of public benefits must not constitute an incentive for immigration to the United States; and

(4) Aliens in the United States must not depend on public resources to meet their needs.

(b) Applicability of public charge inadmissibility.

Unless the immigration benefit or classification requested by the alien has been exempted from section 212(a)(4) of the Act or that section has been waived by law, the provisions of sections 212.20 through 212.26 of this chapter apply to:

(1) Aliens applying for admission to the United States; and

(2) Aliens applying for adjustment of status to lawful permanent resident.

§ 212.21 Definitions Public Charge.

For the purposes of § 212.20 through § 212.26 of this chapter, the following definitions apply:

(a) *Public Charge*. A public charge means a person who is dependent on public benefits as defined in subpart 212.21(d) of this section. An alien inadmissible based on public charge means an alien who is likely to become pendent on public benefits.

(b) *Dependent*. A person who relies on another person or entity for financial or material support.

(c) *Government*. Government means any U.S. Federal, State, Territorial, tribal, or local government entity or entities.

(d) *Public benefit.* (1) Public benefit means any government assistance in the form of cash, checks or other forms of money transfers, or instrument and non-cash government assistance in the form of aid, services, or other relief, except those benefits described in paragraph (d)(2) of this section.

(2) Public benefit does not include earned benefits such as Federal Old-Age, Survivors, and Disability Insurance Social Security benefits, veteran's benefits. government pension benefits, unemployment benefits, and worker's compensation, Medicare, or state disability insurance. In addition, public benefit does not include services or benefits available to the community as a whole and not to a specific individual, or loans provided by the government that require repayment.

(e) *Subsidized health insurance.* Subsidized health insurance is any health insurance for which the premiums are partially or fully paid by the Federal, State or local government including but not limited to advanced premium tax credits, tax credits, or other forms of reimbursement.

§ 212.22 Public Charge Determination

If the Secretary of Homeland Security determines that an alien applying for admission or adjustment of status is likely to become a public charge at any time, the alien is inadmissible under section 212(a)(4) of the Act.

(a) Prospective determination. The Secretary must determine the likelihood that an alien will become a public charge at any time in the future.

(b) Totality of the circumstances. The Secretary must base the determination on the totality of the alien's circumstances by weighing all positive and negative factors, as outlined in paragraphs (c) through (f) of this section.

(c) Minimum factors to consider. Except as provided in paragraph (g) of this section, the Secretary may not make a finding of inadmissibility based on a single factor. At a minimum, the Secretary must consider:

(1) The alien's age;

(2) The alien's health;

(3) The alien's family status;

(4) The alien's assets, resources, and financial status; and

(5) The alien's education and skills.

(d) Additional considerations. The Secretary may also consider each of the following:

(1) Whether the alien has sought, has received, or is receiving any public benefit as defined by 8 CFR 212.21;

(2) Whether the alien has received any public benefit (as defined by 8 CFR 212.21(d)) within the last 2 years;

(3) Whether any dependent family members for whom the alien provides financial support, including a U.S. citizen child, in the alien's household have received or are receiving any public benefits;

(4) Whether an alien has received a fee waiver for an immigration benefit request;

(5) Whether the alien has received or is likely to receive any subsidized health insurance;

(6) Whether there is a sufficient affidavit of support under INA 213A when required. A sufficient affidavit of support meets the sponsorship and income requirements of INA 213A; and

(7) Any other factors or evidence submitted that are relevant to the public charge determination.

(e) Heavily weighted negative factors. The following factors weigh heavily in favor of a finding that an alien is likely to become a public charge:

(1) The alien is of employable age, and is authorized to work, but is unable to demonstrate current employment, and has no employment history or no reasonable prospect of future employment;

(2) The alien is currently receiving public benefit(s);

(3) The alien has received public benefit(s) for more than 6 months cumulatively within 2 years immediately before filing the application or seeking admission;

(4) The alien has a costly medical condition and is unable to show proof of unsubsidized health insurance, prospect of obtaining unsubsidized health insurance, or other non-governmental means of paying for treatment; or

(5) The alien's spouse or parent had previously been found inadmissible based on public charge, and the applicant is an alien spouse or child accompanying under section 203(d) of the Act, 8 U.S.C. 1153(d).

(f) Heavily weighted positive factors. The following factors weigh heavily in favor of a finding that an alien is not likely to become a public charge:

(1) The alien is a healthy person of employable age with financial assets, resources, and support of at least 250 percent of the Federal Poverty Guidelines.

(2) The alien is authorized to work and is currently gainfully employed with an income of at income of at least 250 percent of the Federal Poverty Guidelines.

(g) Lack of a sufficient affidavit of support under INA 213A. Notwithstanding paragraphs (b) and (c) of this section, if an alien is required to submit an affidavit of support under section 212(a)(4)(C) and (D) of the Act and the affidavit of support is not sufficient as defined in 8 CFR 212.22(d)(6)), the alien is inadmissible on public charge grounds.

(h) Effective Date. The Secretary will consider an alien's receipt of public benefits that were previously excluded from consideration under the public charge guidance published in the Federal Register at 64 FR 28689 (May 26, 1999), only if such benefits are received on or after [the effective date of the final rule]. Receipt of such benefits will be considered along with all other relevant factors in the totality of the circumstances analysis in determining whether an alien is inadmissible as likely to become a public charge.

(g) *Lack of a sufficient affidavit of support section 213A of the Act.* Notwithstanding paragraphs (b) and (c) of this section, if an alien is required to submit an affidavit of support under section 212(a)(4)(C) and (D) of the Act and the affidavit of support as defined in paragraph (d)(5) of this section, the alien is inadmissible on public charge grounds.

(h) *Effective date*. The Secretary will consider an alien's receipt of public benefits that were previously excluded from consideration under the public charge guidance published in the Federal Register at 64 FR 28689 (May 26, 1999), but only if such benefits are received on or after [the effective date of the final rule]. Receipt of such

benefits will be considered along with all other relevant factors in the totality of the circumstances analysis in determining whether an alien is inadmissible as likely to become a public charge.

§ 212.23 Public benefits considered for purposes of public charge inadmissibility.

(a) Consideration of public benefits includes, but is not limited to, the following:

(1) Supplemental Security Income (SSI), 42 U.S.C. 1381 et seq.;

(2) Temporary Assistance to Needy Families (TANF), 42 U.S.C. 601 et seq.;

(3) State or local cash benefit programs for income maintenance (often called State "General Assistance," but which may exist under other names);

(4) Any other federal public benefits for purposes of maintaining the applicant's income, such as public cash assistance for income maintenance;

(5) Certain Benefits under the Medicaid Program, 42 U.S.C. 1396 to 1396w-5;

(6) Government-provided subsidies for premium payments under the Patient Protection and Affordable Care Act, Pub. L. 111-148, 42 U.S.C. § 18001 et seq., or other government subsidized medical insurance programs;

(7) Supplemental Nutrition Assistance Program (SNAP) (formerly called "Food Stamps"), 7 U.S.C. 2011 to 2036c;

(8) Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), 42 U.S.C. 1786;

(9) State Children's Health Insurance Program (CHIP) (formerly called "SCHIP"), 42 U.S.C. 1397aa to 1397mm;

(10) Transportation vouchers or other non-cash transportation services;

(11) Housing assistance under the McKinney-Vento Homeless Assistance Act, as amended, 42 U.S.C. 11301 et seq. or the Housing Choice Voucher Program (section 8), U.S. Housing Act of 1937, as amended, 42 U.S.C. 1437u, 24 CFR part 982;

(12) Energy benefits such as the Low Income Home Energy Assistance Program (LIHEAP), 42 U.S.C. 8621 to 8630;

(13) Institutionalization for both long-term and short-term care at government expense;

(14) Certain educational benefits, including, but not limited to, benefits under the Head Start Act, as amended, 42 U.S.C. 9801 et seq., and

(15) Any other Federal, State, or local public benefit program, except for those benefits described in § 212.24 of this chapter.

§ 212.24 Public benefits not considered for purposes of public charge inadmissibility.

(a) *Emergency or disaster relief.* Emergency and disaster relief benefits include, but are not limited to:

(1) Any services provided under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), Pub. L. 93-288, as amended, 42 U.S.C. 1521 et seq.;

(2) Short-term, non-cash, in-kind emergency disaster relief;

(3) Programs, services, or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelter) provided by local communities or through public or private nonprofit organizations;

(4) Benefits under the Emergency Food Assistance Act, as amended, 7 U.S.C. 7501 to 7517; and

(5) Public health assistance for immunizations with respect to immunizable diseases and for testing and treatment of symptoms of communicable diseases whether or not such symptoms are caused by a communicable disease.

(b) *Educational and Child Care Block Grants*. Educational and Child Care Block Grants include, but are not limited to:

(1) Attending public school;

(2) Benefits through school lunch or other supplemental nutrition programs;

(3) Benefits through the Child Nutrition Act of 1966, as amended, 42 U.S.C. 1771 to 1793;

(4) Benefits from the Richard B. Russell National School Lunch Act, as amended, 42 U.S.C. 1751 to 1769j;

(5) Child care related services including the Child Care and Development Block Grant Program (CCDBGP), 42 U.S.C. 9858 to 9858q.; and

(6) Foster care and adoption benefits.

§ 212.25 Burden of proof and evidence.

(a) *Burden of proof.* The alien bears the burden of proof, as provided in section 291 of the Act, to show that he or she is not inadmissible as a public charge under section 212(a)(4) of the Act.

(b) *Evidence obtained by the Government*. The Secretary may request evidence from the alien based on the procedures outlined in 8 CFR 103.2, or from any other

government entity that is relevant to the public charge determination. Evidence that the Government may obtain includes, but is not limited to:

(1) Any information relevant to the determination of an alien's likelihood of becoming a public charge;

(2) Any information obtained or received by DHS that indicates the alien has applied for public benefits, such as verifications of an alien's immigration status and notifications from state or local government agencies that an alien may be indigent;

(3) The results of a credit check of the alien and any person supporting the alien;

(5) Information obtained from the U.S. Department of Labor (DOL) relating to occupational skills and employability;

(6) Information obtained from the Internal Revenue Service (IRS);

(7) Information obtained from the U.S. Social Security Administration (SSA);

(8) Information obtained from U.S. Department of Health and Human Services (HHS);

(9) Information obtained from U.S. Department of Agriculture (USDA);

(10) Information obtained from any other government entity that provides public benefits;

(11) The alien's immigrant medical examination, the applicant's medical records, and any other documentation relating to the alien's health; and

(12) Any other information obtained from any government entity relevant to the public charge determination.

§ 212.26 Exemptions and waivers for public charge ground of inadmissibility.

(a) *Exemptions*. Sections 212.20 through 212.25 do not apply to categories of aliens who are exempt from the public charge ground of inadmissibility as provided by the Act, regulation, or other federal law. The public charge ground of inadmissibility does not apply to the following categories of aliens:

(1) Refugees and asylees at the time of admission and adjustment of status to lawful permanent resident according to sections 207(c)(3) and 209(c) of the Act;

(2) Amerasian immigrants at admission as described in sections 584 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1988, section 101(e), Public Law 100-202, 101 Stat. 1329-183 (Dec. 22, 1987) (as amended), 8 U.S.C. 1101 note;

(3) Afghan and Iraqi Special immigrants serving as translators with United States armed forces Section 1059(a)(2) of the National Defense Authorization Act for Fiscal Year 2006 Pub. L. 109–163 (JAN. 6, 2006) and Section 602(b) of the Afghan Allies Protection Act of 2009, as amended Pub. L. 111–8 (MAR. 11, 2009);

(4) Cuban and Haitian entrants at adjustment as described in section 202 of the Immigration Reform and Control Act of 1986 (IRCA), Public Law 99-603, 100 Stat. 3359 (1986) (as amended), 8 U.S.C. 1255a, note;

(5) Aliens applying for adjustment of status as described in the Cuban Adjustment Act, Pub. L. 89-732 (Nov. 2, 1966) as amended; 8 U.S.C. 1255, note;

(6) Nicaraguans and other Central Americans who are adjusting status as described in section 202(a) and section 203 of the Nicaraguan Adjustment and Central American Relief Act (NACARA), Public Law 105-100, 111 Stat. 2193 (1997) (as amended), 8 U.S.C. 1255 note;

(7) Haitians who are adjusting status as described in section 902 of the Haitian Refugee Immigration Fairness Act of 1998, Public Law 105-277, 112 Stat. 2681 (Oct. 21, 1998), 8 U.S.C. 1255 note;

(8) Lautenberg parolees as described in section 599E of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1990, Public Law 101-167, 103 Stat. 1195 (Nov. 21, 1989), 8 U.S.C.A. 1255 note;

(9) Special immigrant juveniles as described in section 245(h) of the Act;

(10) Aliens who entered the United States prior to January 1, 1972 and who meet the other conditions for being granted lawful permanent residence under section 249 of the Act and 8 CFR part 249 (Registry);

(11) Aliens applying for Temporary Protected Status as described in section 244 of the Act who receive a blanket regulatory waiver of the public charge ground of inadmissibility under 8 CFR 244.3(a);

(12) A nonimmigrant described in section 101(a)(15)(T) of the Act, under section 212(d)(13)(A) of the Act at time of admission;

(13) An applicant for, or who is granted, nonimmigrant status under section 101(a)(15)(U) of the Act described in section 212(a)(4)(E)(ii) of the Act;

(14) Nonimmigrants who were admitted under section 101(a)(15)(U) of the Act at the time of their adjustment of status under section 245(m) of the Act and 8 CFR 245.24;

(15) An alien who is a VAWA self-petitioner under section 212(a)(4)(E)(i) of the Act;

(16) A qualified alien described in section 431(c) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (8 U.S.C. 1641(c)) under section 212(a)(4)(E)(iii) of the Act;

(17) Applicants adjusting status under section 1703 of the National Defense Authorization Act, Pub. L. 108-136, 117 Stat. 1392 (November 24, 2003) (posthumous benefits to surviving spouses, children, and parents);

(18) American Indians Born in Canada as described in INA 289;

(19) Nationals of Vietnam, Cambodia, and Laos adjusting status under section 586 of Public Law 106-429; and

(20) Polish and Hungarian Parolees who were paroled into the United States from November 1, 1989 to December 31, 1991 under Title VI, Subtitle D, Section 646(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) – Pub. L. 104-208.

(21) Subsequent legal provisions that may exempt other categories of aliens from the public charge ground of inadmissibility provisions under section 212(a)(4) of the INA.

(b) *Waiver*. Inadmissibility based on public charge grounds may be waived as provided by the Act or any other federal law. A waiver for the public charge ground of inadmissibility may be available for the following categories of aliens:

(1) Certain aged, blind, or disabled applicants for adjustment of status under section 245A(d)(2)(B)(ii)(IV) of the Act;

(2) Nonimmigrants who were admitted under section 101(a)(15)(T) of the Act at the time of their adjustment of status under section 245(l)(2)(A) of the Act;

(3) Applicants for admission as nonimmigrants under 101(a)(15(S) of the Act;

(4) Nonimmigrants who were admitted under section 101(a)(15)(S) of the Act at the time of their adjustment of status under section INA 245(j) of the Act (witnesses or informants); and

(5) Other categories of aliens may be permitted by subsequent legal provisions to waive the public charge ground in section 212(a)(4) of the Act.

(6) Nonimmigrants described in INA 212(d)(3).

PART 213 – ADMISSION OF ALIENS ON GIVING BOND OR CASH DEPOSIT

5. The authority citation for part 213 continues to read as follows:

Authority: 8 U.S.C. 1103; 8 CFR part 2.

6 Section 213.1 is revised to read as follows:

§ 213.1 Admission of aliens on giving surety bond.

(a) DHS may admit an alien inadmissible on account of public charge under paragraph (4) of section 212(a) upon the alien's giving of a suitable and proper bond according to the procedures outlined in this section 213.1, DHS may accept a suitable and proper public charge surety bond on an alien's behalf if the bond meets the conditions set forth in section 213 of the INA, and in 8 CFR 213 and 8 CFR 103.6. Acceptance of such a bond is discretionary.

(b) The Secretary may accept a public charge bond prior to the issuance of a visa, granting admission under section 235 of the INA, adjustment of status to that of a lawful permanent resident, and extension of stay under 8 CFR 214.1. Additionally, the Secretary may accept a public charge bond prior to the approval of a change of status request under

section 248 of the INA and 8 CFR 248 if the Secretary determined that the alien is described in section 212(a)(4) of the INA, whether inadmissible or not.

(1) After an applicant has been found inadmissible as likely to become a public charge, the Secretary, in his or her discretion, may accept a public charge surety bond, if the alien is otherwise admissible.

(2) A person may submit a surety bond on the alien's behalf after the Secretary has notified the alien that a surety bond may be submitted. The bond must be received by DHS within 30 days of a notice.

(3) A public charge surety bond is only warranted where the applicant was found likely to become a public charge in the totality of the circumstances due to failure to demonstrate sufficient financial resources and the applicant has no heavily weighted negative factors.

(4) An alien who is currently receiving a public benefit as defined by 8 CFR 212.21(d)) is not eligible for a public charge surety bond.

(c) The office having jurisdiction over the place where the examination for admission is being conducted or a designated officer may exercise the authority under section 213 of the Act.

(d) All bonds and agreements given as a condition of an alien's visa, admission or adjustment of status under section 213 of the Act must be executed on the form designated by the Secretary, and must not be less than $10,000.

(e) A suitable and proper bond submitted to overcome inadmissibility based on public charge must not be less than [XXX]. A-must be provided on the form designated by the Secretary.

(f) For procedures relating to bond riders, acceptable sureties, cancellation or breaching of bonds, see §103.6 of this chapter.

(g) *Conditions of bond.* Conditions of bond. The issuance of a bond is on the condition that the alien does not receive any public benefit as defined by 8 CFR 212.21(d)).

PART 214 – NONIMMIGRANT CLASSES

7. The authority citation for part 214 continues to read as follows:

Authority: 6 U.S.C. 202, 236; 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282, 1301-1305 and 1372; sec. 643, Pub. L. 104-208, 110 Stat. 3009-708; Public Law 106-386, 114 Stat. 1477-1480; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note, and 1931 note, respectively; 48 U.S.C. 1806; 8 CFR part 2.

§214.1 Requirements for admission, extension, and maintenance of status.

8. Section 214.1 is amended by revising paragraphs (a)(3)(i), redesignating paragraph (c)(4)(iv) as paragraph (c)(4)(v), and adding an its place a new paragraph (c)(4)(iv), to read to as follows:

(a) * * *

(3) *General requirements.* (i) Every nonimmigrant alien who applies for admission to, or an extension of stay in, the United States, must establish that he or she is admissible to the United States, or that any ground of inadmissibility has been waived under section 212(d)(3) of the Act. Except where the nonimmigrant classification for which the alien applies, or seeks to extend, is exempt from section 212(a)(4) of the Act or

that section has been waived, the alien must demonstrate that he or she is not receiving, nor is likely to receive, public benefits as defined in 8 C.F.R. 212.21(d). Upon application for admission, the alien must present a valid passport and valid visa unless either or both documents have been waived. A nonimmigrant alien's admission to the United States is conditioned on compliance with any inspection requirement in § 235.1(d) or of this chapter, as well as compliance with part 215, subpart B, of this chapter, if applicable. The passport of an alien applying for admission must be valid for a minimum of six months from the expiration date of the contemplated period of stay, unless otherwise provided in this chapter, and the alien must agree to abide by the terms and conditions of his or her admission. An alien applying for extension of stay must present a passport only if requested to do so by the Department of Homeland Security. The passport of an alien applying for extension of stay must be valid at the time of application for extension, unless otherwise provided in this chapter, and the alien must agree to maintain the validity of his or her passport and to abide by all the terms and conditions of his extension.

* * * * *

(c) * * *

(4) * * *

(v) Except where the alien's nonimmigrant classification is exempted from section 212(a)(4) of the Act or that section has been waived, the alien is not currently receiving, nor is likely to receive, public benefits as defined in 8 C.F.R. 212.21(d).

* * * * *

PART 245a ADJUSTMENT OF STATUS TO THAT OF PERSONS ADMITTED FOR TEMPORARY OR PERMANENT RESIDENT STATUS UNDER SECTION 245A OF THE IMMIGRATION AND NATIONALITY ACT

9. The authority citation for part 245a continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1255a and 1255a note.

10. Section 8 CFR 245a.2 is amended by revising the terms "Form I-134, Affidavit of Support, completed, xx" to read " Affidavit of Support, completed on the form designated by the Secretary of Homeland Security," in paragraph (d)(4)(iii).

11. Section 8 CFR 245a.4 is amended by revising the terms "Form I-134, Affidavit of Support, completed" to read " Affidavit of Support, completed on the form designated by the Secretary of Homeland Security," in paragraph (b)(4)(v)(C).

16. Section 8 CFR 245a.1 is amended to read as following:

* * * * *

(d) * * *

(3) An alien may have filed on his or her behalf an Affidavit of Support, on the form designated by the Secretary of Homeland Security. The failure to submit the affidavit of support shall not constitute an adverse factor.

* * * * *

PART 248 – CHANGE OF NONIMMIGRANT CLASSIFICATION

12. The authority citation for part 248 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1184, 1258; 8 CFR part 2.

§ 248.1 Eligibility.

13. In section 248.1, paragraph (a) is revised to read as follows:

(a) *General.* Except for those classes enumerated in § 248.2, any alien lawfully admitted to the United States as a nonimmigrant, including an alien who acquired such status pursuant to section 247 of the Act, 8 U.S.C. 1257, who is continuing to maintain his or her nonimmigrant status, may apply to have his or her nonimmigrant classification changed to any nonimmigrant classification other than that of a spouse or fiance(e), or the child of such alien, under section 101(a)(15)(K) of the Act, 8 U.S.C. 1101(a)(15)(K), or as an alien in transit under section 101(a)(15)(C) of the Act, 8 U.S.C. 1101(a)(15)(C). Except where the nonimmigrant classification to which the alien seeks to change is exempted from section 212(a)(4) of the Act or that section has been waived, the alien must establish that he or she is not currently receiving, nor is likely to receive, public benefits as defined in 8 C.F.R. 212.21(d) as a condition for approval of a change of nonimmigrant status.

(i) An alien defined by section 101(a)(15)(V), or 101(a)(15)(U) of the Act, 8 U.S.C. 1101(a)(15)(V) or 8 U.S.C. 1101(a)(15)(U), may be accorded nonimmigrant status in the United States by following the procedures set forth respectively in § 214.15(f) or § 214.14 of this chapter.

(ii) A non-immigrant who is inadmissible under section 212(a) of the Act, 8 U.S.C. 1182(a) shall not be approved to change his or her nonimmigrant status. This provision does not apply to any ground of inadmissibility that does not apply to the nonimmigrant category to which the alien is requesting to change status or where a ground of inadmissibility in section 212(a) of the Act, 8 U.S.C. 1182(a) has been waived for the particular nonimmigrant category.

14. In section 248.1, paragraphs (b) to (e) are redesignated as paragraphs (c) to (f) respectively, and a new paragraph (b) is added to read as follows:

Adding 8 CFR 248.1(b)

Renumbering 8 CFR 248.1(b) to 8 CFR 248.1(c)

Renumbering 8 CFR 248.1(c) to 8 CFR 248.1(d)

Renumbering 8 CFR 248.1(d) to 8 CFR 248.1(e)

Renumbering 8 CFR 248.1(e) to 8 CFR 248.1(f)

(b) *Decision in change of status proceedings*. Where an applicant or petitioner demonstrates eligibility for a requested change of status, it may be granted at the discretion of DHS. There is no appeal from the denial of an application for change of status.

14. Adding 8 CFR 248.1(c)(4)

(c) ***

(4) Except where the nonimmigrant classification to which the alien seeks to change is exempted from section 212(a)(4) of the Act or that section has been waived, the alien is not currently receiving, nor is likely to receive, public benefits as defined in 8 CFR 212.21(d).

Kirstjen M. Nielsen,
Secretary.

KINSHIP CARE RELEVANT LEGISLATIVE BILLS - March 23, 2018

Kinship Bills 2017-18 Session	
S6013 A8094	**AVELLA/JAFFEE** -- Relates to definition of person in parental relationship (ADDS LEGAL CUSTODIANS) NO SAME AS
Senate: In Higher Education	**Assembly: in Judiciary**
S6015A A7928	**AVELLA/JAFFEE** -- Relates to medical decision making for minors (ADDS LEGAL CUSTODIANS)
Senate: Out of Committee	**Assembly: In Judiciary**
S6016 A7905A	**AVELLA/JAFFEE** -- Relates to a parent or guardian naming a caregiver as a person in parental relation (EXTENDS PERIOD TO TWELVE MONTHS)
Senate: Out of Committee	**Assembly: Out of Committee**
S6217A A7899A	**ROZIC/SAVINO** -- Relates to the appointment of a standby guardian due to administrative separation (ADDS UNDOCUMENTED PARENTS FACING DEPORTATION)
Senate: Out of Committee	**Assembly: Out of Committee**
A9956 S8047	**JAFFEE/SAVINO –** Relates to changing current law to require social services workers to give information about assistance as well as make a referral to kinship services (REQUIRES LOCAL DISTRICT SOCIAL SERVICES TO PROVIDE KINSHIP CAREGIVERS WITH INFORMATION ON BENEFITS AND CUSTODIAL OPTIONS AND TO MAKE REFERRALS TO KINSHIP PROGRAMS)
Senate: In Children and Families	**Assembly: Passed**

Explanation of A.8172 (Hevesi)/S.6017A(Avella):

There are two unfair public assistance budgeting rules that affect children who receive non-parent grants. This bill would amend SSL 131-c to make the following changes:

1. When a non-parent caregiver takes in half-siblings and one of them has income (usually child support or Social Security benefits from the parent that the children do not have in common), current budgeting rules require that the income of the child with income be applied against the needs of the child with no income. This bill would allow the child with no income to receive a full child only grant and the child with income to retain his or her income.

2. When a non-parent caregiver who is not on public assistance applies for a public assistance grant for the child in her care, the caregiver's income is not taken into account when determining the size of the child's grant. When the caregiver herself is on public assistance, however, the caregiver and the child are each given ½ of a grant for two people, which is less than two separate grants for each person. Thus, the non-parent grant is smaller for children who are cared for by relatives on public assistance. This bill would allow relative caregivers who are public assistance recipients themselves to receive a full grant for one person and a child to receive a full grant for one person.

CAREGIVER'S RIGHTS TO OBTAIN VITAL DOCUMENTS

This chart demonstrates 3 types of common kinship custodial arrangements: Legal guardianship, legal custody and informal custody. For each arrangement, we have indicated whether the caregiver has the right to obtain the child's birth certificate, passport and social security card.

LEGAL ARRANGEMENT	BIRTH CERTIFICATE	PASSPORT	SOCIAL SECURITY CARD
INFORMAL CUSTODY	Maybe - may need to bring motion in Supreme Court requesting Dept. of Health Commissioner order the birth certificate be released.	Appears to have the same rights as legal custodian.	Maybe, depending on what other vital documents are available to informal custodian, such as the child's birth certificate.
LEGAL CUSTODY	Yes	Probably, as long as parent's statement of consent (form DS 3053) is obtained. Parental consent or caregiver must show "exigent" circumstances (form DS 5525). If custody is joint, both parents must provide consent. If custody sole, must provide evidence of sole custody.	Yes
LEGAL GUARDIANSHIP	Yes	Yes, provided guardian has sole guardianship or if joint, provides consent of other parent or guardian.	Yes

(Revised 03.05.2018) Disclaimer: The above information is for informational purposes only and is not legal advice. It should not be substituted for the advice of your attorney. Up-to-date legal advice and legal information can only be obtained by consulting with an attorney. Please refer to the NYS Kinship Navigator home page to read the entire disclaimer.

NEW YORK STATE Kinship NAVIGATOR
Information, Referral and Education for Kinship Caregivers

LEGAL FACT SHEET

KINSHIP CAREGIVERS: COMPARISON OF CUSTODY AND GUARDIANSHIP

LEGAL ARRANGEMENTS	LEGAL RECOGNITION	PROCEDURE	Legal AUTHORITY INCLUDES	SECURITY & STABILITY	FINANCIAL	KINSHIP RESOURCES
INFORMAL CUSTODY ("Person in Parental Relationship")	PHL 2504 – consent to medical treatment EdL 3212 – right to enroll child in school	No court order; Caregiver and/or Parent sign affidavits	Right to make medical decisions and to enroll in school	Limited	Non-parent "Child-Only" Grant	Kinship Navigator, local OCFS programs, Volunteer Counseling Services
Parental Designation	GOL 5-1551 – governs parental designation statutes PHL 2504 – school enrollment	If notarized - lasts 6 months from either date signed or can spring from designated event; If not notarized – lasts 1 month from date of signing	Right to make medical decisions and to enroll in school	Limited	Non-parent "Child-Only" Grant	Kinship Navigator, local OCFS programs, Volunteer Counseling Services
LEGAL CUSTODY a/k/a Article 6 Custody	DRL 240, FCA 651, Court orders will often detail very specific rights allowed or not allowed.	Parties agree to the terms of the order, or there will be a trial. If there is a trial, a non-parent must first show extraordinary circumstances exist.	Judicial orders may include specific provisions; little statutory authority - DRL 74, FCA 657 School enrollment, Edl 3212 & PHL 2164 may apply unless order states otherwise	See below, Bennett v. Jeffreys, Suarez v. Williams, Guinta v. Doxtator; DRL 72(2) addresses grandparents' rights	Non-parent "Child-Only" Grant	Kinship Navigator, local OCFS programs, Volunteer Counseling Services
DIRECT CUSTODY a/k/a Article 10 Custody	FCA 1017, THREE OPTIONS: 1. Custody order, Direct Custody (no order), Foster Care	Court and County control process	Legal custody may be retained by county but caregiver has physical custody; County/Caregiver agreements	No protection for caregivers	No foster care payments, but eligible for non-parent "Child-Only" Grant	Kinship Navigator, local OCFS programs, Volunteer Counseling Services

NEW YORK STATE Kinship NAVIGATOR
Information, Referral and Education for Kinship Caregivers

LEGAL FACT SHEET

LEGAL GUARDIAN	**SCPA Article 17, Standby SCPA 1726, FCA 661, Guardian can control the person and/or property; can appoint a standby ("successor ")**	**Standard: similar to legal custody but petition is more cumbersome, includes OCFS statewide central register background check form, where all members of household must provide 28 years of prior addresses; Child abuse registry and criminal record check; background searches may trigger ICE investigation!**	**DRL 74, FCA 657, Edl 3212, PHL 2164, PHL 2504**	**Same as legal custody, in certain cases legal guardian can control child's financial interests, lasts until either age 18 or 21**	**No foster care payments, but eligible for non-parent "Child-Only" Grant**	**Kinship Navigator, local OCFS programs, Volunteer Counseling Services Permanency Centers**
FOSTER - KINSHIP GUARDIAN ("KinGAP")	**SSL 458-a-f**	**Agreement with county, then caregiver can petition for Guardianship**	**Same as legal guardian**	**Same as legal guardian**	**Subsidy Agreement, may be continued for successor.**	**Above plus Permanency Centers**

Key: SCPA = Surrogate's Court Procedure Act; DRL = Domestic Relations Law; SSL = Social Services Law; FCA = Family Court Act; PHL = Public Health Law; GOL = General Obligations Law; Edl = Education Law.

SCPA 1700 ff: Jurisdiction, procedures, etc. for guardianships
SCPA 1726: Standby Guardian statute. Parents, Guardians, Custodian, and Certain caretakers may designate a standby.
DRL 240: Custody proceedings.
DRL 74: Guardians and legal custodians both qualify for school enrollment and employee health insurance.
DRL 76 ff: Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA) codified; jurisdiction when children move between states.
DRL 72(2): Two Years residence in grandparent's home is an extraordinary circumstance.
SSL 458a-f: Kinship Guardianship procedures and reporting.
FCA 651: Family Court jurisdiction and procedures for custody proceedings.
FCA 661: Family Court jurisdiction and procedures for guardianship of the person proceedings.
FCA 657: Guardians and legal custodians qualify for school enrollment and employee health insurance. Guardians have medical decision making authority.
PHl 2164: Person in parental relation has duty to immunize.
PHL 2504: Person in parental relation, not major medical. Implies guardians have medical decision making authority.
GOL 5-1551: Parental designations; parents may designate most authority via person in parental relations for up to six months.

Edl 3212: Defines who are "persons in parental relations"; parents, guardians, and custodians (custodian definition does not include legal custodians.

Bennett v. Jeffreys, 20 NY2d 543 (1976): Non-parent may obtain custody only if extraordinary circumstances exist, followed by an analysis indicating it would be in the child's best interest for the non-parent to obtain custody. An example of a factor constituting extraordinary circumstance would be an extended disruption of custody, such as a child living for extended periods of time with non-parent.

Suarez v. Williams, 26 NY3d 440 (2015): Extraordinary circumstances exist when the child has lived with the grandparents for an extended period of time, even if the child has had some contact with the parents.

Guinta v. Doxtator, 20 AD3d 47 (4th Dept 2005): Court may not revisit the issue of extraordinary circumstances once extraordinary circumstances have been established.

Legal Resources: NYS Kinship Navigator legal resources has links to legal resources in NYS, including guides/forms for guardianship and custody petitions, http://www.nysnavigator.org/?page_id=50

Revised March 5, 2018. Disclaimer: The above information is for informational purposes only and is not legal advice. It should not be substituted for the advice of your attorney. Up-to-date legal advice and legal information can only be obtained by consulting with an attorney. Please refer to the NYS Kinship Navigator home page to read the entire disclaimer.

NEW YORK STATE Kinship NAVIGATOR
Information, Referral and Education for Kinship Caregivers

LEGAL FACT SHEET

PARENTAL DESIGNATION FORM OF CHILDREN'S CAREGIVER FOR SIX MONTHS

NOTICE TO PROVIDERS OF EDUCATIONAL AND HEALTH SERVICES
This designation is made pursuant to New York's General Obligations Law Article 5, §§ 1551-1555.

1. I am the parent of the child/children/incapacitated person(s) named below:
   a. _____ date of birth _____
   b. _____ date of birth _____
   c. _____ date of birth _____

2. I designate _____ to be the caregiver and to be the person in parental relation for purposes of my child's
   ☐ Education; and/or
   ☐ Health
   in accord with the laws of the State of New York, and to have full authority for one or both areas of law that are checked above for a period of: (check one)
   a. ☐ 6 months from the date of signature of this designation, or until date of revocation (orally or in writing), whichever occurs first; or
   b. ☐ 6 months commencing upon _____ (state event) and continuing until_____, or until the date of revocation (orally or in writing), whichever occurs first.

3. ☐ I do not have any specific instructions for the caregiver; or
   ☐ I do have specific instructions for the caregiver. I want the caregiver to:

   _____
   _____

4. Set forth below is the contact information for myself and my designee:

	Parent Making Designation	Designee as Person in Parental Relationship
Name		
Phone		
Address		

Please note that if this contact information is not provided, this designation shall expire 30 days from the date on which it is executed (GOL §5-1552).

5. (Check one): ☐ There is no court order in effect that requires both parents agree on health care and/or medical decisions.
   ☐ There is a court order in effect that requires both parents agree on health care and/or medical decisions.

6. I declare that there is no court order in effect that bars me from making this designation.

PARENT'S CONSENT

Date: _____

_____
Parent's Signature

Sworn to before me this _____
day of _____ 20__

_____
NOTARY PUBLIC

OTHER PARENT'S CONSENT (if required)

I _____ am also the parent of the child/children/incapacitated person(s) named herein **and there is a Court Order directing that both parents must agree on education and/or health decisions concerning such person**, and I hereby consent to this designation by my signature below.[1]

The address and telephone number where I can be reached while this designation is in effect is:

Address: _____
_____

Telephone: _____

Date: _____

_____
Co- Parent's Signature

Sworn to before me this _____
day of _____ 20__

_____
NOTARY PUBLIC

[1] Required pursuant to GOL §5-1551 in the case where a court has ordered that both parents must agree on education or health care decisions.

CAREGIVER'S CONSENT

(Note: The caregiver may sign this form at any time after the parent signs. It is not necessary for the form to be signed by both the parent and caregiver on the same day.)

I _____, the caregiver, hereby consent to assume the responsibilities and duties of a person in parental relationship for the child/children/incapacitated person(s) named herein.

Date: _____

_____
Caregiver's Signature

Sworn to before me this _____
day of _____ 20__

_____
NOTARY PUBLIC

NEW YORK STATE Kinship NAVIGATOR
Information, Referral and Education for Kinship Caregivers

LEGAL FACT SHEET

SUMMARY OF KINSHIP NAVIGATOR FACT SHEETS AND RESOURCES RELATED TO DEPORTED PARENTS AND THE CARE OF CHILDREN

Kinship care refers to non-parents who are full time caregivers of children, without parents in the home. Most kinship care is provided by grandparents, aunts, uncles, adult siblings, and "fictive kin" who are non-blood relatives like domestic partners, godparents, family friends. Most kinship care is private care, not foster care.

Private kinship care can happen:

1) without parental consent and no court order - there is no parent available - parents disappear, are incarcerated, incapacitated, deceased, whereabouts unknown, or for similar reasons cannot provide consent; or

2) with parent consent and no court order - parents are available - by agreement between the parent and caregiver in a writing with no court involvement; or

3) with or without parent available and court order – via a consent decree pursuant to an order of custody, guardianship, or adoption or via a "third party" custody proceeding where the non-parent seeks court ordered custody or guardianship because of an extraordinary circumstance like neglect, abandonment, incarceration (contested private adoptions require compelling circumstances).

Kinship Care - No Parental Writing

Private care with no parental agreement (no parent writing or no court involvement). Common law and statutory law recognize such care as a form of lawful custody. Sometimes referred to as 'in loco parentis" (lawful custody without any order or parental consent, or with informal parental consent). NYS education law and public health law permit a "person in parental relationship" to enroll a child in school, be responsible for education, and consent to immunization of children. McKinney Vento Homeless Assistance Act permits a "homeless" child to be enrolled in school. The Family Court Act permits a "destitute" child to enter foster care, although this statute is not used frequently. Of particular importance is a Department of Education regulation authorizing enrollment without court ordered custody or guardianship.

Kinship Care - Other Pathways to Kinship Care

Oher pathways to kinship care include parental affidavits, parental designation, private custody or guardianship actions, and foster care. Below are some relevant laws and resources:

1. Schooling – Enrollment - Immunizations
   - McKinney Vento – Homeless Child - http://www.nysnavigator.org/wp-content/uploads/2016/01/Kinship-Children-who-are-%E2%80%9CHomeless%E2%80%9D.pdf
   - School Enrollment - http://www.nysnavigator.org/wp-content/uploads/2016/01/Public-School-Enrollment-May2016.pdf
   - Education Law – Who may enroll - http://www.nysnavigator.org/pg/legal-resources/documents/EducationLaw_000.pdf
   - Custodial Affidavits - http://www.nysnavigator.org/pg/legal-resources/documents/HowtoFillOutaCustodialAffidavit.pdf
   - Immunizations - Public Health Law 2164 - http://www.nysnavigator.org/wp-content/uploads/2016/01/Immunization-%E2%80%93-No-Parent-Available.pdf

Parental Designations

2. Powers Available without court order:

- Parental Designations – Gen. Obligations Law
- 1 month-http://www.nysnavigator.org/wp-content/uploads/2016/01/Parental-Designation-of-Childrens-Caregiver-Thirty-Days-or-Less.pdf
- 6 month - http://www.nysnavigator.org/wp-content/uploads/2016/01/Parental-Designation-of-Childrens-Caregiver-for-6-Months.pdf

3. Notarizing Documents in Foreign Countries - http://www.nysnavigator.org/wp-content/uploads/2017/04/Notarization-of-Documents-in-a-Foreign-Country.pdf
4. Standby Guardianship:
   - Who May Name a Standby – http://www.nysnavigator.org/pg/legal-resources/documents/StandbyGuardianshipLaw.pdf
   - Designation Form - http://www.nysnavigator.org/pg/legal-resources/documents/DesignationofaStandbyGuardian_000.pdf

Court Orders – Custody, Guardianship

5. Family Court Act - Article Six Petitions (custody or guardianship) or Surrogate's Court Procedure Act
6. Family Court Act section 262: Who may get assigned counsel - respondent custodians but not guardians, petitioning caregivers? Discussion - http://www.nysnavigator.org/pg/professionals/documents/IndigentLegalServiceEligibilityHearing_KinshipCare_Aug26.pdf
7. Custody versus Guardianship- http://www.nysnavigator.org/pg/legal-resources/documents/Legal_Custody_and_Guardianship.pdf

Comparisons – Procedures, Powers, Access to Records for Informal Custodians, Legal Custodians, Guardians

8. Procedure - http://www.nysnavigator.org/wp-content/uploads/2017/04/Enabling-New-Yorks-Kinship-Caregivers-Custody-Guardianship-Parental-Designation-Basic-Procedure.pdf
9. Powers - http://www.nysnavigator.org/wp-content/uploads/2017/04/Kinship-Caregivers-Comparison-of-Custody-and-Guardianship.pdf

10. Access to Vital Documents - http://www.nysnavigator.org/wp-content/uploads/2017/04/Caregivers-Rights-With-Respect-to-Obtaining-Vital-Documents.pdf

Foster Care

11. Voluntary Placements Agreements (foster care, constructive removals, caregivers approval as foster parents) – http://www.nysnavigator.org/wp-content/uploads/2016/01/Voluntary-Placement-Agreements.pdf; http://www.nysnavigator.org/pg/legal-resources/documents/InitialFosterCarePlacementofChildren.pdf
12. Destitute Child - SSL 358-a, 384-b http://www.nysnavigator.org/wp-content/uploads/2016/01/Destitute-Child-and-Foster-Care.pdf
13. Surrenders - SSL 358-a, SSL 384

Applications for Documents, Records, Benefits

14. Documents
    - Obtaining Birth Certificates - http://www.nysnavigator.org/pg/legal-resources/documents/BirthCertificates_000.pdf

- Passports - http://www.nysnavigator.org/pg/legal-resources/documents/PassportsforMinorChildren.pdf
- Social Security Cards - http://www.nysnavigator.org/pg/legal-resources/documents/GettingaSocialSecurityNumberandCardforaU.SCitizenwhoisaMinor.pdf

15. Public Benefits: http://www.nysnavigator.org/wp-content/uploads/2015/08/2015npcbenefitsguide.pdf

16. Application forms – who may apply http://www.nysnavigator.org/wp-content/uploads/2015/08/Who-May-Apply-for-Benefits-and-What-is-Required.pdf

17. Youth Immigration Status - http://www.ocfs.state.ny.us/main/policies/external/OCFS_2011/ADMs/11-OCFS-ADM-01%20Special%20Immigrant%20Juvenile%20Status%20(SIJS).pdf

For further information on kinship law, legal resources, kinship policy, and county resources, see menus at www.nysnavigator.org,

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KINSHIP CARE RELEVANT LEGISLATIVE BILLS - March 23, 2018

Kinship Bills 2017-18 Session		
S6013 A8094	**AVELLA/JAFFEE** -- Relates to definition of person in parental relationship (ADDS LEGAL CUSTODIANS)	
Senate: In Higher Education		**Assembly: in Judiciary**
S6015A A7928	**AVELLA/JAFFEE** -- Relates to medical decision making for minors (ADDS LEGAL CUSTODIANS)	
Senate: Out of Committee		**Assembly: In Judiciary**
S6016 A7905A	**AVELLA/JAFFEE** -- Relates to a parent or guardian naming a caregiver as a person in parental relation (EXTENDS PERIOD TO TWELVE MONTHS)	
Senate: Out of Committee		**Assembly: Out of Committee**
S6217A A7899A	**ROZIC/SAVINO** -- Relates to the appointment of a standby guardian due to administrative separation (ADDS UNDOCUMENTED PARENTS FACING DEPORTATION)	
Senate: Out of Committee		**Assembly: Out of Committee**

Explanation of A.8172 (Hevesi)/S.6017A(Avella):

There are two unfair public assistance budgeting rules that affect children who receive non-parent grants. This bill would amend SSL 131-c to make the following changes:

1. When a non-parent caregiver takes in half-siblings and one of them has income (usually child support or Social Security benefits from the parent that the children do not have in common), current budgeting rules require that the income of the child with income be applied against the needs of the child with no income. This bill would allow the child with no income to receive a full child only grant and the child with income to retain his or her income.

2. When a non-parent caregiver who is not on public assistance applies for a public assistance grant for the child in her care, the caregiver's income is not taken into account when determining the size of the child's grant. When the caregiver herself is on public assistance, however, the caregiver and the child are each given ½ of a grant for two people, which is less than two separate grants for each person. Thus, the non-parent grant is smaller for children who are cared for by relatives on public assistance. This bill would allow relative caregivers who are public assistance recipients themselves to receive a full grant for one person and a child to receive a full grant for one person.

~~LAW ENFORCEMENT SENSITIVE~~

May 31, 2016 [Re-posted to oig.justice.gov on September 23, 2016, due to a corrected entry in the Appendix, see page 12.]

MEMORANDUM FOR KAROL V. MASON
ASSISTANT ATTORNEY GENERAL
FOR THE OFFICE OF JUSTICE PROGRAMS

FROM: MICHAEL E. HOROWITZ
INSPECTOR GENERAL

SUBJECT: Department of Justice Referral of Allegations of Potential Violations of 8 U.S.C. § 1373 by Grant Recipients

This is in response to your e-mail dated April 8, 2016, wherein you advised the Office of the Inspector General (OIG) that the Office of Justice Programs (OJP) had "received information that indicates that several jurisdictions [receiving OJP and Office of Violence Against Woman (OVW) grant funds] may be in violation of 8 U.S.C. § 1373." With the e-mail, you provided the OIG a spreadsheet detailing Department grants received by over 140 state and local jurisdictions and requested that the OIG "investigate the allegations that the jurisdictions reflected in the attached spreadsheet, who are recipients of funding from the Department of Justice, are in violation of 8 U.S.C. Section 1373." In addition to the spreadsheet, you provided the OIG with a letter, dated February 26, 2016, to Attorney General Loretta E. Lynch from Congressman John Culberson, Chairman of the House Appropriations Subcommittee on Commerce, Justice, Science, and Related Agencies, regarding whether Department grant recipients were complying with federal law, particularly 8 U.S.C. § 1373 (Section 1373). Attached to Chairman Culberson's letter to the Attorney General was a study conducted by the Center for Immigration Studies (CIS) in January 2016, which concluded that there are over 300 "sanctuary" jurisdictions that refuse to comply with U.S. Immigration and Customs Enforcement (ICE) detainers or otherwise impede information sharing with federal immigration officials.[1]

[1] Your e-mail also referenced and attached the OIG's January 2007 report, *Cooperation of SCAAP [State Criminal Alien Assistance Program] Recipients in the Removal of Criminal Aliens from the United States*. In that Congressionally-mandated report, the OIG was asked, among other things, to assess whether entities receiving SCAAP funds were "fully cooperating" with the Department of Homeland Security's efforts to remove undocumented criminal aliens from the United States, and whether SCAAP recipients had in effect policies that violated Section

The purpose of this memorandum is to update you on the steps we have undertaken to address your question and to provide you with the information we have developed regarding your request. Given our understanding that the Department's grant process is ongoing, we are available to discuss with you what, if any, further information you and the Department's leadership believe would be useful in addressing the concerns reflected in your e-mail.

OIG Methodology

At the outset, we determined it would be impractical for the OIG to promptly assess compliance with Section 1373 by the more than 140 jurisdictions that were listed on the spreadsheet accompanying your referral. Accordingly, we judgmentally selected a sample of state and local jurisdictions from the information you provided for further review. We started by comparing the specific jurisdictions cited in the CIS report you provided to us with the jurisdictions identified by ICE in its draft *Declined Detainer Outcome Report*, dated December 2, 2014.[2] Additionally, we compared these lists with a draft report prepared by ICE that identified 155 jurisdictions and stated that "all jurisdictions on this list contain policies that limit or restrict cooperation with ICE and, as of Q3 FY 2015, have declined detainers."[3] From this narrowed list of jurisdictions, we determined, using the spreadsheet provided with your e-mail, which jurisdictions had active OJP and OVW awards as of March 17, 2016, the date through which you provided award information, and received fiscal year (FY) 2015 State Criminal Alien Assistance Program (SCAAP) payments. Lastly, we considered, based on the spreadsheet, the total dollars awarded and the number of active grants and payments made as of March 17,

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1373. As we describe later in this memorandum, the information we have learned to date during our recent work about the present matter differs significantly from what OIG personnel found nearly 10 years ago during the earlier audit. Specifically, during the 2007 audit, ICE officials commented favorably to the OIG with respect to cooperation and information flow they received from the seven selected jurisdictions, except for the City and County of San Francisco. As noted in this memorandum, we heard a very different report from ICE officials about the cooperation it is currently receiving. Additionally, our 2007 report found that the SCAAP recipients we reviewed were notifying ICE in a timely manner of aliens in custody, accepting detainers from ICE, and promptly notifying ICE of impending releases from local custody. By contrast, as described in this memorandum, all of the jurisdictions we reviewed had ordinances or policies that placed limits on cooperation with ICE in connection with at least one of the three areas assessed in 2007.

[2] At the time of our sample selection we only had a draft version of this report. We later obtained an updated copy which was provided to Congress on April 16, 2016. Although it was provided to Congress, this report was also marked "Draft." The updated draft version of the report did not require us to alter our sample selection.

[3] This version of the declined detainer report covered declined detainers from January 1, 2014 through June 30, 2015.

2016, and sought to ensure that our list contained a mix of state and local jurisdictions.

Using this process, we judgmentally selected 10 state and local jurisdictions for further review: the States of Connecticut and California; City of Chicago, Illinois; Clark County, Nevada; Cook County, Illinois; Miami-Dade County, Florida; Milwaukee County, Wisconsin; Orleans Parish, Louisiana; New York, New York; and Philadelphia, Pennsylvania. These 10 jurisdictions represent 63 percent of the total value of the active OJP and OVW awards listed on the spreadsheet as of March 17, 2016, and FY 2015 SCAAP payments made by the Department.

Section 1373 states in relevant part:

(a) **In General**. Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

(b) **Additional authority of government entities.** Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:

(1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.

(2) Maintaining such information.

(3) Exchanging such information with any other Federal, State, or local government entity.

According to the legislative history contained in the House of Representatives Report, Section 1373 was intended "to give State and local officials the authority to communicate with the Immigration and Naturalization Service (INS) regarding the presence, whereabouts, and activities of illegal aliens. This section is designed to prevent any State or local law, ordinance, executive order, policy, constitutional provision, or decision of any Federal or State court that prohibits or in any way restricts any communication between State and local officials and the INS."[4]

[4] House of Representatives Report, *Immigration in the National Interest Act of 1995,* (H.R. 2202), 1996, H. Rept. 104-469, https://www.congress.gov/104/crpt/hrpt469/CRPT-

For the 10 selected jurisdictions, we researched the local laws and policies that govern their interactions with ICE – particularly those governing the ability of the jurisdictions' officers to receive or share information with federal immigration officials. We then compared these local laws and policies to Section 1373 in order to try to determine whether they were in compliance with the federal statute. We also spoke with ICE officials in Washington, D.C., to gain their perspective on ICE's relationship with the selected jurisdictions and their views on whether the application of these laws and policies was inconsistent with Section 1373 or any other federal immigration laws.

The sections that follow include our analysis of the selected state and local laws and policies.

State and Local Cooperation with ICE

A primary and frequently cited indicator of limitations placed on cooperation by state and local jurisdictions with ICE is how the particular state or local jurisdiction handles immigration detainer requests issued by ICE, although Section 1373 does not specifically address restrictions by state or local entities on cooperation with ICE regarding detainers.[5] A legal determination has been made by the Department of Homeland Security (DHS) that civil immigration detainers are voluntary requests.[6] The ICE officials with whom we spoke stated that since the detainers are considered to be voluntary, they are not enforceable against jurisdictions which do not comply, and these ICE officials stated further that state and local jurisdictions throughout the United States vary significantly on how they handle such requests.

In our selected sample of state and local jurisdictions, as detailed in the Appendix, each of the 10 jurisdictions had laws or policies directly related to how those jurisdictions could respond to ICE detainers, and each limited in some way the authority of the jurisdiction to take action with regard to ICE detainers. We found that while some honor a civil immigration detainer request when the subject meets certain conditions, such as prior felony

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104hrpt469-pt1.pdf (accessed May 24, 2016).

[5] A civil immigration detainer request serves to advise a law enforcement agency that ICE seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien. 8 C.F.R. § 287.7(a)

[6] Several courts have reached a similar conclusion about the voluntary nature of ICE detainers. See *Galarza v, Szalczyk et al*, 745 F.3d 634 (3rd Cir. 2014) (noting that all Courts of Appeals to have considered the character of ICE detainers refer to them as "requests," and citing numerous such decisions); and *Miranda-Olivares v. Clackamas County*, 2014 1414305 (D. Or. 2014).

convictions, gang membership, or presence on a terrorist watch list, others will not honor a civil immigration detainer request, standing alone, under any circumstances. ICE officials told us that because the requests are voluntary, local officials may also consider budgetary and other considerations that would otherwise be moot if cooperation was required under federal law.

We also found that the laws and policies in several of the 10 jurisdictions go beyond regulating responses to ICE detainers and also address, in some way, the sharing of information with federal immigration authorities. For example, a local ordinance for the City of Chicago, which is entitled "Disclosing Information Prohibited," states as follows:

> Except as otherwise provided under applicable federal law, no agent or agency shall disclose information regarding the citizenship or immigration status of any person unless required to do so by legal process or such disclosure has been authorized in writing by the individual to whom such information pertains, or if such individual is a minor or is otherwise not legally competent, by such individual's parent or guardian. *Chicago Code, Disclosing Information Prohibited § 2-173-030.*

The ordinance's prohibition on a city employee providing immigration status information "unless required to do so by legal process" is inconsistent with the plain language of Section 1373 prohibiting a local government from restricting a local official from sending immigration status information to ICE. The "except as otherwise provided under applicable federal law" provision, often referred to as a "savings clause," creates a potential ambiguity as to the proper construction of the Chicago ordinance and others like it because to be effective, this "savings clause" would render the ordinance null and void whenever ICE officials requested immigration status information from city employees. Given that the very purpose of the Chicago ordinance, based on our review of its history, was to restrict and largely prohibit the cooperation of city employees with ICE, we have significant questions regarding any actual effect of this "savings clause" and whether city officials consider the ordinance to be null and void in that circumstance.[7]

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[7] The New Orleans Police Department's (NOPD) policy dated February 28, 2016, and entitled "Immigration Status" also seemingly has a "savings clause" provision, but its language likewise presents concerns. In your April 8 e-mail to me, you attached questions sent to the Attorney General by Sen. Vitter regarding whether the NOPD's recent immigration policy was in compliance with Section 1373. Paragraph 12 of the NOPD policy is labeled "Disclosing Immigration Information" and provides that "Members shall not disclose information regarding the citizenship or immigration status of any person unless:

(a) Required to do so by federal or state law; or

(b) Such disclosure has been authorized in writing by the person who is the subject of the request for information; or

In addition, whatever the technical implication of the clause generally referencing federal law, we have concerns that unless city employees were made explicitly aware that the local ordinance did not limit their legal authority to respond to such ICE requests, employees likely would be unaware of their legal authority to act inconsistently with the local ordinance. We noted that in connection with the introduction of this local ordinance the Mayor of Chicago stated, "[w]e're not going to turn people over to ICE and we're not going to check their immigration status, we'll check for criminal background, but not for immigration status."[8] We believe this stated reason for the ordinance, and its message to city employees, has the potential to affect the understanding of

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(c) The person is a minor or otherwise not legally competent, and disclosure is authorized in writing by the person's parent or guardian.

Sub-section (a) applies only when an NOPD employee has an affirmative obligation, i.e., is "required" by federal law, to disclose information regarding citizenship or immigration status. Section 1373, however, does not "require" the disclosure of immigration status information; rather, it provides that state and local entities shall not prohibit or restrict the sharing of immigration status information with ICE. Accordingly, in our view, sub-section (a) of the NOPD policy would not serve as a "savings clause" in addressing Section 1373. Thus, unless the understanding of NOPD's employees is that they are not prohibited or restricted from sharing immigration status information with ICE, the policy would be inconsistent with Section 1373. We did not consider selecting the City of New Orleans to evaluate in this memorandum because it was not listed as a grant recipient on the spreadsheet you provided.

Similarly, the City and County of San Francisco, CA administrative code, Section 12H.2, is entitled "Immigration Status" and provides, "No department, agency, commission, officer or employee of the City and County of San Francisco shall use any City funds or resources to assist in the enforcement of federal immigration law or to gather or disseminate information regarding the immigration status of individuals in the City and County of San Francisco unless such assistance is required by federal or State statute, regulation or court decision." As with the NOPD policy, a "savings clause" that only applies when a city employee is "required" by federal law to take some action would not seem to be effective in precluding the law from running afoul of Section 1373, which "requires" nothing, but instead mandates that state and local entities not prohibit, or in any way restrict, the sharing of immigration status information with ICE. Thus, as with the NOPD policy, unless the understanding of San Francisco employees is that they are permitted to share immigration status information with ICE, the policy would be inconsistent with Section 1373. According to news reports, last week the San Francisco Board of Supervisors reaffirmed its policy restricting local law enforcement's authority to assist ICE, except in limited circumstances. Curtis Skinner, "San Francisco Lawmakers Vote to Uphold Sanctuary City Policy," *Reuters*, May 24, 2016, http://www.reuters.com/article/us-sanfrancisco-immigration-idUSKCN0YG065 (accessed May 26, 2016). We did not consider selecting the City and County of San Francisco to evaluate in this memorandum because it was not listed as a grant recipient on the spreadsheet you provided.

[8] Kristen Mack, "Emanuel Proposes Putting Nondetainer Policy On Books," *Chicago Tribune*, July 11, 2012, http://articles.chicagotribune.com/2012-07-11/news/ct-met-rahm-emanuel-immigrants-0711-2012 (accessed May 24, 2017).

local officials regarding the performance of their duties, including the applicability of any restrictions on their interactions and cooperation with ICE.

Similarly, we have concerns that other local laws and policies, that by their terms apply to the handling of ICE detainer requests, may have a broader practical impact on the level of cooperation afforded to ICE by these jurisdictions and may, therefore, be inconsistent with at least the intent of Section 1373.[9] Specifically, local policies and ordinances that purport to be focused on civil immigration detainer requests, yet do not explicitly restrict the sharing of immigration status information with ICE, may nevertheless be affecting ICE's interactions with the local officials regarding ICE immigration status requests. We identified several jurisdictions with policies and ordinances that raised such concerns, including Cook County, Orleans Parish, Philadelphia, and New York City.

For example, the Cook County, Illinois, detainer policy states, "unless ICE agents have a criminal warrant, or County officials have a legitimate law enforcement purpose that is not related to the enforcement of immigration laws, ICE agents shall not be given access to individuals or allowed to use County facilities for investigative interviews or other purposes, and County personnel shall not expend their time responding to ICE inquiries or communicating with ICE regarding individuals' incarceration status or release dates while on duty." Although this policy falls under the heading "Section 46-37 – Policy for responding to ICE Detainers" and does not explicitly proscribe sharing immigration status information with ICE, the portion of the prohibition relating to personnel expending their time responding to ICE inquiries could easily be read by Cook County officials and officers as more broadly prohibiting them from expending time responding to ICE requests relating to immigration status. This possibility was corroborated by ICE officials who told us that Cook County officials "won't even talk to us [ICE]."

In Orleans Parish, Louisiana, Orleans Parish Sheriff's Office (OPSO) policy on "ICE Procedures" states that, "OPSO officials shall not initiate any immigration status investigation into individuals in their custody or affirmatively provide information on an inmate's release date or address to ICE." While the latter limitation applies by its terms to information related to release date or address, taken in conjunction with the prior ban on initiating immigration status investigations, the policy raises a similar concern as to the

[9] A reasonable reading of Section 1373, based on its "in any way restrict" language, would be that it applies not only to the situation where a local law or policy specifically prohibits or restricts an employee from providing citizenship or immigration status information to ICE, but also where the actions of local officials result in prohibitions or restrictions on employees providing such information to ICE.

limits it places on the authority of OPSO officials to share information on that topic with ICE.

In Philadelphia, Pennsylvania, the Mayor, on January 4, 2016, issued an executive order that states, in part, that notice of the pending release of the subject of an ICE immigration detainer shall not be provided to ICE "unless such person is being released after conviction for a first or second degree felony involving violence and the detainer is supported by a judicial warrant." According to news reports, the purpose of the order was to bar almost all cooperation between city law enforcement and ICE.[10]

In New York City (NYC), a law enacted in November 2014 restricts NYC Department of Corrections personnel from communicating with ICE regarding an inmate's release date, incarceration status, or upcoming court dates unless the inmate is the subject of a detainer request supported by a judicial warrant, in which case personnel may honor the request. The law resulted in ICE closing its office on Riker's Island and ceasing operations on any other NYC Department of Corrections property.

Although the Cook County, Orleans Parish, Philadelphia, and New York City local policies and ordinances purport to be focused on civil immigration detainer requests, and none explicitly restricts the sharing of immigration status with ICE, based on our discussions with ICE officials about the impact these laws and policies were having on their ability to interact with local officials, as well as the information we have reviewed to date, we believe these policies and others like them may be causing local officials to believe and apply the policies in a manner that prohibits or restricts cooperation with ICE in all respects.[11] That, of course, would be inconsistent with and prohibited by Section 1373.[12]

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[10] Michael Matza, "Kenney restores 'sanctuary city' status," *Philadelphia Inquirer*, January 6, 2016, http://articles.philly.com/2016-01-06/news/69541175_1_south-philadelphia-secure-communities-ice (accessed May 24, 2016) and "Kenney rejects U.S. request to reverse 'sanctuary city' status," *Philadelphia Inquirer, May 4, 2016,* http://www.philly.com/philly/news/20160504_Kenney_rejects_Homeland_Security_s_request_to_reverse_Philadelphia_s__sanctuary_city__status.html (accessed May 24, 2016)

[11] For example, the Newark, NJ police department issued a "Detainer Policy" instructing all police personnel that "There shall be no expenditure of any departmental resources or effort by on-duty personnel to comply with an ICE detainer request." More generally, Taos County, NM detention center policy states: "There being no legal authority upon which the United States may compel expenditure of country resources to cooperate and enforce its immigration laws, there shall be no expenditure of any county resources or effort by on-duty staff for this purpose except as expressly provided herein."

[12] The ICE officials we spoke with noted that no one at DHS or ICE has made a formal legal determination whether certain state and local laws or policies violate Section 1373, and we are unaware of any Department of Justice decision in that regard. These ICE officials were

Effect on Department of Justice 2016 Grant Funding

We note that, in March 2016, OJP notified SCAAP and JAG applicants about the requirement to comply with Section 1373, and advised them that if OJP receives information that an applicant may be in violation of Section 1373 (or any other applicable federal law) that applicant may be referred to the OIG for investigation. The notification went on to state that if the applicant is found to be in violation of an applicable federal law by the OIG, the applicant may be subject to criminal and civil penalties, in addition to relevant OJP programmatic penalties, including cancellation of payments, return of funds, participation in the program during the period of ineligibility, or suspension and debarment.

In light of the Department's notification to grant applicants, and the information we are providing in this memorandum, to the extent the Department's focus is on ensuring that grant applicants comply with Section 1373, based on our work to date we believe there are several steps that the Department can consider taking:

- Provide clear guidance to grant recipients regarding whether Section 1373 is an "applicable federal law" that recipients would be expected to comply with in order to satisfy relevant grant rules and regulations;[13]

- Require grant applicants to provide certifications specifying the applicants' compliance with Section 1373, along with documentation sufficient to support the certification.

- Consult with the Department's law enforcement counterparts at ICE and other agencies, prior to a grant award, to determine whether, in their view, the applicants are prohibiting or restricting employees from sharing with ICE information regarding the citizenship or immigration status of individuals, and are therefore not in compliance with Section 1373.

- Ensure that grant recipients clearly communicate to their personnel the provisions of Section 1373, including those

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also unaware of any legal action taken by the federal government against a state or local jurisdiction to require cooperation.

[13] We note that AAG Kadzik's letter to Chairman Culberson dated March 18, 2016, states that Section 1373 "could" be an applicable federal law that with which grant recipients must comply in order to receive grant funds, not that it is, in fact, an applicable federal law.

employees cannot be prohibited or restricted from sending citizenship or immigration status information to ICE.

These steps would not only provide the Department with assurances regarding compliance with Section 1373 prior to a grant award, but also would be helpful to the OIG if the Department were to later refer to the OIG for investigation a potential Section 1373 violation (as the Department recently warned grant applicants it might do in the future).

We would be pleased to meet with you and Department's leadership to discuss any additional audit or investigative efforts by the OIG that would further assist the Department with regard to its concerns regarding Section 1373 compliance by state and local jurisdictions. Such a meeting would allow us to better understand what information the Department's management would find useful so that the OIG could assess any request and consult with our counterparts at the Department of Homeland Security Office of the Inspector General, which would necessarily need to be involved in any efforts to evaluate the specific effect of local policies and ordinances on ICE's interactions with those jurisdictions and their compliance with Section 1373.

Thank you for referring this matter to the OIG. We look forward to hearing from you regarding a possible meeting.

APPENDIX

OIG Approach

At the outset, we determined it would be impractical for the OIG to promptly assess compliance with Section 1373 by the more than 140 jurisdictions that were listed on the spreadsheet accompanying your referral. Accordingly, we judgmentally selected a sample of state and local jurisdictions from the information you provided for further review. We started by comparing the specific jurisdictions cited in the CIS report you provided to us with the jurisdictions identified by ICE in its draft *Declined Detainer Outcome Report,* dated December 2, 2014.[14] Additionally, we compared these lists with a draft report prepared by ICE that identified 155 jurisdictions and stated that "all jurisdictions on this list contain policies that limit or restrict cooperation with ICE and, as of Q3 FY 2015, have declined detainers."[15] From this narrowed list of jurisdictions, we determined, using the spreadsheet that you provided with your e-mail, which jurisdictions had active OJP and OVW awards as of March 17, 2016, the date through which you provided award information, and received fiscal year (FY) 2015 State Criminal Alien Assistance Program (SCAAP) payments. Lastly, we considered, based on the spreadsheet, the total dollars awarded and the number of active grants and payments made as of March 17, 2016, and sought to ensure that our list contained a mix of state and local jurisdictions. Using this process we selected the 10 jurisdictions listed in the following table for further review. The dollar figure represents 63 percent of the active OJP awards as of March 17, 2016, and FY 2015 SCAAP payments made by the Department.

Jurisdiction	Total Award Amounts Reported by OJP
State of Connecticut	$69,305,444
State of California	$132,409,635
Orleans Parish, Louisiana	$4,737,964
New York, New York	$60,091,942
Philadelphia, Pennsylvania	$16,505,312
Cook County, Illinois	$6,018,544
City of Chicago, Illinois	$28,523,222
Miami-Dade County, Florida	$10,778,815
Milwaukee, Wisconsin	$7,539,572
Clark County, Nevada	$6,257,951
TOTAL	**$342,168,401**

Source: OJP

[14] At the time of our sample selection we only had a draft version of this report. We later obtained an updated copy which was provided to Congress on April 16, 2016. Although it was provided to Congress, this report was also marked "Draft." The updated draft version of the report did not require us to alter our sample selection.

[15] This version of the declined detainer report covered declined detainers from January 1, 2014 through June 30, 2015.

The following table lists each of the jurisdictions selected for review by the OIG and the key provisions of its laws or policies related to ICE civil immigration detainer requests and the sharing of certain information with ICE, if applicable.

Jurisdiction	Provisions of Key Local Laws or Policies Related to Civil Immigration Detainer Requests or Information Sharing with ICE [16]
State of Connecticut **The statement of Connecticut law has been corrected from a prior version of this memorandum. This correction does not affect the analysis or conclusions of this memorandum. We regret the error, and have notified those to whom we sent the memorandum of the correction.**	*Public Act No. 13-155, An Act Concerning Civil Immigration Detainers …* (b) No law enforcement officer who receives a civil immigration detainer with respect to an individual who is in the custody of the law enforcement officer shall detain such individual pursuant to such civil immigration detainer unless the law enforcement official determines that the individual: (1) Has been convicted of a felony; (2) Is subject to pending criminal charges in this state where bond has not been posted; (3) Has an outstanding arrest warrant in this state; (4) Is identified as a known gang member in the database of the National Crime Information Center or any similar database or is designated as a Security Risk Group member or a Security Risk Group Safety Threat member by the Department of Correction; (5) Is identified as a possible match in the federal Terrorist Screening Database or similar database; (6) Is subject to a final order of deportation or removal issued by a federal immigration authority; or (7) Presents an unacceptable risk to public safety, as determined by the law enforcement officer. (c) Upon determination by the law enforcement officer that such individual is to be detained or released, the law enforcement officer shall immediately notify United States Immigration and Customs Enforcement. If the individual is to be detained, the law enforcement officer shall inform United States Immigration and Customs Enforcement that the individual will be held for a maximum of forty-eight hours, excluding Saturdays, Sundays and federal holidays. If United States Immigration and Customs Enforcement fails to take custody of the individual within such forty-eight-hour period, the law enforcement officer shall release the individual. In no event shall an individual be detained for longer than such forty-eight-hour period solely on the basis of a civil immigration detainer. **Approved June 25, 2013**

[16] Several specific citations to various state and local laws and policies were removed for brevity.

Jurisdiction	Provisions of Key Local Laws or Policies Related to Civil Immigration Detainer Requests or Information Sharing with ICE [16]
State of California	*An act to add Chapter 17.1 (commencing with Section 7282) to Division 7 of Title I of the Government Code, relating to state government….* 7282.5. (a) A law enforcement official shall have discretion to cooperate with federal immigration officials by detaining an individual on the basis of an immigration hold after that individual becomes eligible for release from custody only if the continued detention of the individual on the basis of the immigration hold would not violate any federal, state, or local law, or any local policy, and only under any of the following circumstances … **Effective Date: October 5, 2013.**
Orleans Parish, Louisiana	The Orleans Parish Sheriff's Office (OPSO) shall decline all voluntary ICE detainer requests unless the individual's charge is for one or more of the following offenses: First Degree Murder; Second Degree Murder; Aggravated Rape; Aggravated Kidnapping; Treason; or Armed Robbery with Use of a Firearm. If a court later dismisses or reduces the individual's charge such that the individual is no longer charged with one of the above offenses or the court recommends declining the ICE hold request, OPSO will decline the ICE hold request on that individual. **Orleans Parish Sheriff's Office Index No. 501.15, Updated June 21, 2013.**
New York, New York	Title: *A Local Law to amend the administrative code of the city of New York, in relation to persons not to be detained by the department of correction.* Bill Summary: … The DOC would only be permitted to honor an immigration detainer if it was accompanied by a warrant from a federal judge, and also only if that person had not been convicted of a "violent or serious" crime during the last five years or was listed on a terrorist database. Further, the bill would prohibit DOC from allowing ICE to maintain an office on Rikers Island or any other DOC property and would restrict DOC personnel from communicating with ICE regarding an inmate's release date, incarceration status, or court dates, unless the inmate is the subject of a detainer request that DOC may honor pursuant to the law. **Enacted Date: November 14, 2014, Law No. 2014/058.**

Jurisdiction	Provisions of Key Local Laws or Policies Related to Civil Immigration Detainer Requests or Information Sharing with ICE [16]
Philadelphia, Pennsylvania	*Executive Order No. 5-16 - Policy Regarding U.S. Immigration and Customs Enforcement Agency Detainer Requests…* NOW, THEREFORE, I, JAMES F. KENNEY, Mayor of the City of Philadelphia, by the powers vested in me by the Philadelphia Home Rule Charter, do hereby order as follows: SECTION 1. No person in the custody of the City who otherwise would be released from custody shall be detained pursuant to an ICE civil immigration detainer request pursuant to 8 C.F.R. § 287.7, nor shall notice of his or her pending release be provided, unless such person is being released after conviction for a first or second degree felony involving violence and the detainer is supported by a judicial warrant. **Signed by Philadelphia Mayor, January 4, 2016.**
Cook County, Illinois	*Sec. 46-37- Policy for responding to ICE detainers …* (b) Unless ICE agents have a criminal warrant, or County officials have a legitimate law enforcement purpose that is not related to the enforcement of immigration laws, ICE agents shall not be given access to individuals or allowed to use County facilities for investigative interviews or other purposes, and County personnel shall not expend their time responding to ICE inquiries or communicating with ICE regarding individuals' incarceration status or release dates while on duty. **Approved and adopted by the President of the Cook County Board of Commissioners on September 7, 2011.**
City of Chicago, Illinois	*Civil Immigration Enforcement Actions – Federal Responsibility §2-173-042 …* (b)(1) Unless an agent or agency is acting pursuant to a legitimate law enforcement purpose that is unrelated to the enforcement of a civil immigration law, no agency or agent shall: (A) permit ICE agents access to a person being detained by, or in the custody of, the agency or agent; (B) permit ICE agents use of agency facilities for investigative interviews or other investigative purpose; or (C) while on duty , expend their time responding to

Jurisdiction	Provisions of Key Local Laws or Policies Related to Civil Immigration Detainer Requests or Information Sharing with ICE [16]
	ICE inquiries or communicating with ICE regarding a person's custody status or release date … *Disclosing Information Prohibited § 2-173-030* Except as otherwise provided under applicable federal law, no agent or agency shall disclose information regarding the citizenship or immigration status of any person unless required to do so by legal process or such disclosure has been authorized in writing by the individual to whom such information pertains, or if such individual is a minor or is otherwise not legally competent, by such individual's parent or guardian. **Updated November 8, 2012.**
Miami-Dade County, Florida	*Resolution No. R-1008-13: Resolution directing the mayor or mayor's designee to implement policy on responding to detainer requests from the United States Department of Homeland Security Immigration and Customs Enforcement* NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF MIAMI-DADE COUNTY, FLORIDA, that the Mayor or Mayor's designee is directed to implement a policy whereby Miami-Dade Corrections and Rehabilitations Department may, in its discretion, honor detainer requests issued by United States Immigration and Customs Enforcement only if the federal government agrees in writing to reimburse Miami-Dade County for any and all costs relating to compliance with such detainer requests and the inmate that is the subject of such a request has a previous conviction for a Forcible Felony, as defined in Florida Statute section 776.08, or the inmate that is the subject of such a request has, at the time the Miami-Dade Corrections and Rehabilitations Department receives the detainer request, a pending charge of a non-bondable offense, as provided by Article I, Section 14 of the Florida Constitution, regardless of whether bond is eventually granted. **Resolution passed and adopted by Miami-Dade Mayor, December 3, 2013.**
Milwaukee County, Wisconsin	Amended Resolution - File No. 12-135 BE IT RESOLVED, that the Milwaukee County Board of Supervisors hereby adopts the following policy with regard to detainer requests from the U.S. Department of

Jurisdiction	Provisions of Key Local Laws or Policies Related to Civil Immigration Detainer Requests or Information Sharing with ICE [16]
	Homeland Security - Immigrations and Customs Enforcement: 1. Immigration detainer requests from Immigrations and Customs Enforcement shall be honored only if the subject of the request: a) Has been convicted of at least one felony or two non-traffic misdemeanor offenses b) Has been convicted or charged with any domestic violence offense or any violation of a protective order c) Has been convicted or charged with intoxicated use of a vehicle d) Is a defendant in a pending criminal case, has an outstanding criminal warrant, or is an identified gang member e) Is a possible match on the US terrorist watch list **Enacted: June 4, 2012**
Clark County, Nevada	"Recent court decisions have raised Constitutional concerns regarding detention by local law enforcement agencies based solely on an immigration detainer request from the Immigration and Customs Enforcement (ICE). Until this areas of the law is further clarified by the courts, effective immediately the Las Vegas Metropolitan Police Department will no longer honor immigration detainer requests unless one of the following conditions are met: 1. Judicial determination of Probable Cause for that detainer; or 2. Warrant from a judicial officer. … The Las Vegas Metropolitan Police Department continues to work with our federal law enforcement partners and will continue to provide professional services to the Las Vegas community regardless of their immigration status in United States. **Via Press Release on: July 14, 2014.**

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KATHY SHEEHAN
MAYOR

EXECUTIVE ORDER No. 1-17

April 24, 2017

City of Albany Policy Regarding Community Policing and Protection of Immigrants

WHEREAS, the City of Albany is a diverse City where more than one in ten of our residents were born in a country other than the United States; and

WHEREAS, access to city services is essential to all residents and visitors regardless of their immigration status; and

WHEREAS, the City of Albany ensures equity and social justice guide all decisions; and

WHEREAS, the City of Albany is committed to community policing and 21st century policing strategies, and law enforcement is more effective as a result of the partnerships cultivated from continued interaction and trust between all residents, visitors, and the Albany Police Department; and

WHEREAS, the Albany Police Department's role is to protect all individuals, and individuals should not be afraid to contact the police if they are the victim or witness of a crime because they are concerned the police will inquire as to their immigration status; and

WHEREAS, the Federal Government is best suited, and required by law, to enforce federal immigration laws; and

WHEREAS, in furtherance of these policies, the City of Albany will not inquire as to the immigration status of any individual as provided herein;

NOW, THEREFORE, I, Kathy M. Sheehan, Mayor of the City of Albany, by the authority vested in me by the charter and laws of the City of Albany do hereby order:

Section 1. Definitions. As used herein,

a. "Alien" means any person who is not a citizen or national of the United States.

b. "Employee" means any officer, official, board or committee member, agent, or person employed by or acting on behalf of the City of Albany.

c. "Law enforcement officer" means any person employed by or acting on behalf of the Albany Police Department.

Section 2. Law Enforcement Officers

a. The Albany Police Department and its law enforcement officers shall not inquire as to an individual's immigrations status, including a crime victim, a witness, or a person who contacts or approaches a law enforcement officer seeking assistance, unless necessary to investigate criminal activity by that individual.

b. The Albany Police Department and its law enforcement officers shall not stop, question, interrogate, investigate, or arrest an individual based solely on the following:

   (1) Actual or suspected immigration or citizenship status; or

   (2) A "civil immigration warrant," administrative warrant, or a civil immigration detainer in the individual's name, including those identified in the National Crime Information Center (NCIC) database.

c. As per the Tenth Amendment to the United States Constitution, the Albany Police Department and its law enforcement officers shall not perform the functions of a federal immigration officer or otherwise engage in the enforcement of federal immigration law pursuant to 8 U.S.C. § 1357(g).

Section 3. Information Regarding Aliens

a. Employees of the City of Albany shall not inquire about or request proof of immigration status or citizenship when providing services or benefits, except where the receipt of such services or benefits are contingent upon one's immigration or citizenship status or where inquiries are otherwise lawfully required by federal, state, or local laws.

b. Any service provided by the City of Albany shall be made available to all individuals who are otherwise eligible for such service. The City of Albany shall encourage all aliens to make use of those services provided for which aliens are not denied eligibility by law.

Section 4. Communication with Federal Officials

a. The Albany Police Department shall not collect information regarding immigration or citizenship status except as required by law, and shall prohibit the use or disclosure of such information except as required by law. Nothing in this Executive Order shall be construed to direct the Albany Police Department to violate 8 U.S.C. § 1373.

b. The Albany Police Department shall not respond to a U.S. Immigration and Customs Enforcement (ICE) or U.S. Customs and Border Protection (CBP) request for non-public information about an individual, including but not limited to non-public information about an individual's release, home address, or work address, unless the request is otherwise permitted by law.

Section 5. Effective Date

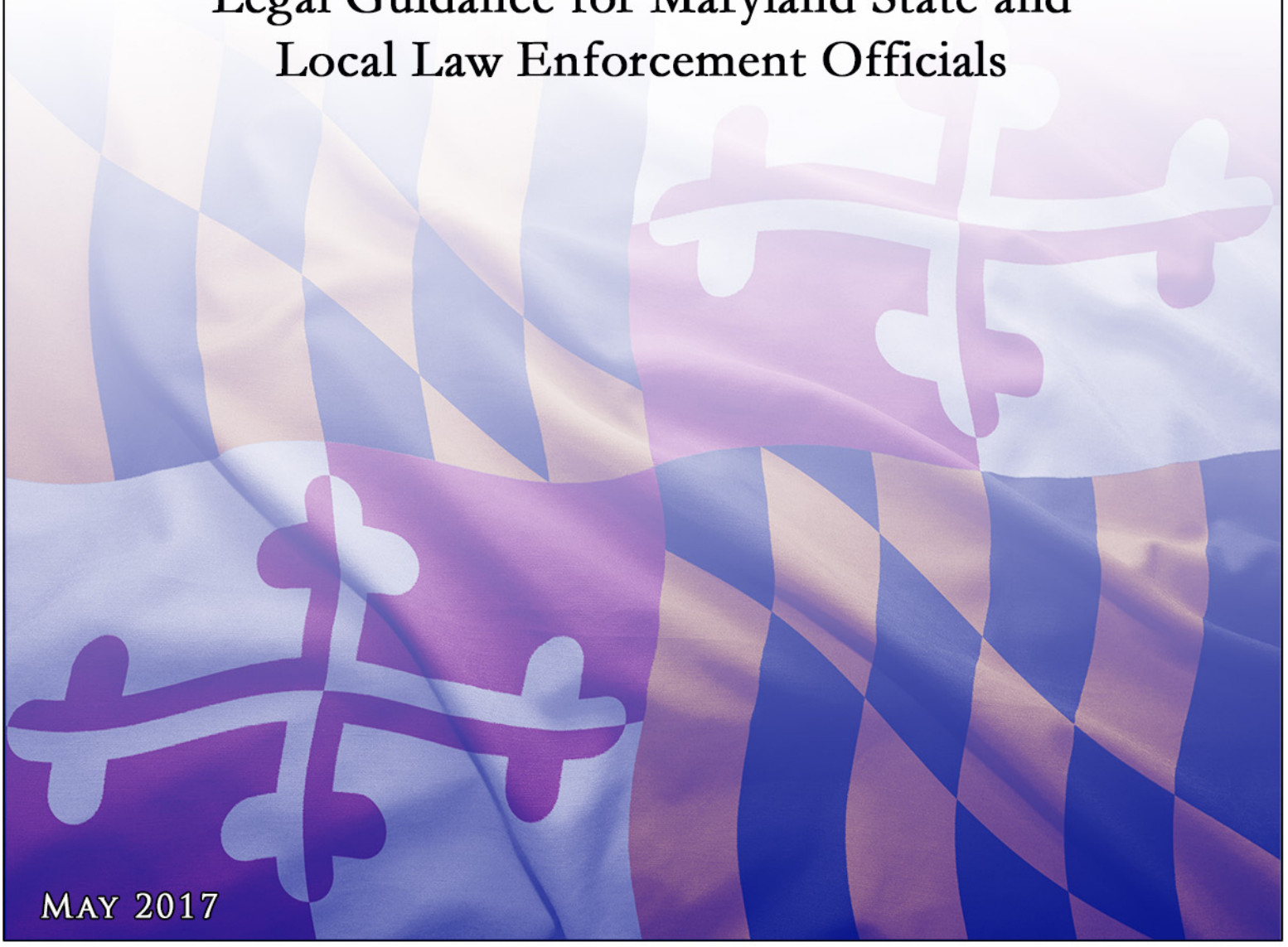
a. This order shall take effect immediately.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the City of Albany to be affixed this 24th day of April, 2017.

Kathy M. Sheehan
Mayor, City of Albany

GUIDANCE MEMORANDUM

Local Enforcement of Federal Immigration Law: Legal Guidance for Maryland State and Local Law Enforcement Officials



MAY 2017

INTRODUCTION

For some time now, questions have arisen about the extent to which State and local law enforcement officials may, or are required to, assist U.S. Immigration and Customs Enforcement ("ICE") and the Customs and Border Protection ("CBP") officials with the enforcement of federal immigration law. In August 2014, our Office issued advice on the "ICE detainers" issued by federal immigration officials when they seek custody of suspected removable aliens.[1] In that letter, our Office concluded that (a) compliance with ICE detainers is voluntary, and (b) State and local law enforcement officials are potentially exposed to liability if they hold someone beyond his or her State-law release date without a judicial warrant or probable cause that the detainee has committed a crime.[2]

In light of recent federal measures designed to restrict immigration and intensify the enforcement of federal immigration laws, we are now updating and supplementing our 2014 guidance. The purpose of this new guidance is to describe for Maryland State and local governments the current legal landscape governing the participation of law enforcement officials in immigration enforcement, and to help those officials make decisions about how to engage with federal immigration officers.

This guidance reaches several legal conclusions for State and local law enforcement agencies ("LEAs") to consider as they interact with federal immigration law and officials:

1. LEAs face potential liability exposure if they seek to enforce federal immigration laws, particularly if they do so outside the context of a federal cooperation agreement under 8 U.S.C. § 1357(g)(1).

2. LEAs must absorb all costs associated with federal cooperation agreements under 8 U.S.C. § 1357(g)(1). The federal government does

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[1] Letter from Adam D. Snyder, Chief Counsel, Opinions & Advice, to the Hon. Douglas W. Mullendore, Washington County Sheriff (Aug. 14, 2014).

[2] This guidance applies equally to all non-federal law enforcement officers and agencies, whether they operate at the municipal, county, or state level. To distinguish those officers from federal immigration officers, we will sometimes refer to them together as "local" officials, but at other times we will refer to both State and local entities. These differences in nomenclature are not intended to have substantive effect.

not provide reimbursement for these agreements, and the agreements may increase the risk of unconstitutional profiling.

3. LEAs face potential liability exposure if they honor ICE or CBP detainer requests unless the request is accompanied by a judicial warrant or supported by information providing probable cause that the subject of the detainer has committed a crime.

4. State and local officers may not be prohibited from sharing information about a detainee's citizenship or immigration status with federal immigration officials, but they are not required to do so either.

5. As an overriding principle, the government bears the burden of proving that the detention of someone beyond the person's State-law release date does not violate the Fourth Amendment and its Maryland counterpart.

AUTHORITIES GOVERNING LOCAL PARTICIPATION IN THE ENFORCEMENT OF FEDERAL IMMIGRATION LAWS

A. The Tenth Amendment to the U.S. Constitution

The Tenth Amendment to the United States Constitution[3] limits the federal government's ability to mandate particular action by states and localities, including in the area of federal immigration law enforcement and investigations. The federal government cannot "compel the States to enact or administer a federal regulatory program," or compel state employees to participate in the administration of a federally enacted regulatory scheme.[4] The anti-commandeering restrictions of the Tenth Amendment extend not only to states but also to localities and their employees.[5] Voluntary cooperation with a federal scheme does not present Tenth Amendment issues, but the federal government may not

[3] The Tenth Amendment to the United States Constitution provides that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[4] *New York v. United States*, 505 U.S. 144, 188 (1992) (federal government may not compel states to enact legislation providing for the disposal of their radioactive waste or else take title to that waste); *Printz v. United States*, 521 U.S. 898, 935 (1997) (federal government may not require state and local law enforcement officers to perform background checks on prospective firearm purchasers).

[5] *See Printz*, 521 U.S. at 904-05 (county); *City of New York v. United States*, 179 F.3d 29, 34 (2d Cir. 1999) (municipality).

force state or local officials to carry out federal law, either directly or indirectly through the withdrawal of unrelated federal funding.[6]

> *The Tenth Amendment bars the federal government from requiring local law enforcement officials to enforce federal immigration law.*

B. Federal Immigration Laws

1. Information Sharing Under 8 U.S.C. § 1373

Federal law does not *require* any local governmental agency or law enforcement officer to communicate with federal immigration authorities. Rather, federal law only requires that state and local governments not *bar* their employees from sharing certain types of information with federal immigration authorities. Specifically, 8 U.S.C. § 1373 provides that state and local governments cannot prohibit employees or entities "from sending to, or receiving from, [federal immigration authorities] information regarding the citizenship or immigration status, lawful or unlawful, of any individual."[7] In addition, state and local governments may not impose restrictions on "exchanging" information regarding "immigration status" with "any other Federal, State, or local government entity" or on "maintaining" such information.[8]

By its terms, 8 U.S.C. § 1373 applies only to information regarding an individual's "citizenship" or "immigration status"; it does not apply to other types of information, such as information about an individual's release, next court date, or address.[9] In addition, § 1373 places no affirmative obligation on LEAs to *collect* information about an individual's immigration status. Thus, local governments may adopt policies prohibiting their officers and employees from inquiring about a person's immigration status except where required by law.

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[6] *See Lomont v. O'Neill*, 285 F.3d 9, 14 (D.C. Cir. 2002); *see also Nat'l Fed. of Ind. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012).

[7] 8 U.S.C. § 1373(a).

[8] 8 U.S.C. § 1373(b).

[9] As discussed below, the U.S. Department of Justice has indicated that it interprets § 1373 to preclude more than express restrictions on information disclosure. *See infra*, § C.

Finally, the Tenth Amendment, as discussed above, may further limit § 1373's reach. Although at least one court has held that § 1373 does not, on its face, violate that Amendment's anti-commandeering restrictions, the same court indicated that the Tenth Amendment may be read to limit the reach of § 1373 where a state or locality can show that the statute creates "an impermissible intrusion on state and local power to control information obtained in the course of official business or to regulate the duties and responsibilities of state and local governmental employees."[10] The Tenth Amendment thus might protect local efforts to keep information confidential—even from the federal government—if such information is "essential to the performance of . . . state and local governmental functions" where those functions would be "difficult or impossible" to perform "if some expectation of confidentiality is not preserved."[11] If a local jurisdiction determines, therefore, that the sharing of information about citizenship or immigration status would make it "difficult or impossible" to perform essential governmental functions, the Tenth Amendment might justify a policy of not providing information under § 1373.

> *Federal law does not require local law enforcement to share with federal officials information about citizenship or immigration status. However, State and local officials may not prohibit such sharing unless maintaining confidentiality is necessary to perform state and local governmental functions.*

2. Cooperation Agreements Under 8 U.S.C. § 1357(g)

Section 287(g) of the Immigration and Nationality Act—which is codified at 8 U.S.C. § 1357(g)—enables ICE to enter into agreements with state and local law enforcement agencies and authorize designated local officers to perform immigration-enforcement functions. After an agreement is signed, officers selected by the state or

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[10] *City of New York*, 179 F.3d at 37. The Court rejected the City's Tenth Amendment argument on the grounds that—based on the record before it—the City kept immigration-related information confidential from the federal government only and made it available to others. *Id.* The Court expressly declined to reach how the Tenth Amendment would apply to "generalized confidentiality policies that are necessary to the performance of legitimate municipal functions and that include federal immigration status." *Id.*

[11] *Id*.

local agency receive federal training on how to access immigration databases, complete immigration forms, and otherwise carry out the functions of federal immigration agents. State and local law enforcement officials "deputized" through one of these agreements perform the same functions performed by federal immigration agents: they have access to federal immigration databases, may interrogate and take into custody noncitizens believed to have violated federal immigration laws, and may lodge "detainers" against alleged noncitizens held in state or local custody.[12]

A local law enforcement officer deputized under such an agreement functions as a federal officer and is treated as such for purposes of the Federal Tort Claims Act[13] and worker's compensation claims[14] when performing functions under the agreement.[15] In addition, authorized local personnel enjoy the same defenses and immunities from personal liability for their in-scope acts that are available to ICE officers,[16] and may request—but are not entitled to—representation by the Department of Justice in any litigation arising from activities carried out under the agreement.[17]

With federal authority, however, come federal obligations. When local personnel act under *federal* authority, they must comply with a variety of different federal standards and guidelines. For example, deputized local officials must comply with the federal government's rules governing the disclosure of impeachment information about potential witnesses.[18] They also must comply with the federal Privacy Act of 1974 and associated regulations and guidelines regarding data collection and use of information.[19]

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[12] *See* § B.3 below (discussing detainers).

[13] 28 U.S.C. §§ 1346(b)(l), 2671-2680.

[14] 5 U.S.C. § 8101 *et seq*.

[15] *See* 8 U.S.C. § 1357(g)(7); 28 U.S.C. § 2671.

[16] *See* 8 U.S.C. § 1357(g)(8).

[17] *See* 28 C.F.R. § 50.15.

[18] *See* Model § 287(g) Agreement, ¶ XII, available at https://www.ice.gov/doclib/detention-reform/pdf/287g_moa.pdf; *Giglio v. United States*, 405 U.S. 150 (1972) (requiring the disclosure of material tending to impeach the character or testimony of the prosecution witness in a criminal trial).

[19] *See* 5 U.S.C. § 552a, 6 C.F.R. §§ 5.20-5.36. A recent Presidential Executive Order reversed the prior Administration's policy of applying the protections of the federal Privacy Act

The decision to enter into a § 287(g) agreement is purely discretionary; local jurisdictions are not required to do so.[20] The federal government, while it encourages such agreements, does not reimburse local jurisdictions for the expenses their officers incur while assisting with federal immigration enforcement activities.[21] And providing such assistance with officers who have only limited expertise and training in immigration enforcement risks the type of racial profiling that is unconstitutional, as our Office stated in our 2015 guidance memorandum, "Ending Discriminatory Profiling in Maryland."[22]

> *Local law enforcement agencies may, but are not required to, enter into agreements deputizing their officers to exercise federal immigration enforcement powers. The federal government does not provide reimbursement for these agreements, and the agreements may increase the risk of unconstitutional profiling.*

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to undocumented immigrants, though other federal requirements remain in place. *See* Executive Order No. 13768, § 14.

[20] There are a number of policy considerations that are outside the scope of this legal guidance but that jurisdictions might wish to consider before entering into these agreements. For example, the enforcement of federal immigration laws might divert resources from the investigation of local crimes. Formal participation in federal immigration enforcement—particularly by patrol officers—might also discourage immigrant communities from coming forward with information about criminal activity. There are a number of reports describing how the local enforcement of federal immigration law can affect police/community relations. *See, e.g.*, American Immigration Council, "The 287(g) Program: An Overview" (Mar. 15, 2017); Nik Theodore, Department of Urban Planning and Policy, University of Illinois at Chicago, "Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement" (May 2013). In addition, these agreements might discourage immigrant communities from coming forward to testify in court. *See* Letter from Brian E. Frosh, Attorney General of Maryland, to the Hon. John Kelly, Secretary, Department of Homeland Security *et al*. (March 2, 2017), at www.marylandattorneygeneral.gov/News%20Documents/Homeland%20Security_Ltr_030117.pdf.

[21] *See* 8 U.S.C. § 1357(g)(1) (stating that the actions of local officials under a cooperative agreement must be carried out "at the expense of the State or political subdivision").

[22] Guidance Memorandum, "Ending Discriminatory Profiling in Maryland" (Aug. 2015), at http://www.marylandattorneygeneral.gov/Reports/Ending_Discriminatory_Profiling.pdf; *see also Santos v. Frederick County Board of Commissioners*, 725 F.3d 451, 459 n.2 (4th Cir. 2013) (observing that, while the Fourth Circuit has not addressed the issue, "two other Circuit Courts have indicated that consensual encounters initiated solely based on race may violate the Equal Protection Clause").

3. ICE Detainers Under 8 U.S.C. §§ 1226 and 1357 and 8 C.F.R. § 287.7

When ICE learns that a local law enforcement agency has custody of an individual who might be in the country illegally, it might issue what is commonly referred to as an "immigration detainer." An immigration detainer advises local law enforcement that ICE is seeking custody of the individual and asks that the local agency hold the individual "for a period not to exceed 48 hours beyond the time when [the subject] would otherwise have been released" in order to allow ICE officials the opportunity to assume custody.[23] Immigration detainers are requests only; local officers are not obligated to honor them.[24]

An LEA's decision to comply with a detainer request and hold an individual beyond his or her normal release date constitutes a new "seizure." That new seizure must be justified under the Fourth Amendment and the analogous provisions of Article 26 of the Maryland Declaration of Rights.[25] The requirements of the Fourth Amendment do not change simply because ICE or CBP has issued a detainer request to an LEA.[26]

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[23] *See* Form I-247A ("Immigration Detainer – Notice of Action," March 2017).

[24] *See, e.g., Galarza v. Szalczyk*, 745 F.3d 634, 643 (3d Cir.2014); *Mercado v. Dallas County*, 2017 WL 169102, at *8-10 (N.D. Texas, Jan. 17, 2017); *Alfaro-Garcia v. Henrico County*, 2016 WL 5388946 (E.D. Va., Sept. 26, 2016); *People ex rel. Swenson v. Ponte*, 46 Misc.3d 273 (N.Y. Supr. Ct. 2014). Immigration detainers should not be confused with interstate criminal detainers subject to the Interstate Agreement on Detainers, which Maryland officials are obligated to fulfill. *See generally* Md. Code Ann., Corr. Serv. §§ 8-401 through 8-417.

[25] *See, e.g., Morales v. Chadbourne*, 793 F.3d 208, 217 (1st Cir. 2015); *cf. Illinois v. Caballes*, 543 U.S. 405, 407 (2005) (noting that a legitimate seizure "can become unlawful if it is prolonged beyond the time reasonably required" to achieve its purpose); *see also King v. State*, 434 Md. 472, 482-84 (2013) (construing Article 26 *in pari materia* with the Fourth Amendment); Title 2 of the Criminal Procedure Article, Annotated Code of Maryland (governing the arrest process under Maryland law).

[26] *See Orellana v. Nobles County*, 2017 WL 72397, at *8 (D. Minn. Jan. 6, 2017) (stating that immigration detainers "do not categorically provide law enforcement a constitutionally permissible predicate for an arrest"); *see also, e.g., Buquer v. City of Indianapolis*, 2013 WL 1332158, at *8 (S.D. Ind. Mar. 28, 2013). In court filings, ICE has taken the contrary position that immigration detainers *do* provide probable cause for state officers to detain someone. *See* Brief of the United States as Amicus Curiae in Support of Neither Party, *Massachusetts v. Lunn*, No. SJC-12276 (Mass., filed March 27, 2017) (citing *People v. Xirum*, 45 Misc. 3d 785 (N.Y. Supr. Ct. 2014) and *Miranda-Olivares v. Clackamas County*, No. 3:12-CV-02317-ST, 2014 WL 1414305, at *11 (D. Or. Apr. 11, 2014)).

Therefore, local officials who hold someone solely on the basis of having received a detainer request risk civil liability, including monetary damages and attorneys fees.[27]

In August 2014, our Office issued an advice letter evaluating the extent to which immigration detainers issued on specific grounds might provide a local officer probable cause to detain someone beyond their State-law release date. That evaluation hinged on the "check-boxes" provided on the form used by ICE officials at the time and the extent to which information conveyed through those boxes provided probable cause to believe that the subject had committed a crime.[28]

On March 24, 2017, ICE announced the introduction of a *new* form—Form I-247A—that officials must use effective April 2, 2017.[29] The new form and the guidance accompanying its introduction make two significant changes to the detainers and the process by which ICE officials issue them. First, the new immigration detainer form must now be accompanied by one of two administrative warrants: a Warrant for Arrest of Alien (Form I-200), or a Warrant for Removal/Deportation (Form I-205). According to the federal guidance, obtaining an administrative warrant will allow ICE officials to arrest undocumented individuals without having to make an individualized finding that the subject is "likely to escape," as is required for warrantless arrests under federal immigration laws.[30] Second, the new immigration form eliminates the multiple check-

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[27] *See, e.g., Santos v. Frederick County Bd. of Comm'rs*, 725 F.3d 451, 464-65 (4th Cir. 2013); *Morales v. Chadbourne*, 793 F.3d 208 (1st Cir. 2015); *Miranda-Olivares v. Clackamas County*, No. 3:12-CV-02317-ST, 2014 WL 1414305 (D. Or. Apr. 11, 2014); *People ex rel. Swenson v. Ponte*, 46 Misc.3d 273 (N.Y. Supr. Ct. 2014); *see also Gerstein v. Pugh*, 420 U.S. 103, 111-12 (1975) (discussing underlying basis of Fourth Amendment's probable cause requirement). Liability will also depend, of course, on the applicability of other legal principles that govern the tort liability of State and local officials under 42 U.S.C. § 1983 and the State and local tort claims acts. Those issues, however, are beyond the reach of this analysis.

[28] ICE has used various versions of form I-247 over the years. *See Roy v. Cty. of Los Angeles*, 2016 WL 5219468, at *2 (C.D. Cal. Sept. 9, 2016) (describing evolution of the form from October 2010 until 2015). Our analysis focused on form I-247, which was in effect between December 2012 and March 2015.

[29] *See* ICE, Policy No. 10074.2, Issuance of Immigration Detainers by ICE Immigration Officers (March 24, 2017).

[30] 8 U.S.C § 1357(a)(2); ICE Policy No. 10074.2, ¶ 2.4; *see Moreno v. Napolitano*, No. 11-5452, —F.Supp.3d—, 2016 WL 5720465, at *1 (N.D. Ill. Sept. 30, 2016) (ruling that the detainer program exceeds DHS's statutory authority "by seeking to detain individuals without a warrant and without a determination by ICE that the individuals are 'likely to escape' within the meaning

boxes used on other forms—which described a wide variety of civil and criminal bases for continued detention—and replaces them with just four, each of which is focused purely on the subject's unauthorized presence in the United States.

As is discussed in greater detail in Appendix A, neither change alters our advice: Local officials may not hold someone beyond their State-law release date in the absence of a judicial warrant or probable cause that the subject has committed a crime. Although the issuance of an administrative warrant might authorize an arrest by a federal official or a local official operating under a § 287 agreement, it would not—by itself—authorize a continued detention under State law. The legality of a continued detention on the basis of a removal order is less clear; while there is some authority that removal orders justify local detentions, there is contrary authority as well.[31] Given that uncertainty, detaining someone on the grounds that they are the subject of a removal order may result in liability for an unlawful seizure.

As for the check-boxes provided on the new form, none of them gives local officials probable cause to believe that a detainee has committed a crime. Instead, all four boxes relate to the subject's unauthorized presence within the United States, which is a civil, not criminal, offense.[32] And, as with the warrant issues discussed in the preceding paragraph, the case law is split as to whether an order for removal—the first of the four check-boxes—justifies a local detention.[33] For these reasons, we recommend that LEAs respond to immigration detainers only when they are accompanied by a *judicial* warrant, or when further inquiry gives the local official probable cause to believe that a *crime*—not merely a civil offense—has been committed. Only under those

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of 8 U.S.C. § 1357(a)(2)"); *see also Orellana v. Nobles County*, 2017 WL 72397, at *8-9 (D. Minn. Jan. 6, 2017) (describing holding in *Moreno*); *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (highlighting the "particularized" inquiry probable cause demands).

[31] *See* Appendix A at A-2 (contrasting *People v. Xirum*, 45 Misc. 3d 785 (N.Y. Sup. Ct. 2014) with *People ex rel. Swenson v. Ponte*, 46 Misc. 3d 273 (N.Y. Sup. Ct. 2014)).

[32] *Arizona v. United States*, 567 U.S. 387, 132 S.Ct. 2492, 2505 (2012).

[33] *See* Appendix A at A-2.

circumstances will a local official have a clear legal basis to hold a detainee beyond his or her State-law release date.[34]

> *Local law enforcement officials face potential liability if they honor ICE detainers and hold someone beyond their State-law release date unless the detainer is accompanied by a judicial warrant or when the information provided with the detainer form establishes probable cause to believe that the detainee has committed a crime. Illegal presence in the United States is a civil offense and does not provide a clear basis for continued detention.*

C. Executive Order No. 13768, "Enhancing Public Safety in the Interior of the United States"

On January 25, 2017, the President of the United States issued Executive Order No. 13768 for the purpose of guiding the actions of federal agencies involved in immigration enforcement. On February 20, 2017, DHS published a memorandum implementing the Executive Order.[35] Together, these materials raise additional issues about the local enforcement of federal immigration law.[36]

The Executive Order and the DHS Memorandum both state that the federal government will seek increased cooperation from state and local governments in connection with immigration enforcement.[37] Both documents also address the § 1373 information-sharing provisions and the 287(g) agreements discussed above. Although neither document may legally alter federal statutory law on those topics, they provide some insight into how broadly the federal government construes those laws.

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[34] Of course, an individual held beyond his or her State-law release date must be afforded the same due process protections afforded to any other detainee. *See, e.g.,* Maryland Rule 4-212(f) (individual held on warrantless arrest must be given a copy of the charging document "be taken before a judicial officer of the District Court without unnecessary delay and in no event later than 24 hours after arrest"); *see also* Form I-247A (stating that the detained individual "must be served with a copy of this form for the detainer to take effect" (emphasis omitted)).

[35] *See* "Enforcement of the Immigration Laws to Serve the National Interest," available at https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf ("DHS Memorandum").

[36] Several jurisdictions have challenged the constitutionality of the executive order and, in one case, the court has issued a nationwide injunction blocking its implementation. *See County of Santa Clara v. Trump*, No. 17-CV-00485-WHO, 2017 WL 1459081 (N.D. Cal. Apr. 25, 2017).

[37] *See* Executive Order No. 13768, § 8; DHS Memorandum § B.

The Executive Order takes aim at so-called "sanctuary jurisdictions," which it describes as "jurisdictions that willfully refuse to comply with 8 U.S.C. § 1373."[38] The Order grants the U.S. Attorney General and the DHS Secretary authority to (1) designate localities as "sanctuary jurisdictions," and (2) ensure that jurisdictions so designated are ineligible for federal grants, "except as deemed necessary for law enforcement purposes."[39] The Executive Order further directs the U.S. Attorney General to take "appropriate enforcement action" against any jurisdiction that either violates § 1373 or "has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law."[40]

As discussed above, § 1373 relates only to sharing "information" regarding "citizenship or immigration status"; it does not restrict a locality from declining to share with federal immigration officials other types of information, such as non-public information about an individual's release, next court date, or address. Nor does § 1373 place an affirmative obligation on local governments to *collect* information about an individual's immigration status. An LEA that chooses not to share additional information with federal officials should not run afoul of § 1373 so long as its practices do not prohibit employees from sharing information regarding citizenship or immigration status.

Federal officials have, however, interpreted § 1373 broadly to include not only local rules that restrict the sharing of information about citizenship or immigration status, but any law, rule, or "practice" that has the *effect* of restricting that sharing. The Executive Order itself directs the U.S. Attorney General to take "appropriate enforcement action" against any jurisdiction that "has in effect a statute, policy, or practice that

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[38] Executive Order No. 13768, § 9.

[39] *Id*. The Executive Order also requires certain federal agencies to report information about "sanctuary jurisdictions" and publicize a list of criminal actions committed by immigrants and of jurisdictions that ignored or failed to honor detainer requests with respect to those immigrants. *Id*. ICE has temporarily suspended the publication of the "declined retainer outcome report" after questions were raised about its accuracy. *See* www.ice.gov/declined-detainer-outcome-report.

[40] Executive Order No. 13768, § 9.

prevents or hinders the enforcement of Federal law"[41]—a standard that seems to go beyond the narrow information-sharing that § 1373 is designed to protect. The federal government has also stated that a local policy prohibiting law enforcement officials from honoring detainer requests—which are not covered by § 1373—might qualify as a violation of § 1373,[42] particularly if it causes local officials to *believe* that all types of cooperation with federal immigration officials are prohibited.[43]

Local jurisdictions would be understandably concerned about the possible loss of federal funding if the U.S. Attorney General were to find that they have violated § 1373 under one of these federal interpretations. The federal government provides Maryland and its local jurisdictions with numerous grants in areas ranging from education and health care to social services and criminal justice, and the loss of federal funding could have significant consequences. Each grant is governed by different regulatory schemes, however, and the specific provisions of those schemes must be reviewed to determine whether they might restrict the federal government's ability to withhold funding.

Still, there are certain actions that an LEA can take without risking the loss of federal funding. A local jurisdiction's decision not to enter into a § 287(g) agreement cannot be considered a violation of § 1373.[44] And a local rule, policy, or practice of not cooperating with federal immigration authorities should not violate even the federal government's view of § 1373 if the local government does not restrict its employees from

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[41] *Id.* (emphasis added).

[42] *See* Attorney General Jeff Sessions, Remarks on Sanctuary Jurisdictions (Mar. 27, 2017), available at https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-sanctuary-jurisdictions) (citing jurisdictions "refusing to honor [ICE] detainer requests" as examples of conduct that violates § 1373).

[43] *See* United States Department of Justice, Department of Justice Referral of Allegations of Potential Violations of 8 U.S.C. § 1373 by Grant Recipients (May 31, 2016), at 7 n.9 (suggesting that § 1373 also prohibits "actions of local officials" that "result in" employees not providing information to ICE) (available at https://oig.justice.gov/reports/2016/1607.pdf).

[44] *See* 8 U.S.C. § 1357(g)(9) ("Nothing in this subsection shall be construed to require any State or political subdivision of a State to enter into an agreement with the Attorney General under this subsection."); *see also* Executive Order No. 13768, § 8(b) (directing DHS to enter into § 287(g) agreements "with the consent of State or local officials, as appropriate"); DHS Memorandum at 4 (directing ICE officials to enter into agreements with those LEAs that make such a "request").

responding to federal requests for information about a person's citizenship or immigration status.

Finally, although the federal government has wide latitude to condition its funding to states and localities on their fulfillment of certain conditions, the U.S. Supreme Court has identified limitations on that authority. First, the power to impose funding conditions under the Spending Clause lies with Congress, not the President or the federal agencies he oversees.[45] Second, Congress cannot use its spending power "to induce the States to engage in activities that would themselves be unconstitutional."[46] The federal government thus cannot condition a grant of federal funds on invidiously discriminatory state action, and likely cannot *withdraw* funds from a state that declines to fulfill detainers that would violate the Fourth Amendment. Third, any funding conditions must be reasonably related to the federal interest in the program at issue.[47] For this reason, the federal government likely cannot withdraw from so-called "sanctuary jurisdictions" federal funding that is not related to the enforcement of federal immigration laws.[48] Fourth, the funding condition must be stated "unambiguously" so that the recipient can "voluntarily and knowingly" decide whether to accept those funds and the associated requirements.[49] Accordingly, the federal government may not be able to withdraw federal funding on the basis of an expansive reading of the states' obligations under

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[45] *See County of Santa Clara v. Trump*, No. 17-CV-00485-WHO, 2017 WL 1459081, at *21-22; *see also Dole*, 483 U.S. at 206 (stating that Congress, incident to its power under Article I, § 8, "may attach conditions on the receipt of federal funds").

[46] *Dole*, 483 U.S. at 210.

[47] In *Dole*, the Supreme Court held that Congress could permissibly withhold 5% of certain highway funds from states that failed to raise their drinking age to 21 because raising the drinking age was "directly related to one of the main purposes for which highway funds are expended," namely "safe interstate travel." *Id*. at 208-09.

[48] The federal funding programs that seem most closely related to the enforcement of federal immigration law are the State Criminal Alien Assistance Program (SCAAP), the Edward Byrne Memorial Justice Assistance Grant (JAG) Program, and the Community-Oriented Policing Services (COPS) grant program, all of which are administered by divisions of the U.S. Department of Justice.

[49] *See, e.g., Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Of the law-enforcement related programs identified in the preceding footnote, only participation in the JAG program is expressly conditioned on compliance with "all other applicable Federal laws." 42 U.S.C. § 3752(a)(5)(D).

§ 1373. And finally, the amount of federal funding that a noncomplying State would forfeit cannot be so large that the State would be left with "no real option but to acquiesce" and accept the condition[50]—a limitation that would be implicated should the federal government seek to withdraw *all* federal funding from a jurisdiction. Depending on the amount and nature of any federal funding cut, states and localities may be able to challenge the defunding on one or more of these grounds.[51]

Although Executive Order No. 13768 threatens local jurisdictions with the loss of federal funds if they "hinder" federal immigration enforcement, local jurisdictions remain free not to enter into § 287(g) agreements or share information with federal immigration officials so long as they do not restrict employees from sharing with federal officials information about a person's citizenship or immigration status.

CONCLUSION

Much has changed since 2014, when our Office last provided advice on the local enforcement of federal immigration laws. Some changes have come through the courts, which continue to review the legality of local detentions on the basis of immigration detainers. Other changes have come through federal immigration enforcement policy, which is only now becoming subject to judicial review. These changes have created considerable legal uncertainty surrounding the local participation in the enforcement of federal immigration laws.

In light of this uncertainty, this guidance recommends a few basic principles to guide local law enforcement agencies as they interact with federal immigration law and officials:

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[50] *See, e.g., Nat'l Fed. of Ind. Bus. v. Sebelius*, 132 S. Ct. 2566, 2604 (2012); *Dole*, 483 U.S. at 209.

[51] The Northern District of California, in enjoining the effect of the executive order, concluded that the plaintiff counties were likely to succeed not only on their claims that the executive order violates the Spending Clause and the Tenth Amendment, but also on their claims that the order is vague and fails to comport with the due process principles of the Fifth Amendment. *See County of Santa Clara v. Trump*, No. 17-CV-00485-WHO, 2017 WL 1459081, at *24-26.

1. LEAs face potential liability exposure if they seek to enforce federal immigration laws, particularly if they do so outside the context of a federal cooperation agreement under 8 U.S.C. § 1357(g)(1).

2. LEAs must absorb all costs associated with federal cooperation agreements under 8 U.S.C. § 1357(g)(1). The federal government does not provide reimbursement for these agreements, and the agreements may increase the risk of unconstitutional profiling.

3. LEAs face potential liability exposure if they honor ICE or CBP detainer requests unless the request is accompanied by a judicial warrant or supported by information providing probable cause that the subject of the detainer has committed a crime.

4. State and local officers may not be prohibited from sharing information about a detainee's citizenship or immigration status with federal immigration officials, but they are not required to do so either.

5. As an overriding principle, the government bears the burden of proving that the detention of someone beyond the person's State-law release date does not violate the Fourth Amendment and its Maryland counterpart.

Following these principles will allow law enforcement agencies to comply with federal law in a manner that respects the constitutional rights of individuals, protects local agencies and officials from potential legal liability, and allows them to remain faithful to their mission of promoting public safety.

APPENDIX A

The extent to which an immigration detainer authorizes a local official to detain someone beyond his or her State-law release date depends on what information is provided with the detainer form. In an August 2014 advice letter, our Office evaluated the extent to which the specific "check-boxes" provided on the form used by ICE officials at the time provided probable cause to believe that the subject had committed a crime.[1] On March 24, 2017, ICE announced that it would use a *new* form—Form I-247A—as of April 2, 2017.[2]

Form I-247A

The new detainer form is different from its predecessors in two significant ways: (1) the form must now be accompanied by either a Warrant for Arrest of Alien (Form I-200), or a Warrant for Removal/Deportation (Form I-205); and (2) the new form eliminates the multiple check-boxes used on previous forms—which described a wide variety and civil and criminal bases for continued detention—and replaces them with just four, each of which is focused purely on the subject's unauthorized presence in the United States.[3] We address the two developments separately.

1. Administrative Warrants

Like all administrative warrants, the two that may accompany the new immigration detainers are not reviewed or issued by a court or judicial officer. Instead, an ICE official issues them for the purpose of authorizing other ICE officials—or local officials operating under a § 287(g) agreement—to take a suspect into custody.[4] The Warrant for Arrest of Alien (Form I-200) is issued for the purpose of bringing someone before an administrative tribunal to determine whether he or she is subject to removal or deportation.[5] It is issued prior to adjudication of the individual's lawful status. A

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[1] Letter from Adam D. Snyder, Chief Counsel, Opinions & Advice, to the Hon. Douglas W. Mullendore, Washington County Sheriff (Aug. 14, 2014).

[2] *See* ICE, Policy No. 10074.2, Issuance of Immigration Detainers by ICE Immigration Officers (March 24, 2017).

[3] The new form I-247A and accompanying warrants are reproduced in their entirety at the back of this Appendix.

[4] *See* 8 C.F.R. § 287.5; 8 C.F.R. § 241.2.

[5] *See* 8 C.F.R. § 236.1(b).

Warrant for Removal/Deportation (Form I-205), by contrast, is issued *after* an adjudicative inquiry has already resulted in the issuance of an order of removal or deportation.[6]

The courts have reached mixed conclusions about the effect of these types of warrants. At least one court has held that a final order of deportation or removal—which generates the issuance of the Form I-205 Warrant for Removal/Deportation—provides "lawful authority" for local officials to detain the subject of the order.[7] The same court, however, suggested the opposite in a subsequent case,[8] and other courts have held more generally that arrests made pursuant to administrative immigration warrants must be treated as warrantless for purposes of state tort law and federal constitutional claims.[9]

Without settled law on whether a local officer may lawfully arrest an individual solely on the basis of an order of deportation or removal, we cannot assure local officers that such an arrest would not give rise to potential liability. Two reasons lie behind this conclusion. First, under federal immigration law, only a federally-authorized ICE agent is permitted to execute an administrative ICE warrant.[10] State and local officials

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[6] *See* 8 C.F.R. § 241.2 (stating that a warrant for removal is "based upon the final administrative removal order in the alien's case").

[7] *See People v. Xirum*, 45 Misc.3d 785, 789 (Sup. Ct. N.Y. 2014). Two other courts have suggested that it might have been reasonable for a local official to believe he had probable cause to detain someone who had been "subject to a warrant for arrest or order of removal or deportation by ICE," but neither included that within its holding. *See Miranda-Olivares*, No. 3:12-CV-02317-ST, 2014 WL 1414305, at *11; *see also Santos v. Frederick County Bd. of Comm'rs*, 725 F.3d 451, 458, 466 (4th Cir. 2013) (suggesting that an active, "outstanding ICE warrant for 'immediate deportation'" would have been sufficient to justify an arrest if the local officer had learned that the warrant was active before he had made the arrest).

[8] *See People ex rel. Swenson v. Ponte*, 46 Misc. 3d 273, 278 (Sup. Ct. N.Y. 2014) ("There is no allegation that the Department has actually obtained a removal order and, if in fact they had, there is still no authority for a local correction commissioner to detain someone based upon a civil determination, as immigration removal orders are civil, not criminal, in nature.").

[9] *See, e.g., El Badrawi v. Dept. of Homeland Sec*., 579 F. Supp. 2d 249, 275-76 (D. Conn. 2008) (treating an arrest as warrantless under state law when ICE warrant and "Notice to Appear" were not issued by "neutral magistrates" and thus "are ignored for Fourth Amendment purposes"); *see also Coolidge v. N.H*., 403 U.S. 443, 449 (1971); *Johnson v. U.S*., 333 U.S. 10, 13-14 (1948) (holding the Fourth Amendment requires findings by a "neutral and detached magistrate" not just those of the investigating officer).

[10] *See* 8 U.S.C. § 1357(g)(1); 8 C.F.R. § 287.5(e); *see also Santos*, 725 F.3d at 463-64.

operating outside of a § 287(g) agreement have no such authority. Second, the underlying infraction for which the warrants are issued—being in the country illegally—is typically a *civil* infraction, which cannot justify a State-law arrest. For these reasons, we continue to recommend that local officials who receive a detainer accompanied by an administrative warrant not hold someone beyond their State-law release date in the absence of probable cause to believe that the subject has committed a crime.

Although neither warrant itself provides such probable cause, further inquiry into the circumstances justifying the issuance of the warrant might. Removal orders can be issued on several different grounds, including that the person has committed one of several categories of criminal offenses.[11] If a local official contacts ICE officials and learns that the individual is subject to removal for having committed a crime, that inquiry might provide a local official probable cause to detain the individual beyond his or her State-law release date. Although that type of additional inquiry could provide probable cause based on either type of warrant, it is more likely to do so when ICE has issued a Warrant for Removal/Deportation (Form I-205), which is issued after an adjudicative inquiry has already established grounds for removal.

It is important to remember that federal law does not require a local official to engage in this type of additional inquiry. Immigration detainers are voluntary requests only and the decision not to honor them does not violate federal law, at least as long as local officials remain free to communicate with federal immigration agents about a subject's citizenship or immigration status.

2. Check-Boxes

There are two sets of check-boxes on the new form, only one of which provides any information about the grounds on which the detainer is being issued.[12] The first set, which appears at the top of the page, states:

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[11] *See* 8 U.S.C. § 1227(a)(2).

[12] The form includes a second option for DHS to use when it originally transferred someone to an LEA for a local proceeding or investigation and is seeking to have custody over the subject returned. That option does not, however, provide any information that would bear on whether a local official has probable cause to detain someone beyond their State-law release date and we thus do not address it further.

> DHS HAS DETERMINED THAT PROBABLE CAUSE EXISTS THAT THE SUBJECT IS A REMOVABLE ALIEN. THIS DETERMINATION IS BASED ON:
>
> □ a final order of removal against the alien;
>
> □ the pendency of ongoing removal proceedings against the alien;
>
> □ biometric confirmation of the alien's identity and a records check of federal databases that affirmatively indicate, by themselves or in addition to other reliable information, that the alien either lacks immigration status or notwithstanding such status is removable under U.S. immigration law; and/or
>
> □ statements made by the alien to an immigration officer and/or other reliable evidence that affirmatively indicate the alien either lacks immigration status or notwithstanding such status is removable under U.S. immigration law.

The last two, lengthy check-boxes plainly do not provide probable cause for a local official to believe that the subject has committed a crime. Both relate only to the subject's unauthorized presence within the United States, which the Supreme Court has made clear is a civil, not criminal, offense.[13] The second check-box—the pendency of ongoing removal proceedings against the alien—likewise does not establish probable cause. That removal proceedings are pending against someone does not mean that the individual has been adjudicated to be in the country illegally. At most, it indicates that the individual has been *charged* with immigration violations based on allegations made by ICE officials. The Supreme Court has made clear that a "Notice to Appear" form—which also signifies pending removal proceedings—"does not authorize an arrest."[14] That principle applies here, particularly if the underlying violation is illegal presence within the country, which is a civil infraction.

The first check-box—a final order of removal against the alien—presents a closer call. As discussed above with respect to the Warrant for Removal/Deportation (Form I-205), at least one court has held that the issuance of a final order of removal provides

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[13] *Arizona v. United States*, 132 S.Ct. at 2505.

[14] *Id*.

"lawful authority" for local officials to detain the subject of the order.[15] To some extent, the legality of a local arrest based solely on an order of removal might depend on what type of order has been issued. Federal immigration law provides for different types of removal orders, some issued by immigration judges, others by the U.S. Attorney General.[16] It might also depend on what lies behind a specific order. Generally speaking, a removal order indicates only that an individual is in the country illegally and is subject to deportation. Again, because a removal order is a *civil* order, not a criminal finding, it is less likely to provide the basis for a lawful local arrest. But if the removal order is issued in response to criminal activity, it might justify a local detention if the LEA learns of that criminal activity before fulfilling the detainer.[17]

In the absence of a clear judicial consensus that a local officer is authorized to make an arrest of the basis of an order of deportation of removal, we recommend that LEAs respond to detainers issued on this basis only when they are accompanied by a *judicial* warrant or when additional inquiry gives probable cause to believe a crime has been committed.

---

[15] *See supra* at A-2; *see also People v. Xirum*, 45 Misc.3d 785, 789 (Sup. Ct. N.Y. 2014); *but see People ex rel. Swenson v. Ponte*, 46 Misc. 3d 273, 278 (N.Y. Sup. Ct. 2014).

[16] *Compare* 8 U.S.C. § 1229a *with* 8 U.S.C. § 1228(b).

[17] *See Santos*, 725 F.3d at 466.

DEPARTMENT OF HOMELAND SECURITY

IMMIGRATION DETAINER - NOTICE OF ACTION

Subject ID: Event #:	File No: Date:

TO: (Name and Title of Institution - OR Any Subsequent Law Enforcement Agency)	FROM: (Department of Homeland Security Office Address)

Name of Alien: _____

Date of Birth: _____ Citizenship: _____ Sex: _____

1. DHS HAS DETERMINED THAT PROBABLE CAUSE EXISTS THAT THE SUBJECT IS A REMOVABLE ALIEN. THIS DETERMINATION IS BASED ON *(complete box 1 or 2).*

- ☐ A final order of removal against the alien;
- ☐ The pendency of ongoing removal proceedings against the alien;
- ☐ Biometric confirmation of the alien's identity and a records check of federal databases that affirmatively indicate, by themselves or in addition to other reliable information, that the alien either lacks immigration status or notwithstanding such status is removable under U.S. immigration law; and/or
- ☐ Statements made by the alien to an immigration officer and/or other reliable evidence that affirmatively indicate the alien either lacks immigration status or notwithstanding such status is removable under U.S. immigration law.

2. DHS TRANSFERRED THE ALIEN TO YOUR CUSTODY FOR A PROCEEDING OR INVESTIGATION *(complete box 1 or 2).*

- ☐ Upon completion of the proceeding or investigation for which the alien was transferred to your custody, DHS intends to resume custody of the alien to complete processing and/or make an admissibility determination.

IT IS THEREFORE REQUESTED THAT YOU:

- **Notify DHS** as early as practicable (at least 48 hours, if possible) before the alien is released from your custody. Please notify DHS by calling ☐ U.S. Immigration and Customs Enforcement (ICE) or ☐ U.S. Customs and Border Protection (CBP) at _____. If you cannot reach an official at the number(s) provided, please contact the Law Enforcement Support Center at: (802) 872-6020.
- **Maintain custody** of the alien for a period **NOT TO EXCEED 48 HOURS** beyond the time when he/she would otherwise have been released from your custody to allow DHS to assume custody. The alien **must be served with a copy of this form** for the detainer to take effect. This detainer arises from DHS authorities and should not impact decisions about the alien's bail, rehabilitation, parole, release, diversion, custody classification, work, quarter assignments, or other matters
- Relay this detainer to any other law enforcement agency to which you transfer custody of the alien.
- Notify this office in the event of the alien's death, hospitalization or transfer to another institution.

☐ If checked: please cancel the detainer related to this alien previously submitted to you on _____ (date).

_____ _____

(Name and title of Immigration Officer) (Signature of Immigration Officer) (Sign in ink)

Notice: If the alien may be the victim of a crime or you want the alien to remain in the United States for a law enforcement purpose, notify the ICE Law Enforcement Support Center at (802) 872-6020. You may also call this number if you have any other questions or concerns about this matter.

TO BE COMPLETED BY THE LAW ENFORCEMENT AGENCY CURRENTLY HOLDING THE ALIEN WHO IS THE SUBJECT OF THIS NOTICE:

Please provide the information below, sign, and return to DHS by mailing, emailing or faxing a copy to _____ .

Local Booking/Inmate #: _____ Estimated release date/time: _____

Date of latest criminal charge/conviction: _____ Last offense charged/conviction: _____

This form was served upon the alien on _____ , in the following manner:

☐ in person ☐ by inmate mail delivery ☐ other (please specify): _____

_____ _____

(Name and title of Officer) (Signature of Officer) (Sign in ink)

NOTICE TO THE DETAINEE

The Department of Homeland Security (DHS) has placed an immigration detainer on you. An immigration detainer is a notice to a law enforcement agency that DHS intends to assume custody of you (after you otherwise would be released from custody) because there is probable cause that you are subject to removal from the United States under federal immigration law. DHS has requested that the law enforcement agency that is currently detaining you maintain custody of you for a period not to exceed 48 hours beyond the time when you would have been released based on your criminal charges or convictions. **If DHS does not take you into custody during this additional 48 hour period, you should contact your custodian** (the agency that is holding you now) to inquire about your release. **If you believe you are a United States citizen or the victim of a crime, please advise DHS by calling the ICE Law Enforcement Support Center toll free at (855) 448-6903.**

NOTIFICACIÓN A LA PERSONA DETENIDA

El Departamento de Seguridad Nacional (DHS) le ha puesto una retención de inmigración. Una retención de inmigración es un aviso a una agencia de la ley que DHS tiene la intención de asumir la custodia de usted (después de lo contrario, usted sería puesto en libertad de la custodia) porque hay causa probable que usted está sujeto a que lo expulsen de los Estados Unidos bajo la ley de inmigración federal. DHS ha solicitado que la agencia de la ley que le tiene detenido actualmente mantenga custodia de usted por un periodo de tiempo que no exceda de 48 horas más del tiempo original que habría sido puesto en libertad en base a los cargos judiciales o a sus antecedentes penales. **Si DHS no le pone en custodia durante este periodo adicional de 48 horas, usted debe de contactarse con su custodio** (la agencia que le tiene detenido en este momento) para preguntar acerca de su liberación. **Si usted cree que es un ciudadano de los Estados Unidos o la víctima de un crimen, por favor avise al DHS llamando gratuitamente al Centro de Apoyo a la Aplicación de la Ley ICE al (855) 448-6903.**

AVIS AU DETENU OU À LA DÉTENUE

Le Département de la Sécurité Intérieure (DHS) a placé un dépositaire d'immigration sur vous. Un dépositaire d'immigration est un avis à une agence de force de l'ordre que le DHS a l'intention de vous prendre en garde à vue (après celà vous pourrez par ailleurs être remis en liberté) parce qu'il y a une cause probable que vous soyez sujet à expulsion des États-Unis en vertu de la loi fédérale sur l'immigration. Le DHS a demandé que l'agence de force de l'ordre qui vous détient actuellement puisse vous maintenir en garde pendant une période ne devant pas dépasser 48 heures au-delà du temps après lequel vous auriez été libéré en se basant sur vos accusations criminelles ou condamnations. **Si le DHS ne vous prenne pas en garde à vue au cours de cette période supplémentaire de 48 heures, vous devez contacter votre gardien (ne)** (l'agence qui vous détient maintenant) pour vous renseigner sur votre libération. **Si vous croyez que vous êtes un citoyen ou une citoyenne des États-Unis ou une victime d'un crime, s'il vous plaît aviser le DHS en appelant gratuitement le centre d'assistance de force de l'ordre de l'ICE au (855) 448-6903**

NOTIFICAÇÃO AO DETENTO

O Departamento de Segurança Nacional (DHS) expediu um mandado de detenção migratória contra você. Um mandado de detenção migratória é uma notificação feita à uma agência de segurança pública que o DHS tem a intenção de assumir a sua custódia (após a qual você, caso contrário, seria liberado da custódia) porque existe causa provável que você está sujeito a ser removido dos Estados Unidos de acordo com a lei federal de imigração. ODHS solicitou à agência de segurança pública onde você está atualmente detido para manter a sua guarda por um período de no máximo 48 horas além do tempo que você teria sido liberado com base nas suas acusações ou condenações criminais. **Se o DHS não leva-lo sob custódia durante este período adicional de 48 horas, você deve entrar em contato com quem tiver a sua custódia** (a agência onde você está atualmente detido) para perguntar a respeito da sua liberação. **Se você acredita ser um cidadão dos Estados Unidos ou a vítima de um crime, por favor informe ao DHS através de uma ligação gratuita ao Centro de Suporte de Segurança Pública do Serviço de Imigração e Alfândega (ICE) pelo telefone (855) 448-6903.**

THÔNG BÁO CHO NGƯỜI BỊ GIAM

Bộ Nội An (DHS) đã ra lệnh giam giữ di trú đối với quý vị. Giam giữ di trú là một thông báo cho cơ quan công lực rằng Bộ Nội An sẽ đảm đương việc lưu giữ quý vị (sau khi quý vị được thả ra) bởi có lý do khả tín quý vị là đối tượng bị trục xuất khỏi Hoa Kỳ theo luật di trú liên bang. Sau khi quý vị đã thi hành đầy đủ thời gian của bản án dựa trên các tội phạm hay các kết án, thay vì được thả tự do, Bộ Nội An đã yêu cầu cơ quan công lực giữ quý vị lại thêm không quá 48 tiếng đồng hồ nữa. Nếu Bộ Nội An không đến bắt quý vị sau 48 tiếng đồng hồ phụ trội đó, quý vị cần liên lạc với cơ quan hiện đang giam giữ quý vị để tham khảo về việc trả tự do cho quý vị. Nếu quý vị là công dân Hoa Kỳ hay tin rằng mình là nạn nhân của một tội ác, xin vui lòng báo cho Bộ Nội An bằng cách gọi số điện thoại miễn phí 1(855) 448-6903 cho Trung Tâm Hỗ Trợ Cơ Quan Công Lực Di Trú.

被拘留者通知書

國土安全部(Department of Homeland Security，簡稱DHS)已經對你發出移民拘留令。移民拘留令為一給予執法機構的通知書，闡明DHS意欲獲取對你的羈押權(若非有此羈押權，你將會被釋放)；因為根據聯邦移民法例，並基於合理的原由，你將會被遞解離美國國境。DHS亦已要求現正拘留你的執法機構，在你因受到刑事檢控或定罪後，而在本應被釋放的程序下，繼續對你作出不超過四十八小時的監管。若你在這附加的四十八小時內，仍未及移交至**DHS**的監管下，你應當聯絡你的監管人(即現正監管你的機構)查詢有關你釋放的事宜。若你認為你是美國公民或為罪案受害者，請致電**ICE**執法部支援中心**(Law Enforcement Support Center)**知會**DHS**，免費電話號碼：**(855)448-6903**。

U.S. DEPARTMENT OF HOMELAND SECURITY **Warrant for Arrest of Alien**

File No. _____

Date: _____

To: Any immigration officer authorized pursuant to sections 236 and 287 of the Immigration and Nationality Act and part 287 of title 8, Code of Federal Regulations, to serve warrants of arrest for immigration violations

I have determined that there is probable cause to believe that _____ is removable from the United States. This determination is based upon:

☐ the execution of a charging document to initiate removal proceedings against the subject;

☐ the pendency of ongoing removal proceedings against the subject;

☐ the failure to establish admissibility subsequent to deferred inspection;

☐ biometric confirmation of the subject's identity and a records check of federal databases that affirmatively indicate, by themselves or in addition to other reliable information, that the subject either lacks immigration status or notwithstanding such status is removable under U.S. immigration law; and/or

☐ statements made voluntarily by the subject to an immigration officer and/or other reliable evidence that affirmatively indicate the subject either lacks immigration status or notwithstanding such status is removable under U.S. immigration law.

YOU ARE COMMANDED to arrest and take into custody for removal proceedings under the Immigration and Nationality Act, the above-named alien.

_____
(Signature of Authorized Immigration Officer)

_____
(Printed Name and Title of Authorized Immigration Officer)

Certificate of Service

I hereby certify that the Warrant for Arrest of Alien was served by me at _____
(Location)

on _____ on _____, and the contents of this
(Name of Alien) (Date of Service)

notice were read to him or her in the _____ language.
(Language)

_____ _____
Name and Signature of Officer Name or Number of Interpreter (if applicable)

DEPARTMENT OF HOMELAND SECURITY
U.S. Immigration and Customs Enforcement

WARRANT OF REMOVAL/DEPORTATION

File No: _____

Date: _____

To any immigration officer of the United States Department of Homeland Security:

_____
(Full name of alien)

who entered the United States at _____ on _____
(Place of entry) (Date of entry)

is subject to removal/deportation from the United States, based upon a final order by:

- ☐ an immigration judge in exclusion, deportation, or removal proceedings
- ☐ a designated official
- ☐ the Board of Immigration Appeals
- ☐ a United States District or Magistrate Court Judge

and pursuant to the following provisions of the Immigration and Nationality Act:

I, the undersigned officer of the United States, by virtue of the power and authority vested in the Secretary of Homeland Security under the laws of the United States and by his or her direction, command you to take into custody and remove from the United States the above-named alien, pursuant to law, at the expense of:

_____
(Signature of immigration officer)

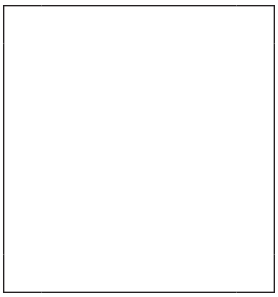
_____
(Title of immigration officer)

_____
(Date and office location)

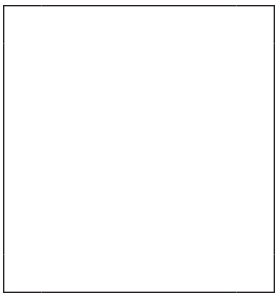
To be completed by immigration officer executing the warrant: Name of alien being removed:

_____

Port, date, and manner of removal: _____



Photograph of alien removed



Right index fingerprint of alien removed

_____
(Signature of alien being fingerprinted)

_____
(Signature and title of immigration officer taking print)

Departure witnessed by: _____
(Signature and title of immigration officer)

If actual departure is not witnessed, fully identify source or means of verification of departure:

_____

_____

_____

_____

If self-removal (self-deportation), pursuant to 8 CFR 241.7, check here. ☐

Departure Verified by: _____
(Signature and title of immigration officer)

Guidance Concerning Local Authority Participation In Immigration Enforcement And Model Sanctuary Provisions

New York State Attorney General

Eric T. Schneiderman

January 19, 2017

&

March 12, 2017 Supplemental Memorandum

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

EXECUTIVE OFFICE

January 19, 2017

Dear Colleague:

As the chief law enforcement officer in our state, I have heard from many New Yorkers who have questions about what this week's transfer of power in Washington, D.C. means for federal immigration enforcement. Local elected officials and law enforcement agencies rightly want to promote public safety while protecting vulnerable communities. I write today to set forth what the US Constitution and federal law currently require and describe concrete steps that local governments and law enforcement agencies can immediately take to achieve these important dual objectives.

The enclosed *Guidance Concerning Local Authority Participation In Immigration Enforcement and Model Sanctuary Provisions* first describes the legal landscape governing local jurisdictions' involvement in immigration investigation and enforcement, so that local officials understand the extent to which they may decline to participate in such activities. The *Guidance* follows the letter that I sent on December 2, 2014 to police chiefs and sheriffs throughout the state, but provides much greater detail and context for law enforcement officials and local policymakers. The *Guidance* also provides model language that localities can voluntarily enact—consistent with current federal law—to limit law enforcement and local agency participation in federal immigration activities. The model language is based on an extensive review of provisions from the numerous states, cities, and towns around the country—including many in New York State—that have already have acted to protect this vulnerable population.

The Attorney General's Office recognizes that by protecting the rights and well-being of immigrant families, we build trust in law enforcement and other public agencies, thus enhancing public safety for all. As you know, justice cannot be served when a victim of domestic violence or a witness to a shooting does not call the police because she fears that doing so will attract the attention of officials who wish to deport her family members. That's why standing together in this time of uncertainty is our most effective tool for keeping our communities safe.

Sincerely yours,

ERIC T. SCHNEIDERMAN

GUIDANCE CONCERNING LOCAL AUTHORITY PARTICIPATION IN IMMIGRATION ENFORCEMENT AND MODEL SANCTUARY PROVISIONS

PART I: PURPOSE AND PRINCIPLES

The purpose of this guidance is two-fold: (1) to describe for local governments in New York State the legal landscape governing the participation of local authorities in immigration enforcement; and (2) to assist local authorities that wish to become "sanctuary" jurisdictions by offering model language that can be used to enact local laws or policies that limit participation in immigration enforcement activities.[1]

As the United States Supreme Court recognized in *Arizona v. United States*, "[a]s a general rule, it is not a crime for a removable alien to remain present in the United States."[2] In addition, undocumented aliens—like other New Yorkers—are afforded certain rights by the New York State and United States Constitutions. As explained in detail in Part II, local law enforcement agencies ("LEAs") retain significant discretion regarding whether and how to participate in federal immigration enforcement. LEAs nonetheless must adhere to the requirements and prohibitions of the New York State and United States Constitutions and federal and state law in serving the public, regardless of whether an individual is lawfully present in the U.S.

In light of concerns expressed by many local governments about protecting immigrants' rights while appropriately aiding federal authorities, Part III of this guidance offers model language that can be used to enact laws and policies on how localities can and should respond to federal requests for assistance with immigration enforcement. Several states and hundreds of municipalities—including New York City and other local governments throughout New York State—have enacted sanctuary laws and policies that prohibit or substantially restrict the involvement of state and local law enforcement agencies with federal immigration enforcement. *See* Appendix B. The Office of the Attorney General believes that effective implementation of the policies set forth in this guidance can help foster a relationship of trust between law enforcement officials and immigrants that will, in turn, promote public safety for all New Yorkers.

This guidance recommends eight basic measures:

1. LEAs should not engage in certain activities solely for the purpose of enforcing federal immigration laws.

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[1] "Sanctuary" is not a legal term and does not have any fixed or uniform legal definition, but it is often used to refer to jurisdictions that limit the role of local law enforcement agencies and officers in the enforcement of federal immigration laws.

[2] 132 S. Ct. 2492, 2505 (2012) (citation omitted).

2. Absent a judicial warrant, LEAs should honor U.S. Immigration and Customs Enforcement ("ICE") or Customs and Border Protection ("CBP") detainer requests only in limited, specified circumstances.

3. Absent a judicial warrant, LEAs should not honor ICE or CBP requests for certain non-public, sensitive information about an individual.

4. LEAs should not provide ICE or CBP with access to individuals in their custody for questioning solely for immigration enforcement purposes.

5. LEAs should protect the due process rights of persons as to whom federal immigration enforcement requests have been made, including providing those persons with appropriate notice.

6. Local agency resources should not be used to create a federal registry based on race, gender, sexual orientation, religion, ethnicity, or national origin.

7. Local agencies should limit collection of immigration-related information and ensure nondiscriminatory access to benefits and services.

8. LEAs should collect and report data to the public regarding detainer and notification requests from ICE or CBP in order to monitor their compliance with applicable laws.

As explained in Part II below, state and federal law permit localities to adopt these proposed measures.

PART II: LAWS GOVERNING LOCAL AUTHORITY PARTICIPATION IN IMMIGRATION ENFORCEMENT

A. The Tenth Amendment to the U.S. Constitution

The Tenth Amendment to the U. S. Constitution[3] limits the federal government's ability to mandate particular action by states and localities, including in the area of federal immigration law enforcement and investigations. The federal government cannot "compel the States to enact or administer a federal regulatory program,"[4] or compel state employees to participate in the administration of a federally enacted regulatory scheme.[5] Importantly, these Tenth Amendment protections extend not only to states but to localities and their employees.[6] *Voluntary* cooperation with a federal scheme does not present Tenth Amendment issues.[7]

B. The N.Y. Constitution and Home Rule Powers

Under the home rule powers granted by the New York State Constitution,[8] as implemented by the Municipal Home Rule Law,[9] a local government may adopt a local law relating to the "government, protection, order, conduct, safety, health and well-being of persons" therein, as long as its provisions are not inconsistent with the state constitution or a general state law.[10]

The model provisions for localities outlined in Part III are consistent with both the state constitution and existing state law.

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[3] The Tenth Amendment to the United States Constitution provides that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., Am. X.

[4] *New York v. United States*, 505 U.S. 144, 188 (1992). The compelled conduct invalidated in *New York v. United States* was a federal statutory requirement that States enact legislation providing for the disposal of their radioactive waste or else take title to that waste. *See id*. at 152-54.

[5] *Printz v. United States*, 521 U.S. 898, 935 (1997). The compelled conduct invalidated in *Printz* was the Brady Handgun Violence Prevention Act's requirement that state and local law enforcement officers perform background checks on prospective firearm purchasers. *See id.* at 903-04.

[6] *See id.* at 904-05 (allowing county-level law enforcement officials to raise Tenth Amendment claim); *see also Lomont v. O'Neill*, 285 F.3d 9, 13 (D.C. Cir. 2002) (same); *City of New York v. United States*, 179 F.3d 29, 34 (2d Cir. 1999) (city may raise a Tenth Amendment claim), *cert. denied*, 528 U.S. 1115 (2000).

[7] *See Lomont*, 285 F.3d at 14.

[8] N.Y. Const., Art. IX, § 2(c)(ii)(10).

[9] Municipal Home Rule Law § 10(1)(ii)(a)(12).

[10] *See*, *e.g.*, *Eric M. Berman, P.C. v. City of New York*, 25 N.Y.3d 684, 690 (2015).

C. Laws Governing Treatment of ICE and CBP Detainer Requests

ICE and CBP have a practice of issuing detainer or immigration-hold requests to LEAs, asking that the LEA keep an individual in its custody for up to 48 hours beyond that individual's normal release date (i.e., the date the individual is scheduled for release in whatever matter brought that person into the LEA's custody) while ICE determines whether to take custody of the individual to pursue immigration enforcement proceedings. LEAs have the authority to honor or decline an ICE or CBP request to detain, transfer, or allow access to any individual within their custody for immigration enforcement purposes. As the Attorney General's December 2, 2014 letter to police chiefs and sheriffs across New York State explained, an LEA's compliance with ICE detainers or requests for immigration holds is *voluntary*—not mandatory—and compliance with such requests remains at the discretion of the LEA.[11]

This guidance recommends that LEAs honor ICE or CBP detainers or requests for immigration holds only when (1) ICE or CBP presents a judicial warrant or (2) there is probable cause to believe that the individual committed a limited number of criminal offenses, including terrorism related offenses. *See infra* Part III, Objective 2. Such an approach promotes public safety in a manner that also respects the constitutional rights of individuals and protects LEAs from potential legal liability.

All LEAs in New York State must comply with the Fourth Amendment to the U.S. Constitution's prohibition on unreasonable searches and seizures, as well as with the similar provision in Article I, § 12 of the New York State Constitution.[12] This mandate does not change simply because ICE or CBP has issued a detainer request to an LEA. Should an LEA choose to comply with an ICE or CBP detainer request and hold an individual beyond his or her normal release date, this constitutes a new "seizure" under the Fourth Amendment. That new seizure must meet all requirements of the Fourth Amendment, including a showing of probable cause that the individual committed a criminal offense.[13]

A judicial warrant would fulfill the Fourth Amendment's requirements. Absent a judicial warrant, however, further detention is permissible only upon a showing of probable cause that

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[11] *See* Letter from New York Attorney General Eric T. Schneiderman to New York State Police Chiefs and Sheriffs (Dec. 2, 2014) (available at https://ag.ny.gov/pdfs/AG_Letter_And_Memo_Secure_Communities_12_2.pdf).

[12] Article I, § 12 of the New York State Constitution provides: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[13] *Cf. Illinois v. Caballes*, 543 U.S. 405, 407 (2005) (noting that a legitimate seizure "can become unlawful if it is prolonged beyond the time reasonably required" to achieve its purpose); *see also Dunaway v. New York,* 442 U.S. 200, 213 (1979) (noting general rule that "Fourth Amendment seizures are 'reasonable' only if based on probable cause").

the individual committed a crime or that an exception to the probable cause requirement applies.[14]

The mere fact that an individual is unlawfully in the U.S. is not a criminal offense.[15] Therefore, unlawful presence in the U.S., by itself, does not justify continued detention beyond that individual's normal release date. This applies even where ICE or CBP provide an LEA with administrative forms that use terms such as "probable cause" or "warrant."[16] A determination of whether the LEA had probable cause to further detain an individual will turn on all the facts and circumstances, not simply words that ICE or CBP places on its forms.

Accordingly, in several different lawsuits, federal courts have held that an LEA violated the Fourth Amendment rights of an individual whom the LEA held past his or her normal release date in response to an ICE detainer request.[17] The courts reasoned that the ICE detainer requests did not constitute probable cause to believe that the individual had committed a crime; therefore further detention was unconstitutional. Indeed, LEAs that detain individuals in the absence of a judicial warrant or probable cause may be liable for monetary damages.[18] For these reasons, this guidance recommends that LEAs respond to ICE or CBP detainer requests only when they are accompanied by a judicial warrant, or in other limited circumstances in which there is probable cause to believe a crime has been committed.

D. Laws Governing Information Sharing with Federal Authorities

In addition to issuing detainer requests, ICE and CBP have historically sought information about individuals in an LEA's custody. For example, ICE may request notification of an individual's release date, time, and location to enable ICE to take custody of the individual upon release.

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[14] *See, e.g.*, *Gerstein v. Pugh*, 420 U.S. 103, 111-12 (1975).

[15] *See Arizona*, 132 S. Ct. at 2505.

[16] For example, a "Warrant of Removal" is issued by immigration officials, and not by a neutral fact-finder based on a finding of probable cause that the individual committed a crime. *See* 8 C.F.R. § 241.2. In addition, DHS Form I-247D ("Immigration Detainer—Request for Voluntary Action") (5/15), available at https://www.ice.gov/sites/default/files/documents/Document/2016/I-247D.PDF, includes a check-box for ICE to designate that "Probable Cause Exists that The Subject is a Removable Alien." It is not a crime to be in the U.S. unlawfully. *See supra* at 4. Thus, ICE's checking of a "probable cause" box on the I-247D does not constitute probable cause to believe that an individual has committed a crime, and cannot on its own justify continued detention.

[17] *See, e.g.*, *Santos v. Frederick Cnty. Bd. of Comm'rs*, 725 F.3d 451, 464-65 (4th Cir. 2013)*; Miranda-Olivares v. Clackamas Cnty.,* 12-CV-02317, 2014 U.S. Dist. LEXIS 50340, at *32-33 (D. Or. April 11, 2014); *see also Gerstein*, 420 U.S. at 111-12 (discussing underlying basis of Fourth Amendment's probable cause requirement).

[18] *See, e.g.*, *Santos*, 725 F.3d at 464-66, 470 (holding that municipality was not entitled to qualified immunity in § 1983 lawsuit seeking, *inter alia*, compensatory damages, where deputies violated arrestee's constitutional rights by detaining her solely on suspected civil violations of federal immigration law).

This guidance recommends that, unless presented with a judicial warrant, LEAs should not affirmatively respond to ICE or CBP requests for sensitive information that is not generally available to the public, such as information about an individual's release details or home address. *See infra* Part III, Objective 3. This approach enables LEAs to protect individual privacy rights and ensure positive relationships with the communities they serve, which in turn promotes public safety.

(1) 8 U.S.C. § 1373 and the Tenth Amendment

Federal law "does not require, in and of itself, any government agency or law enforcement official to communicate with [federal immigration authorities]."[19] Rather, federal law limits the ability of state and local governments to enact an outright ban on sharing certain types of information with federal immigration authorities. Specifically, 8 U.S.C. § 1373 provides that state and local governments *cannot prohibit* employees or entities "from sending to, or receiving from, [federal immigration authorities] information regarding *the citizenship or immigration status*, lawful or unlawful, of any individual."[20] In addition, federal law bars restrictions on "exchanging" information regarding "*immigration status*" with "any other Federal, State, or local government entity" or on "maintaining" such information.[21] By their own language, these laws apply only to information regarding an individual's "citizenship or immigration status."

Section 1373 thus does not impose an affirmative mandate to share information—nor could it, for the reasons discussed below. Instead, this law simply provides that localities may not forbid or restrict their employees from sharing information regarding an individual's "citizenship or immigration status."[22] Nothing in Section 1373 restricts a locality from declining to share other information with ICE or CBP, such as non-public information about an individual's release, her next court date, or her address.

In addition, Section 1373 places no affirmative obligation on local governments to *collect* information about an individual's immigration status. Thus, local governments can adopt

[19] H.R. Rep. No. 104-725, Subtitle B, § 6, at 383 (1996).

[20] 8 U.S.C. § 1373(a)-(b) (emphasis added).

[21] 8 U.S.C. § 1373(b) (emphasis added).

[22] It should be noted that the U.S. Department of Justice's Office of the Inspector General, which monitors compliance with various federal grant programs, has interpreted Section 1373 to preclude not just express restrictions on information disclosure, but also "actions of local officials" that result in "restrictions on employees providing information to ICE." *See* United States Department of Justice, Department of Justice Referral of Allegations of Potential Violations of 8 U.S.C. § 1373 by Grant Recipients (May 31, 2016), at 7 n.9 (*available at* https://oig.justice.gov/reports/2016/1607.pdf).

policies prohibiting their officers and employees from inquiring about a person's immigration status except where required by law.[23]

The Tenth Amendment may further limit Section 1373's reach. The Tenth Amendment's reservation of power to the states prohibits the federal government from "compel[ling] the States to enact or administer a federal regulatory program" or "commandeering" state government employees to participate in the administration of a federally enacted regulatory scheme.[24] As noted above, these Tenth Amendment protections extend to localities and their employees.

Although the United States Court of Appeals for the Second Circuit has rejected a facial Tenth Amendment challenge to Section 1373, that court has recognized that a city may be able to forbid voluntary information sharing where such information sharing interferes with the operations of state and local government.[25] As the Second Circuit has observed, "[t]he obtaining of pertinent information, which is essential to the performance of a wide variety of state and local governmental functions, may in some cases be difficult or impossible if some expectation of confidentiality is not preserved," and "[p]reserving confidentiality may in turn require that state and local governments regulate the use of such information by their employees."[26] Accordingly, the Tenth Amendment may be read to limit the reach of Section 1373 where a state or locality can show that the statute creates "an impermissible intrusion on state and local power to control information obtained in the course of official business or to regulate the duties and responsibilities of state and local governmental employees"—such as the impairment of the entity's ability to collect information necessary to its functioning—"if some expectation of confidentiality is not preserved."[27]

Some jurisdictions have adopted policies expressly restricting the disclosure of immigration-status information to any third parties, including federal authorities, on the grounds that confidentiality is necessary to gather this information and the information is crucial to various governmental functions. For these reasons, New York City, for example, prohibits its employees from "disclos[ing] confidential information"—including information relating to "immigration status"—except under certain circumstances (e.g., suspicion of illegal activity unrelated to

[23] Under a New York City Executive Order, for example, officers and employees (other than law enforcement officers) are not permitted to inquire about a person's immigration status "unless: (1) Such person's immigration status is necessary for the determination of program, service or benefit eligibility or the provision of . . . services; or (2) Such officer or employee is required by law to inquire about such person's immigration status." N.Y.C. Exec. Order No. 41, § 3(a) (2003).

[24] *New York*, 505 U.S. at 188; *Printz*, 521 U.S. at 916.

[25] *City of New* York, 179 F.3d at 35-37.

[26] *Id.*

[27] *Id.* at 36, 37.

undocumented status or the investigation of potential terrorist activity), or if "such disclosure is required by law."[28]

(2) Freedom of Information Law

Disclosure of information held by the government is also governed by New York's Freedom of Information Law ("FOIL"). While FOIL generally requires state agencies to make publicly available upon request all records not specifically exempt from disclosure by state or federal statute,[29] FOIL also mandates that an agency withhold such records where disclosure would "constitute an unwarranted invasion of personal privacy."[30] Non-public information about an individual, such as home address, date and place of birth, or telephone number, would likely be exempt from disclosure on personal privacy grounds.[31]

[28] N.Y.C. Exec. Order No. 41, Preamble, § 2 (2003).

[29] Public Officers Law § 87(2).

[30] *Id.* § 89(2)(b); *see also In re Massaro v. N.Y. State Thruway Auth.*, 111 A.D.3d 1001, 1003-04 (3d Dep't 2013) (records containing employee names, addresses, and Social Security numbers subject to personal privacy exemption under FOIL).

[31] These examples are illustrative, not exhaustive.

PART III: MODEL SANCTUARY PROVISIONS[32]

This Part describes eight core objectives and proposes model language that jurisdictions can use to enact local laws and/or policies to achieve these objectives.

1. Objective: LEAs should not engage in certain activities solely for the purpose of enforcing federal immigration laws.

Model Language:

(a) [The LEA] shall not stop, question, interrogate, investigate, or arrest an individual based solely on any of the following:

(i) Actual or suspected immigration or citizenship status; or

(ii) A "civil immigration warrant," administrative warrant, or an immigration detainer in the individual's name, including those identified in the National Crime Information Center (NCIC) database.

(b) [The LEA] shall not inquire about the immigration status of an individual, including a crime victim, a witness, or a person who calls or approaches the police seeking assistance, unless necessary to investigate criminal activity by that individual.

(c) [The LEA] shall not perform the functions of a federal immigration officer or otherwise engage in the enforcement of federal immigration law--whether pursuant to Section 1357(g) of Title 8 of the United States Code or under any other law, regulation, or policy.

2. Objective: Absent a judicial warrant, LEAs should honor ICE or CBP detainer requests only in limited, specified circumstances.

Model Language:

[The LEA] may respond affirmatively to a "civil immigration detainer" from ICE or CBP to detain or transfer an individual for immigration enforcement or investigation purposes for up to 48 hours ONLY IF the request is accompanied by a judicial warrant,

(i) EXCEPT THAT local police may detain a person for up to 48 hours on a "civil immigration detainer" in the absence of a judicial warrant IF

[32] See Appendix A for definitions of key terms used in this Part.

See Appendix B for a compilation of states and localities with similar provisions.

- (1) there is probable cause to believe that the individual has illegally re-entered the country after a previous removal or return as defined by 8 U.S.C. § 1326 and (2) the individual has been convicted at any time of (i) a specifically enumerated set of serious crimes under the New York Penal Law (e.g., Class A felony, attempt of a Class A felony, Class B violent felony, etc.)[33] or (ii) a federal crime or crime under the law of another state that would constitute a predicate felony conviction, as defined under the New York Penal Law, for any of the preceding felonies; or

- there is probable cause to believe that the individual has or is engaged in terrorist activity.

3. Objective: Absent a judicial warrant, LEAs should not honor ICE or CBP requests for certain non-public, sensitive information about an individual.

Model Language:

(a) [The LEA] may respond affirmatively to an ICE or CBP request for non-public information about an individual—including but not limited to non-public information about an individual's release, home address, or work address—ONLY IF the request is accompanied by a judicial warrant,

(i) EXCEPT THAT nothing in this law prohibits any local agency from:

- sending to or receiving from any local, state, or federal agency—as per 8 U.S.C. § 1373—(i) information regarding an individual's country of citizenship or (ii) a statement of the individual's immigration status; or

- disclosing information about an individual's criminal arrests or convictions, where disclosure of such information about the individual is otherwise permitted by state law or required pursuant to subpoena or court order; or

- disclosing information about an individual's juvenile arrests or delinquency or youthful offender adjudications, where disclosure of such information about the individual is otherwise permitted by state law or required pursuant to subpoena or court order.

(b) [The LEA] shall limit the information collected from individuals concerning immigration or citizenship status to that necessary to perform agency duties and

[33] *See, e.g.*, N.Y.C. Admin. Code § 14-154(a)(6) for a list of designated felonies in New York City's law.

shall prohibit the use or disclosure of such information in any manner that violates federal, state, or local law.

4. Objective: LEAs should not provide ICE or CBP with access to individuals in their custody for questioning solely for immigration enforcement purposes.

Model Language:

[The LEA] shall not provide ICE or CBP with access to an individual in their custody or the use of agency facilities to question or interview such individual if ICE or CBP's sole purpose is enforcement of federal immigration law.

5. Objective: LEAs should protect the due process rights of persons as to whom federal immigration enforcement requests have been made, including providing those persons with appropriate notice.

Model Language:

(a) [The LEA] shall not delay bail and/or release from custody upon posting of bail solely because of (i) an individual's immigration or citizenship status, (ii) a civil immigration warrant, or (iii) an ICE or CBP request—for the purposes of immigration enforcement—for notification about, transfer of, detention of, or interview or interrogation of that individual.

(b) Upon receipt of an ICE or CBP detainer, transfer, notification, interview or interrogation request, [the LEA] shall provide a copy of that request to the individual named therein and inform the individual whether [the LEA] will comply with the request before communicating its response to the requesting agency.

(c) Individuals in the custody of [the LEA] shall be subject to the same booking, processing, release, and transfer procedures, policies, and practices of that agency, regardless of actual or suspected citizenship or immigration status.

6. Objective: Local agency resources should not be used to create a federal registry based on race, gender, sexual orientation, religion, ethnicity, or national origin.

Model Language:

[Local agency] may not use agency or department monies, facilities, property, equipment, or personnel to investigate, enforce, or assist in the investigation or enforcement of any federal program requiring registration of individuals on the basis of race, gender, sexual orientation, religion, ethnicity, or national origin.

7. Objective: Local agencies should limit collection of immigration-related information and ensure nondiscriminatory access to benefits and services.

Model Language:

(a) [Local agency] personnel shall not inquire about or request proof of immigration status or citizenship when providing services or benefits, except where the receipt of such services or benefits are contingent upon one's immigration or citizenship status or where inquiries are otherwise lawfully required by federal, state, or local laws.

(b) [Local agencies] shall have a formal Language Assistance Policy for individuals with Limited English Proficiency and provide interpretation or translation services consistent with that policy.[34]

8. Objective: LEAs should collect and report aggregate data containing no personal identifiers regarding their receipt of, and response to, ICE and CBP requests, for the sole purpose of monitoring the LEAs' compliance with all applicable laws.

Model Language:

(a) [The LEA] shall record, solely to create the reports described in subsection (b) below, the following for each immigration detainer, notification, transfer, interview, or interrogation request received from ICE or CBP:

- The subject individual's race, gender, and place of birth;
- Date and time that the subject individual was taken into LEA custody, the location where the individual was held, and the arrest charges;
- Date and time of [the LEA's] receipt of the request;
- The requesting agency;
- Immigration or criminal history indicated on the request form, if any;
- Whether the request was accompanied any documentation regarding immigration status or proceedings, e.g., a judicial warrant;
- Whether a copy of the request was provided to the individual and, if yes, the date and time of notification;
- Whether the individual consented to the request;
- Whether the individual requested to confer with counsel regarding the request;

[34] Under Title VI of the Civil Rights Act of 1964, any agency that is a direct or indirect recipient of federal funds must ensure meaningful or equal access to its services or benefits, regardless of ability to speak English. *See* 42 U.S.C. § 2000d *et seq.*; *Lau v. Nichols*, 414 U.S. 563 (1974).

- [The LEA's] response to the request, including a decision not to fulfill the request;
- If applicable, the date and time that ICE or CBP took custody of, or was otherwise given access to, the individual; and
- The date and time of the individual's release from [the LEA's] custody.

(b) [The LEA] shall provide semi-annual reports to the [designate one or more public oversight entity] regarding the information collected in subsection (a) above in an aggregated form that is stripped of all personal identifiers in order that [the LEA] and the community may monitor [the LEA's] compliance with all applicable law.

APPENDIX A
DEFINITION OF KEY TERMS

- "Civil immigration detainer" (also called a "civil immigration warrant") means a detainer issued pursuant to 8 C.F.R. § 287.7 or any similar request from ICE or CPB for detention of a person suspected of violating civil immigration law. *See* DHS Form I-247D ("Immigration Detainer—Request for Voluntary Action") (5/15), available at https://www.ice.gov/sites/default/files/documents/Document/2016/I-247D.PDF.

- "Judicial warrant" means a warrant based on probable cause and issued by an Article III federal judge or a federal magistrate judge that authorizes federal immigration authorities to take into custody the person who is the subject of the warrant. A judicial warrant does not include a civil immigration warrant, administrative warrant, or other document signed only by ICE or CBP officials.

- "Probable cause" means more than mere suspicion or that something is at least more probable than not. "Probable cause" and "reasonable cause," as that latter term is used in the New York State criminal procedure code, are equivalent standards.[35]

- "Local law enforcement agencies" or "LEAs" include, among others, local police personnel, sheriffs' department personnel, local corrections and probation personnel, school safety or resource officers, and school police officers.

[35] *People v. Valentine*, 17 N.Y.2d 128, 132 (1966).

APPENDIX B
COMPILATION OF SIMILAR PROVISIONS FROM OTHER STATES AND LOCALITIES

1. Objective: LEAs should not engage in certain activities that are solely for the purpose of enforcing federal immigration laws.

N.Y.C. Exec. Order 41 (2003): "Law enforcement officers shall not inquire about a person's immigration status unless investigating illegal activity other than mere status as an undocumented alien."

N.Y.C. Exec. Order 41 (2003): It is the "policy of the Police Department not to inquire about the immigration status of crime victims, witnesses or others who call or approach the police seeking assistance."

Illinois Executive Order 2 (2015): "No law enforcement official . . . shall stop, arrest, search, detain, or continue to detain a person solely based on an individual's citizenship or immigration status or on an administrative immigration warrant entered into [NCIC or similar databases]."

Oregon State Law § 181A.820 (2015): "No [state or local] law enforcement agency shall use agency moneys, equipment or personnel for the purpose of detecting or apprehending persons whose only violation of law is that they are persons of foreign citizenship present in the United States in violation of federal immigration laws," subject to certain exceptions including where a person is charged with criminal violation of federal immigration laws.

LAPD Special Order 40 (1979): "Officers shall not initiate police action with the objective of discovering the alien status of a person. Officers shall not arrest or book persons for violation of Title 8, Section 1325 of the United States Immigration Code (Illegal Entry)."

Washington D.C. Mayor's Order 2011-174: Public safety agencies "shall not inquire about a person's immigration status . . . for the purpose of initiating civil enforcement of immigration proceedings that have no nexus to a criminal investigation."

Washington D.C. Mayor's Order 2011-174: "It shall be the policy of Public Safety Agencies not to inquire about the immigration status of crime victims, witnesses, or others who call or approach the police seeking assistance."

2. Objective: Absent a judicial warrant, LEAs should honor ICE or CBP detainer requests only in limited, specified circumstances.

Philadelphia, PA Executive Order No. 5-2016: "No person in the custody of the City who would otherwise be released from custody shall be detained pursuant to an ICE civil

immigration detainer request pursuant to 8 C.F.R. Sec. 287.7 . . . unless [a] such person is being released from conviction for a first or second degree felony involving violence and [b] the detainer in supported by a judicial warrant."

3. Objective: Absent a judicial warrant, LEAs should not honor ICE or CBP requests for certain non-public, sensitive information about an individual.

Illinois Executive Order 2 (2015): LEAs may not "communicat[e] an individual's release information or contact information" "solely on the basis of an immigration detainer or administrative immigration warrant."

Philadelphia, PA Executive Order No. 5-2016: Notice of an individual's "pending release" shall not be provided "unless [a] such person is being released from conviction for a first or second degree felony involving violence and [b] the detainer is supported by a judicial warrant."

California Values Act, SB No. 54 *(Proposed)* (2016):

An LEA may not (a) "[r]espond[] to requests for nonpublicly available personal information about an individual," including, but not limited to, information about the person's release date, home address, or work address for immigration enforcement purposes," or (b) "make agency or department databases available to anyone . . . for the purpose of immigration enforcement or investigation or enforcement of any federal program requiring registration of individuals on the basis of race, gender, sexual orientation, religion, immigration status, or national or ethnic origin."

An LEA may (a) share information "regarding an individual's citizenship or immigration status" and (b) respond to requests for "previous criminal arrests and convictions" as permitted under state law or when responding to a "lawful subpoena."

4. Objective: LEAs should not provide ICE or CBP with access to individuals in their custody for questioning for solely immigration enforcement purposes.

Vermont Criminal Justice Training Council Policy: "Unless ICE or Customs and Border Patrol (CBP) agents have a criminal warrant, or [Agency members] have a legitimate law enforcement purpose exclusive to the enforcement of immigration laws, ICE or CBP agents shall not be given access to individuals in [Agency's] custody."

Santa Clara, CA Board of Supervisor Resolution No. 2011-504 (2011): ICE "shall not be given access to individuals or be allowed to use County facilities" for investigative interviews or other purposes unless ICE has a judicial warrant or officials have a "legitimate law enforcement purpose" not related to immigration enforcement.

California Values Act, SB No. 54 *(Proposed)* (2016): LEAs may not "[g]iv[e] federal immigration authorities access to interview individuals in agency or department custody for immigration enforcement purposes."

5. **Objective: LEAs should protect the due process rights of persons as to whom federal immigration enforcement requests have been made, including providing those persons with appropriate notice.**

Connecticut Department of Correction, Administrative Directive 9.3 (2013): "If a determination has been made to detain the inmate, a copy of Immigration Detainer – Notice of Action DHS Form I-247, and the Notice of ICE Detainer form CN9309 shall be delivered to the inmate."

6. **Objective: Local agency resources should not be used to create a federal registry based on race, gender, sexual orientation, religion, ethnicity, or national origin.**

California Values Act, SB No. 54 *(Proposed)* (2016): State and local law enforcement shall not "[u]se agency or department moneys, facilities, property, equipment, or personnel to investigate, enforce, or assist in the investigation or enforcement of any federal program requiring registration of individuals on the basis of race, gender, sexual orientation, religion, or national or ethnic origin."

7. **Objective: Local agencies should limit collection of immigration-related information and ensure nondiscriminatory access to benefits and services.**

N.Y.C. Exec. Order 41 (2003): "Any service provided by a City agency shall be made available to all aliens who are otherwise eligible for such service to aliens. Every City agency shall encourage aliens to make use of those services provided by such agency for which aliens are not denied eligibility by law."

N.Y.C. Exec. Order 41 (2003): "A City officer or employee, other than law enforcement officers, shall not inquire about a person's immigration status unless: (1) Such person's immigration status is necessary for the determination of program, service or benefit eligibility or the provision of City services; or (2) Such officer or employee is required by law to inquire about such person's immigration status."

8. **Objective: LEAs should collect and report aggregate data containing no personal identifiers regarding their receipt of, and response to, ICE and CBP requests, for the sole purpose of monitoring the LEAs' compliance with all applicable laws.**

N.Y.C. Local Law Nos. 58-2014 and 59-2014 (N.Y.C. Admin Code § 9-131 and § 14-154) (2014): By October 15 each year, NYPD and NYC DOC "shall post a report on the department's website" that includes, among other things, the number of detainer

requests received, the number of persons held or transferred pursuant to those requests, and the number of requests not honored.

King County (Seattle), WA, Ordinance 17706 (2013): The detention department "shall prepare and transmit to the [county] council a quarterly report showing the number of detainers received and descriptive data," including the types of offenses of individuals being held, the date for release from custody, and the length of stay before the detainer was executed.

SUPPLEMENTAL MEMORANDUM TO GUIDANCE CONCERNING LOCAL AUTHORITY PARTICIPATION IN IMMIGRATION ENFORCEMENT AND MODEL SANCTUARY PROVISIONS

NEW YORK STATE ATTORNEY GENERAL
MARCH 12, 2017

This Memorandum supplements the ***Guidance Concerning Local Authority Participation in Immigration Enforcement and Model Sanctuary Provisions*** (the "Guidance") released by the Office of the New York State Attorney General (the "NYAG") on January 19, 2017.[1] The NYAG issued the Guidance to assist local governments and law enforcement agencies ("LEAs") in fulfilling our joint responsibilities to promote public safety and protect vulnerable communities. To that end, the Guidance describes the legal landscape governing local involvement in federal immigration enforcement, so that local officials and LEAs understand the extent to which they may decline to participate in those activities.

Within a week of releasing the Guidance, the President of the United States issued three executive orders relating to immigration and immigration enforcement.[2] The January 25 Executive Orders, as well as implementing memoranda issued by the U.S. Department of Homeland Security ("DHS") on February 20, 2017,[3] dramatically alter the United States'

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[1] The Guidance is available at https://ag.ny.gov/sites/default/files/guidance.concerning.local_.authority.particpation.in_.immigration.enforcement.1.19.17.pdf.

[2] On January 25, 2017, President Trump signed two executive orders:

(1) the "Enhancing Public Safety in the Interior of the United States" Executive Order (available at https://www.federalregister.gov/documents/2017/01/30/2017-02102/enhancing-public-safety-in-the-interior-of-the-united-states) (the "Interior Executive Order"); and

(2) the "Border Security and Immigration Enforcement Improvements" Executive Order (available at https://www.federalregister.gov/documents/2017/01/30/2017-02095/border-security-and-immigration-enforcement-improvements) (the "Border Security Executive Order," together with the Interior Executive Orders, the "January 25 Executive Orders").

On January 27, 2017, President Trump signed a third executive order, "Protecting the Nation from Foreign Terrorist Entry into the United States." Sections of this Order were temporarily enjoined by two federal courts. And this Order was replaced with an Executive Order with the same title on March 6, 2017. Neither the January 27 nor the March 6 executive orders are addressed in this supplemental memorandum.

[3] On February 20, 2017, DHS published two memoranda implementing the Interior Executive Order and the Border Security Executive Order, respectively. The first memorandum, "Enforcement of the Immigration Laws to Serve the National Interest" (the "DHS Interior Memorandum"), is available at https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf. The second memorandum, "Implementing the

immigration enforcement priorities. The Interior Executive Order and DHS Interior Memorandum state that the federal government seeks to vastly increase the number of deportations by, among other things, prioritizing the deportation of "removable aliens"[4] who have engaged in any criminal activity—even if the individual has not been charged or convicted of a crime.[5] In contrast, the prior federal administration's policy prioritized the removal of aliens who had committed serious criminal offenses.[6] Moreover, the Border Security Executive Order directs DHS to detain aliens apprehended for immigration violations to the extent permitted by law,[7] which will likely lead to a greater number of detentions. Both the January 25 Executive Orders and DHS Memoranda state that the federal government will seek increased cooperation from state and local governments in pursuit of these goals.[8]

Following issuance of the January 25 Executive Orders and DHS Memoranda, local governments and local LEAs have contacted the NYAG with questions regarding state and local involvement in federal immigration enforcement. The Executive Orders and DHS Memoranda also discuss certain topics that were addressed in the NYAG's earlier Guidance, including compliance with the federal information-sharing requirements in 8 U.S.C. § 1373 and agreements between federal immigration officials and LEAs regarding immigration enforcement. After closely reviewing the Executive Orders and DHS Memoranda, the NYAG has concluded that none of the provisions contained therein alter or invalidate the analysis and model provisions set forth in the Guidance. Localities still retain substantial discretion to limit their involvement in federal immigration enforcement. The NYAG issues this Supplemental Memorandum to assure localities that they may continue to consult the Guidance to keep our communities—including our immigrant neighbors—safe and secure.

President's Border Security and Immigration Enforcement Improvements Policies" (the "DHS Border Security Memorandum," together with the DHS Interior Memorandum, the "DHS Memoranda"), is available at https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf.

4 A removable alien is a noncitizen who is deportable under federal immigration laws.

5 *See* Interior Executive Order § 5. The Executive Order does not delineate how it will be determined—or by whom—that a removable alien has committed an act constituting a chargeable offense, where that individual has not been convicted or even charged with that offense.

6 Interior Executive Order § 5; DHS Interior Memorandum § A.

7 *See* Border Security Executive Order § 6.

8 *See* Interior Executive Order § 8; Border Interior Order § 10; DHS Interior Memorandum § B; DHS Border Memorandum § D.

PART I: KEY PROVISIONS IN THE EXECUTIVE ORDERS AND DHS MEMORANDA REGARDING LOCAL PARTICIPATION IN FEDERAL IMMIGRATION ENFORCEMENT

This Part summarizes and analyzes those provisions in the January 25, 2017 Interior and Border Security Executive Orders, and the implementing DHS Memoranda, that pertain to local government and LEA involvement in federal immigration enforcement. As discussed below (*infra* Part I.A.), the Interior Executive Order defines a "sanctuary jurisdiction" as a jurisdiction that willfully refuses to comply with the information-sharing requirements in 8 U.S.C. § 1373, and describes certain actions the federal government may seek to take against such jurisdictions. The remaining sections in Part I discuss other provisions in the Executive Orders that pertain to local participation in federal immigration enforcement, including LEA practices in response to Immigration and Customs Enforcement ("ICE") detainer requests, and voluntary agreements between federal and state or local LEAs regarding immigration enforcement.

A. Defining "Sanctuary Jurisdictions" as Jurisdictions that Violate 8 U.S.C. § 1373

As the Guidance noted, the term "sanctuary jurisdiction"—which has no legal definition—is used to generally describe state and local efforts to limit their participation in federal activities related to immigration enforcement. The Interior Executive Order specifically defines "sanctuary jurisdictions" as "jurisdictions that willfully refuse to comply with 8 U.S.C. § 1373," and states that it is the executive branch's policy to ensure that states and localities fully comply with 8 U.S.C. § 1373. To that end, the Order grants the U.S. Attorney General and the DHS Secretary authority to (1) designate localities as "sanctuary jurisdictions," and (2) ensure that jurisdictions so designated are ineligible for federal grants, "except as deemed necessary for law enforcement purposes."[9] The Interior Executive Order further directs the Attorney General to take "appropriate enforcement action" against any jurisdiction that either violates Section 1373 or "has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law."[10] Neither the Interior Executive Order nor the DHS Interior Memorandum lists the federal grants that the federal government may seek to withhold from "sanctuary jurisdictions"; indeed, the language of the Interior Executive Order suggests that <u>all</u> federal grants may be targeted. [11] As discussed more fully *infra* in Part II, however, there are limits on the federal government's powers to condition grant funding.

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[9] Interior Executive Order § 9. The fact that a jurisdiction refers to itself as a "sanctuary" has no bearing on whether that jurisdiction is in compliance with Section 1373 or other applicable federal laws. Therefore, such self-identification should not, in the NYAG's view, affect whether a jurisdiction is designated as a "sanctuary jurisdiction" as defined by the Interior Executive Order.

[10] *Id.* To date, at least four jurisdictions have challenged the constitutionality of this provision of the Interior Executive Order. *See City and Cnty. Of San Francisco v. Trump*, 17-cv-485 (N.D. Cal. Jan. 31, 2017); *Cnty of Santa Clara v. Trump*, 17-cv-574 (N.D. Cal. Feb. 3, 2017); *City of Chelsea, City of Lawrence v. Trump*, 17-cv-10214 (D. Mass. Feb. 8, 2017).

[11] *See* Interior Executive Order §9(a) (stating that "[sanctuary jurisdictions] are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the [DHS] Secretary," and §9(c) (directing the Director of the Office of Management and Budget

Section 1373 provides that state and local governments cannot prohibit employees or entities "from sending to, or receiving from, [federal immigration authorities] information regarding the citizenship or immigration status, lawful or unlawful, of any individual."[12] By its terms, Section 1373 relates only to sharing "information" regarding "immigration status." Nothing in Section 1373 restricts a locality from declining to share other information with ICE or Customs and Border Protection ("CBP"), such as non-public information about an individual's release, her next court date, or her address. Nor does Section 1373 place an affirmative obligation on local governments to collect information about an individual's immigration status.[13] The model provision at Part III.3 of the Guidance that addresses information sharing is consistent with the terms of 8 U.S.C. § 1373, and permits restrictions on sharing information that are not covered by that federal statute.

B. Reinstating the Secure Communities Program and the Issuance of ICE Detainer Requests

The Interior Executive Order and DHS Interior Memorandum direct DHS to immediately terminate the "Priority Enforcement Program" ("PEP") and reinstate the "Secure Communities Program," which was in effect from 2007-2014.[14] Under Secure Communities, ICE regularly issued detainer requests (sometimes referred to as "immigration holds") for individuals arrested by state and local LEAs. The detainer requests asked LEAs to hold individuals for up to 48 hours beyond their scheduled release date in order to permit ICE to transfer those individuals to federal custody for deportation proceedings. Secure Communities was widely viewed as having eroded trust between law enforcement and immigrant communities.[15] In addition, multiple federal courts have held that state and local LEAs violated the Fourth Amendment to the U.S. Constitution by detaining certain individuals pursuant to federal detainer requests issued under the Secure Communities Program.[16]

("OMB") to provide information "on all Federal grant money that currently is received by any sanctuary jurisdiction.") The language of the Order does not specify to whom the OMB Director must supply the information.

[12] 8 U.S.C. § 1373.

[13] Section 1373 contains no provisions requiring local governments to comply with detainer requests or to enter into 287(g) agreements with the federal government. *See infra* Part II.B; *see also* Guidance at Part II.D.1.

[14] Interior Executive Order § 10; DHS Interior Memorandum § B.

[15] *See, e.g.*, Kate Linthicum, *Obama ends Secure Communities program as part of immigration action*, *L.A. Times*, November 21, 2014, http://www.latimes.com/local/california/la-me-1121-immigration-justice-20141121-story.html (last visited March 6, 2017).

[16] *See* Memorandum from Jeh Charles Johnson, Sec'y of DHS, (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf.

In 2014, DHS terminated Secure Communities and adopted PEP, which prioritized the transfer of immigrants in local or state custody who had been convicted of specifically enumerated crimes.[17] Under PEP, ICE was instructed to request notification of when an individual in state or local custody was to be released, and to only seek detainers of individuals in specific, limited circumstances.[18] When ICE opted to issue a detainer request, it was required to specify either that the target individual was subject to a final order of removal or that there was probable cause to find that the subject was a removable alien.[19]

As described in detail at Part II.C of the Guidance, LEAs that comply with detainer requests must also comply with the Fourth Amendment to the U.S. Constitution and the similar provision in Article I, § 12 of the New York State Constitution. Thus, absent a judicial warrant, an LEA may only hold an individual in custody if the LEA officer has probable cause to believe that the person has committed a crime. LEAs may be found liable for damages if, in response to an ICE or CBP detainer, they hold an individual past his or her normal release date under circumstances that violate the Fourth Amendment or New York State Constitution Article I, § 12. The Executive Orders do not alter these constitutional requirements.

As a result of this shift back to Secure Communities, LEAs will likely see an increase in ICE detainer requests.[20] Nonetheless, as discussed in Part II.C of the Guidance, LEAs have the authority to decline a request by ICE or CBP to detain, transfer, or allow access to an individual in their custody for federal immigration enforcement purposes absent a judicial warrant.

To achieve the dual goals of promoting public safety while complying with constitutional requirements, the Guidance provides model language that LEAs may use to limit their compliance with ICE or CBP detainers to circumstances in which (1) ICE or CBP presents a judicial warrant or (2) there is probable cause to believe that (i) the individual has illegally re-entered the country and has been previously convicted of certain serious criminal offenses, or (ii) the subject has engaged in terrorist activity.[21]

C. Federal Reporting Requirements Regarding Jurisdictions That Limit Their Participation in Immigration Enforcement

The Interior Executive Order also requires certain federal agencies to report information about "sanctuary jurisdictions." Specifically, the Order states that "[t]o better inform the public regarding the public safety threats associated with sanctuary jurisdictions, the [DHS] Secretary

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17 *Id.* § A.

18 *See* Priority Enhancement Program (archived content), https://www.ice.gov/pep (last visited March 6, 2017).

19 *Id*.

20 DHS intends to replace its current notification and detainer forms (i.e., forms I-247D, I-247, and I-247X). *See* DHS Interior Memorandum § B.

21 *See* Guidance at Part III.2.

shall utilize the Declined Detainer Outcome Report or its equivalent" and publicize a list of criminal actions committed by immigrants and of jurisdictions that ignored or failed to honor detainer requests with respect to those immigrants.[22] The Order further instructs the Director of the federal Office of Management and Budget ("OMB") to "obtain and provide relevant and responsive information on all Federal grant money that is currently received by any sanctuary jurisdiction."[23]

D. Directing DHS to Enter into 287(g) Agreements

The January 25 Executive Orders direct DHS to enter into voluntary agreements with state and local officials under Section 287(g) of the Immigration and Nationality Act, which would permit designated state and local law enforcement officers to enforce certain aspects of federal immigration law "at the expense of the State or political subdivision and to the extent consistent with State and local law."[24] Section 287(g) authorizes such agreements provided that the officers receive appropriate training and are supervised by ICE officers.[25] Although federal law provides that the enforcement activities of state and local governments will be "at the expense of the State or political subdivision,"[26] it appears that ICE sometimes has agreed to cover certain, limited expenses for equipment, training, and legal representation.[27] According to ICE's published materials, ICE currently has 287(g) agreements with 32 LEAs in 16 states; none of these agencies are located in New York.[28]

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22 Interior Executive Order § 9.

23 *Id.* As noted in footnote 11, *supra*, the Order does not specify to whom the OMB Director is to provide this information.

24 Specifically, 8 U.S.C. § 1357(g)(1) provides that:

> Notwithstanding section 1342 of Title 31, the Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.

25 *Id*.

26 *Id*.

27 *See* https://www.ice.gov/factsheets/287g#wcm-survey-target-id (last visited March 6, 2017).

28 DHS Interior Memorandum § B.

As the Executive Orders and DHS Memoranda acknowledge, cooperation agreements under Section 287(g) are strictly voluntary.[29] Refusing to enter into such an agreement should not, therefore, jeopardize the receipt of federal grants. (*See infra* Part II.)

E. Excluding Noncitizens and Other Immigrants from Privacy Act Protections

Section 14 of the Interior Executive Order directs federal agencies to "ensure that their privacy policies exclude persons who are not U.S. citizens or lawful permanent residents from the protections of the Privacy Act regarding personally identifiable information."[30] Under the Privacy Act, 5 U.S.C. § 552a, a federal agency must protect personally identifiable information that is collected, maintained, and used by a federal agency. By its terms, the Privacy Act only applies to U.S. citizens and legal permanent residents. However, in 2009 DHS issued a Privacy Policy Guidance Memorandum declaring that, as a matter of policy, DHS would apply the Privacy Act to all personally identifiable information, regardless of the subject's immigration status.[31] The DHS Interior Memorandum explicitly rescinds the 2009 DHS policy directive.[32]

Notably, this policy shift pertains only to the Privacy Act which, in turn, applies only to federal agencies. The Interior Executive Order's directive does not affect the continued obligation of state and local governments to comply with other federal privacy requirements, such as those included in the Family Educational Rights and Privacy Act (FERPA), the Health Insurance Portability and Accountability Act (HIPAA), and the Federal Drug and Alcohol Confidentiality Laws and Regulations, as well as any confidentiality provisions in state and local laws and regulations.[33]

PART II: LIMITS ON THE FEDERAL GOVERNMENT'S POWER TO CONDITION FEDERAL GRANTS

States and localities are understandably concerned about the possible loss of federal funding if the U.S. Attorney General finds that they have violated 8 U.S.C. § 1373, or have "in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law."[34] Indeed, the federal government provides New York State and its localities with numerous grants in areas ranging from education and health care to social services and criminal justice. Each grant is governed by different statutory and regulatory schemes. The requirements and provisions of

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[29] 8 U.S.C. § 1357(g) ("Nothing in this subsection shall be construed to require any State or political subdivision of a State to enter into an agreement with the Attorney General under this subsection.").

[30] Interior Executive Order § 14.

[31] DHS Interior Memorandum § G.

[32] *Id.*

[33] *See, e.g.* Public Officers Law, Article 6-A, sections 91-99 (New York's "Personal Privacy Protection Law").

[34] *See* Interior Executive Order § 9. Some jurisdictions already have filed lawsuits challenging this provision of the Interior Executive Order, arguing that it is unconstitutionally vague in violation of the Due Process Clause of the Fifth Amendment to the U.S. Constitution. *See supra* n. 10.

those schemes may restrict the federal government's ability to withhold funding and thus should be closely and individually analyzed.

Moreover, although the federal government has wide latitude to condition its funding to states and localities on their fulfillment of certain conditions, the U.S. Supreme Court has established some limitations on that authority. First, the federal government cannot use its spending power "to induce the States to engage in activities that would themselves be unconstitutional"; for example, it cannot condition a grant of federal funds on invidiously discriminatory state action.[35] Second, any funding conditions must be reasonably related to the federal interest in the program at issue.[36] Third, the condition must be stated "unambiguously" so that the recipient can "voluntarily and knowingly" decide whether to accept those funds and the associated requirements.[37] And finally, the amount of federal funding that a noncomplying State would forfeit cannot be so large that the State would be left with "no real option but to acquiesce" and accept the condition.[38] Depending on the amount and nature of any federal funding cut, states and localities may be able to challenge the defunding on one or more of these grounds.

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[35] *South Dakota v. Dole*, 483 U.S. 203, 210 (1987).

[36] In *Dole*, the Supreme Court held that Congress could permissibly withhold 5% of certain highway funds from states that failed to raise their drinking age to 21 because raising the drinking age was "directly related to one of the main purposes for which highway funds are expended," namely "safe interstate travel." *Id*. at 208-209.

[37] *See, e.g., Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

[38] *See, e.g., Nat'l Fed. of Ind. Bus. v. Sebelius*, 132 S. Ct. 2566, 2604 (2012); *Dole*, 483 U.S. at 209.

State of New York

Executive Chamber

No. 170

EXECUTIVE ORDER

STATE POLICY CONCERNING IMMIGRANT ACCESS TO STATE SERVICES

WHEREAS, New York State will remain true to the ideals that founded this country, and will continue to welcome immigrants as a source of energy, and celebrate them as a source of revitalization for our State; and

WHEREAS, New York State's residents make up one of the nation's most diverse communities, as over 4.3 million immigrants reside within the State and over twenty percent of the State's population is foreign-born; and

WHEREAS, immigrants residing in New York State are an essential part of the economic fabric of this State, as over 29% of all business owners in New York are foreign-born, such businesses generate millions of dollars in total net income, and the combined purchasing power of immigrant communities exceeds $165 billion dollars; and

WHEREAS, the reporting of unlawful activity by immigrant witnesses and victims is critical to strengthening ties between immigrants and law enforcement, reducing crime, and enhancing the State's ability to protect the safety of all of its residents; and

WHEREAS, the New York State Constitution and the New York State Human Rights Law protect individuals from discrimination on the basis of national origin in the areas of education, benefits, employment, housing, and public accommodation, and the State is committed to enforcing those protections to the fullest extent of the law; and

WHEREAS, State government has a responsibility to ensure that services are provided equally, and consistent with civil rights laws, to all individuals eligible to receive them; and

WHEREAS, access to State services is critical to the vitality and well-being of immigrant communities and their continued integration into the State's economic, civil, and cultural life; and

WHEREAS, providing State services to immigrant communities is necessary to meet the needs of the State's diverse population, to maintain public confidence in State government and its agencies, and to comply with State and Federal civil rights laws; and

NOW, THEREFORE, I, ANDREW M. CUOMO, Governor of the State of New York, by virtue of the authority vested in me by the Constitution and laws of the State of New York, do hereby order as follows:

A. Definitions

1. "State entity" shall mean (i) all agencies and departments over which the Governor has executive authority, and (ii) all public benefit corporations, public authorities, boards, and commissions, for which the Governor appoints the Chair, the Chief Executive, or the majority of Board members, except for the Port Authority of New York and New Jersey.

2. "Alien" shall mean any person who is not a citizen or national of the United States.

3. "Illegal activity" shall mean any unlawful activity that constitutes a crime under state or federal law. However, an individual's status as an undocumented alien does not constitute unlawful activity.

B. Agency and Authority Responsibilities Respecting the Privacy of Personal Information

1. No State officers or employees, other than law enforcement officers as provided in B.3 *infra*, shall inquire about an individual's immigration status unless:

   a. The status of such individual is necessary to determine his or her eligibility for a program, benefit, or the provision of a service; or

   b. The State officer or employee is required by law to inquire about such individual's status.

2. No State officers or employees, including law enforcement officers, shall disclose information to federal immigration authorities for the purpose of federal civil immigration enforcement, unless required by law. Notwithstanding such prohibition, this Order does not prohibit, or in any way restrict, any state employee from sending to, or receiving from, federal immigration authorities, information regarding the citizenship or immigration status, lawful or unlawful, of any individual, as required by law.

3. No law enforcement officers shall inquire about an individual's immigration status unless investigating such individual's illegal activity, provided however that such inquiry is relevant to the illegal activity under investigation. Nothing in this section shall restrict law enforcement officers from seeking documents for the purpose of identification following arrest.

   a. This prohibition against inquiring into status includes, but is not limited to, when an individual approaches a law enforcement officer seeking assistance, is the victim of a crime, or is witness to a crime.

   b. Law enforcement officers may not use resources, equipment or personnel for the purpose of detecting and apprehending any individual suspected or wanted only for violating a civil immigration offense. Law enforcement officers have no authority to take any police action solely because the person is an undocumented alien. This includes identifying, questioning, detaining, or demanding to inspect federal immigration documents.

GIVEN under my hand and the Privy Seal of the State in the City of Albany this fifteenth day of September in the year two thousand seventeen.

BY THE GOVERNOR

Secretary to the Governor

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MCGREGOR SCOTT
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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

THE UNITED STATES OF AMERICA,

Plaintiff,

v.

THE STATE OF CALIFORNIA; EDMUND GERALD BROWN JR., Governor of California, in his Official Capacity; and XAVIER BECERRA, Attorney General of California, in his Official Capacity,

Defendants.

No. 18-264

COMPLAINT

Plaintiff, the United States of America, by and through its undersigned counsel, brings this civil action for declaratory and injunctive relief, and alleges as follows:

PRELIMINARY STATEMENT

1. In this action, the United States seeks a declaration invalidating and preliminarily and permanently enjoining the enforcement of certain provisions of California law. These provisions are preempted by federal law and impermissibly discriminate against the United States, and therefore violate the Supremacy Clause of the United States Constitution.

2. The United States has undoubted, preeminent authority to regulate immigration matters. This authority derives from the United States Constitution and numerous acts of Congress. California has no authority to enforce laws that obstruct or otherwise conflict with, or discriminate against, federal immigration enforcement efforts.

3. This lawsuit challenges three California statutes that reflect a deliberate effort by California to obstruct the United States' enforcement of federal immigration law, to regulate private entities that seek to cooperate with federal authorities consistent with their obligations under federal law, and to impede consultation and communication between federal and state law enforcement officials.

4. The first statute, the "Immigrant Worker Protection Act," Assembly Bill 450 ("AB 450"), prohibits private employers in California from voluntarily cooperating with federal officials who seek information relevant to immigration enforcement that occurs in places of employment.

5. The second statute, Assembly Bill 103 ("AB 103"), creates an inspection and review scheme that requires the Attorney General of California to investigate the immigration enforcement efforts of federal agents.

6. The third statute, Senate Bill 54 ("SB 54"), which includes the "California Values Act,"

limits the ability of state and local law enforcement officers to provide the United States with basic information about individuals who are in their custody and are subject to federal immigration custody, or to transfer such individuals to federal immigration custody.

7. The provisions of state law at issue have the purpose and effect of making it more difficult for federal immigration officers to carry out their responsibilities in California. The Supremacy Clause does not allow California to obstruct the United States' ability to enforce laws that Congress has enacted or to take actions entrusted to it by the Constitution. Accordingly, the provisions at issue here are invalid.

JURISDICTION AND VENUE

8. The Court has jurisdiction over this action under 28 U.S.C. §§ 1331 and 1345.

9. Venue is proper in this jurisdiction under 28 U.S.C. § 1391(b) because Defendants reside within the Eastern District of California and because a substantial part of the acts or omissions giving rise to this Complaint arose from events occurring within this judicial district.

10. The Court has the authority to provide the relief requested under the Supremacy Clause, U.S. Const. art. VI, cl. 2, as well as 28 U.S.C. §§ 1651, 2201, and 2202, and its inherent equitable powers.

PARTIES

11. Plaintiff, the United States, regulates immigration under its constitutional and statutory authorities, and it enforces the immigration laws through its Executive agencies, including the Departments of Justice, State, and Labor, and the Department of Homeland Security (DHS) including its component agencies U.S. Immigration and Customs

Enforcement (ICE), and U.S. Customs and Border Protection (CBP).

12. Defendant State of California is a state of the United States.

13. Defendant Edmund Gerald Brown Jr. is the Governor of the State of California and is being sued in his official capacity.

14. Defendant Xavier Becerra is Attorney General for the State of California and is being sued in his official capacity.

FEDERAL IMMIGRATION LAW

15. The Constitution affords Congress the power to "establish an uniform Rule of Naturalization," U.S. Const., art. I § 8, cl. 4, and to "regulate Commerce with foreign Nations," U.S. Const., art. I § 8, cl. 3, and affords the President of the United States the authority to "take Care that the Laws be faithfully executed." U.S. Const., art. II § 3.

16. The Supremacy Clause of the Constitution mandates that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2. Thus, a state enactment is invalid if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), or if it "discriminate[s] against the United States or those with whom it deals," *South Carolina v. Baker*, 485 U.S. 505, 523 (1988).

17. Based on its enumerated powers and its constitutional power as a sovereign to control and conduct relations with foreign nations, the United States has broad authority to establish immigration laws, the execution of which the States cannot obstruct or discriminate against. *See Arizona v. United States*, 567 U.S. 387, 394-95 (2012); *accord North*

Dakota v. United States, 495 U.S. 423, 435 (1990) (plurality); *id.* at 444-47 (Scalia, J., concurring).

18. Congress has exercised its authority to make laws governing the entry, presence, status, and removal of aliens within the United States by enacting various provisions of the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.*, the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat 3359, codified at 8 U.S.C. § 1324a *et seq.*, and other laws regulating immigration.

19. These laws codify the Executive Branch's authority to inspect, investigate, arrest, detain, and remove aliens who are suspected of being, or found to be, unlawfully in the United States. *See* 8 U.S.C. §§ 1182, 1225, 1226, 1227, 1228, 1231, 1357.

20. Congress has also codified basic principles of cooperation and comity between state and local authorities and the United States. For example, federal law contemplates that removable aliens in state custody who have been convicted of state or local offenses will generally serve their state or local criminal sentences before being subject to removal, but that they will be taken into federal custody upon the expiration of their state prison terms. *See id.* §§ 1226(c), 1231(a)(1)(B)(iii), (a)(4).

21. "Consultation between federal and state officials is an important feature of the immigration system." *Arizona*, 567 U.S. at 411. Congress has therefore directed that a federal, state, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, DHS "information regarding the citizenship or immigration status of an individual." 8 U.S.C. § 1373(a); *see* 8 U.S.C. § 1644 (same); *see also* 8 U.S.C. § 1357(g)(10)(A) (providing for state and local "communicat[ion] with [DHS] regarding the immigration status of any

individual, including reporting knowledge that a particular alien is not lawfully present in the United States"). Congress also authorized states and localities "to cooperate with the [Secretary] in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." *Id.* § 1357(g)(10)(B).

22. Federal law also explicitly recognizes the United States' authority to "arrange for appropriate places of detention for aliens detained pending removal or a decision on removal," including the lease or rental of state, local, and private facilities. *See* 8 U.S.C. § 1231(g); *accord* 8 U.S.C. § 1103(a)(11).

23. Federal regulation provides that "[n]o person, including any state or local government entity or any privately operated detention facility, that houses, maintains, provides services to, or otherwise holds any detainee on behalf of [DHS] (whether by contract or otherwise), and no other person who by virtue of any official or contractual relationship with such person obtains information relating to any detainee, shall disclose or otherwise permit to be made public the name of, or other information relating to, such detainee. Such information shall be under the control of [DHS] and shall be subject to public disclosure only pursuant to the provisions of applicable federal laws, regulations and executive orders." 8 C.F.R. § 236.6.

24. Congress, through IRCA, has also enacted a "comprehensive framework for combating the employment of illegal aliens." *Arizona*, 567 U.S. at 404. IRCA makes it illegal for employers to knowingly hire, recruit, refer, or continue to employ aliens without appropriate work authorization. *See* 8 U.S.C. § 1324a(a)(1)(A), (a)(2). It also requires every employer to verify the employment authorization status of prospective employees. *See id.* § 1324a(a)(1)(B), (b). DHS enforces these requirements through criminal

penalties and an escalating series of civil penalties tied to the number of times an employer has violated the provisions. *See* 8 U.S.C. §§ 1324a(e)(4), (f).

25. As a means of enforcing IRCA's criminal and civil penalties, Congress established a nationally uniform inspection process whereby employers are required to retain documentary evidence of authorized employment of aliens, and to permit federal investigative officers to inspect such documents. *See* 8 U.S.C. § 1324a(b), (e)(2)(A).

26. DHS, through ICE and CBP, performs a significant portion of its law enforcement activities in California. In Fiscal Year 2017, ICE's Enforcement and Removal Operations (ERO) apprehended 20,201 aliens in California alone, or roughly 14% of the aliens apprehended nationwide. Thus far in 2018, ICE ERO has apprehended 8,588 aliens in California, or roughly 14% of the aliens apprehended nationwide. Of those aliens apprehended nationwide in 2016, 2017, and thus far in 2018, 92%, 90%, and 87% respectively, were criminal aliens. In Fiscal Year 2017, ICE ERO booked a total of 323,591 aliens into custody, 41,880 of whom were detained in California. And CBP is responsible for enforcing the immigration laws at ports of entry and areas near the border in California, including apprehending recent entrants with criminal convictions or who are national security concerns, and patrolling the border for narcotics.

CALIFORNIA PROVISIONS

Restrictions on Cooperation with Workplace Immigration Enforcement (AB 450)

27. On October 5, 2017, Governor Brown signed into law the "Immigrant Worker Protection Act," Assembly Bill 450 (AB 450), effective January 1, 2018 (Exhibit 1). Through AB 450, California regulates how private employers in California must respond to federal efforts to ensure compliance with federal immigration laws through investigations in

places of employment.

28. AB 450 added Section 7285.1(a) of the California Government Code, which provides that an employer or its agent "shall not provide voluntary consent to an immigration enforcement agent to enter any nonpublic areas of a place of labor," unless "the immigration enforcement agent provides a judicial warrant" or consent is "otherwise required by federal law."

29. Section 7285.2(a)(1) similarly prohibits an employer or its agent from "provid[ing] voluntary consent to an immigration enforcement agent to access, review, or obtain the employer's employee records without a subpoena or judicial warrant."

30. Section 7285.2(a)(2) contains an exception for certain documents for which the United States has provided a "Notice of Inspection," Cal. Gov't Code § 7285.2(a)(2). AB 450 added provisions to the California Labor Code that establish new requirements employers must satisfy *before* allowing ICE to conduct the inspection process directed by federal law. AB 450 requires employers to notify employees and their authorized representatives of upcoming inspections of employment records "within 72 hours of receiving notice of the inspection." Cal. Lab. Code § 90.2(a)(1). It also requires employers to provide employees and their authorized representatives, within 72 hours, with copies of written immigration agency notices providing results of inspections. *Id.* § 90.2(b)(1).

31. All these provisions are subject to a schedule of civil penalties "of two thousand dollars ($2,000) up to five thousand dollars ($5,000) for a first violation and five thousand dollars ($5,000) up to ten thousand dollars ($10,000) for each subsequent violation." Cal. Gov't Code §§ 7285.1(b), 7285.2(b); Cal. Lab. Code § 90.2(c).

32. AB 450 added Section 1019.2(a) of the California Labor Code, which provides that an

employer or its agent "shall not reverify the employment eligibility of a current employee at a time or in a manner not required by Section 1324a(b) of Title 8 of the United States Code." Violators are subject to "a civil penalty of up to ten thousand dollars ($10,000)." Cal. Lab. Code § 1019.2(b).

33. Upon information and belief, California law does not prohibit employers from voluntarily complying with requests from any other federal or California entities for information or inspection, or compel employers to provide notice to their employees of other efforts to collect information.

34. In Fiscal Year 2017, ICE conducted approximately 1,300 worksite inspections authorized by IRCA across the country, including approximately 230 in California. If conditions are appropriate, any of those investigations could lead to an inspection with the consent of the employer, and often employers are very willing to provide consent in order to alleviate and address concerns that arise during the inspection process. In addition such inspections with the consent of the employer are critical to investigating cross border smuggling of people, narcotics, and terrorism.

35. These provisions, individually and collectively, have the purpose and effect of interfering with the enforcement of the INA and IRCA's prohibition on working without authorization. California has no lawful interest in protecting unauthorized workers from detection or in shielding employers who have violated federal immigration law from penalty. These provisions, as applied to private employers, violate the Supremacy Clause by, among other things, constituting an obstacle to the United States' enforcement of the immigration laws and discriminating against federal immigration enforcement.

Inspection and Review of Immigration Detention Facilities (AB 103)

36. Under longstanding California law, "local detention facilities" are subject to biennial inspections concerning health and safety, fire suppression preplanning, compliance with training and funding requirements, and the types and availability of visitation. Cal. Penal Code § 6031.1(a). The law defines "local detention facilities" as any city, county, or regional facility in which individuals are confined for more than 24 hours, and includes private facilities (though it excludes certain facilities for parolees, treatment and restitution facilities, community correctional centers, and work furlough programs). *Id.* § 6031.4.

37. On June 27, 2017, California enacted Assembly Bill 103 (AB 103) (Exhibit 2). Section 12 of AB 103 added Section 12532 to the California Government Code.

38. Rather than subject facilities housing civil immigration detainees to the inspection scheme deemed sufficient for other detention facilities, the statute imposes a new set of requirements specific to facilities housing immigration detainees. In particular, Section 12532(a) requires the California Attorney General or his designee "to engage in reviews of county, local, or private locked detention facilities in which noncitizens are being housed or detained for purposes of civil immigration proceedings in California."

39. The statute is not limited to an inspection of facilities. The law also requires the California Attorney General or his designee to examine the "due process provided" to civil immigration detainees, and "the circumstances around their apprehension and transfer to the facility." Cal. Gov't Code § 12532(b). Section 12532(c) instructs that the California Attorney General or his designee "shall be provided all necessary access for the observations necessary to effectuate reviews required pursuant to this section, including, but not limited to, access to detainees, officials, personnel, and records."

40. DHS, through ICE, has entered into contracts for detention services with private entities, intergovernmental services agreements (IGSAs) with county, city, or local government entities in California, and intergovernmental agreements (IGAs) with the U.S. Marshals service that provide ICE with guaranteed housing for ICE detainees as needed. ICE currently has twenty active contracts, IGSAs or IGAs, in California and regularly uses nine detention facilities in California to house civil immigration detainees in ICE custody.

41. Information obtained or developed as a result of an agreement with the detention facility are federal records under the control of ICE for purposes of disclosure and are subject to disclosure only pursuant to applicable federal information laws, regulations, and policies, including but not limited to the Freedom of Information Act, 5 U.S.C. § 552 *et seq.*, and 8 C.F.R. § 236.6.

42. Three of these facilities, the Adelanto Correctional Facility, the Imperial Regional Detention Facility, and the Mesa Verde Detention Facility are dedicated facilities that exclusively house immigration detainees. In Fiscal Year 2018, these three facilities have had an average daily population of 1,685, 680, and 384 detainees pending the outcome of their administrative immigration cases, respectively.

43. The remaining facilities with IGSAs house both immigration detainees and local detainees and are used on an as-needed basis. In Fiscal Year 2018, average daily detainee populations at the as-needed facilities have ranged between a high of 956 at Otay Mesa Detention and a low of 171 at Rio Cosumnes Correctional Center.

44. DHS, through ICE, houses civil immigration detainees at the Otay Mesa Detention Center in California, a private detention facility that CoreCivic owns and operates. Otay

Mesa has an average daily population of around 1,000 detainees awaiting removal or a decision on removal.

45. Upon information and belief, on November 16, 2017, Defendant Becerra initiated via letter a request to inspect various ICE detention facilities, including Imperial, Adelanto, Mesa Verde, the Theo Lacy Facility, the James A. Musick Facility, Yuba County Jail, Rio Cosumnes Correctional Center, Contra Costa West County Detention Facility, and Otay Mesa, as well as a request to inspect DHS documents concerning aliens detained in these locations.

46. Upon information and belief, Yuba, Rio Cosumnes, Contra Costa, Theo Lacy, and James A. Musick, have been inspected since the law's passage

47. On January 24, 2018, Defendant Becerra via letter informed Imperial, Adelanto, Mesa Verde, and Otay Mesa that he intended to inspect those facilities on either February 26, 2018 or March 5, 2018, and required access to documents and other material subject to ICE control and deemed privileged under federal law and regulation. *See* 8 C.F.R. § 236.6.

48. Upon information and belief, California does not require any local detention facility to comply with section 12532's heightened inspections regime when it houses detainees for other federal or California entities. AB 103's requirements apply only when local detention facilities house federal civil immigration detainees.

49. AB 103 thus requires the California Attorney General to investigate the law enforcement efforts of federal agents engaged in apprehending and transferring aliens, to assess the "due process" provided to those aliens and the "circumstances around their apprehension and transfer to the facility," and to assess the law enforcement decisions of personnel

under contract to the United States, as well as records of unspecified scope. The statute thus commands an improper, significant intrusion into federal enforcement of the immigration laws. California has no lawful interest in investigating federal law enforcement efforts. These provisions violate the Supremacy Clause by, among other things, constituting an obstacle to the United States' enforcement of the immigration laws and discriminating against the United States.

Restrictions on State and Local Cooperation with Federal Officials (SB 54)

50. On October 5, 2017, the Governor signed into law the Senate Bill 54 (SB 54), which includes the "California Values Act," effective January 1, 2018 (Exhibit 3).

51. SB 54 limits state and local cooperation with federal immigration enforcement in a number of ways. New Section 7284.6 prohibits state and local law enforcement officials, other than employees of the California Department of Corrections, from, among other things: "[p]roviding information regarding a person's release date or responding to requests for notification by providing release dates or other information," Cal Gov't Code § 7284.6(a)(1)(C); providing "personal information," including (but not limited to) an individual's home address or work address, *id.* § 7284.6(a)(1)(D); and "[t]ransfer[ring] an individual to immigration authorities," *id.* § 7284.6(a)(4).

52. These provisions contain limited exceptions. State and local law enforcement may share with the United States "information regarding a person's release date" or respond "to requests for notification by providing release dates or other information," but only where an individual subject to such information sharing has been convicted of a limited subset crimes, or where the information is available to the public. Cal. Gov't Code §§ 7282.5(a), 7284.6(a)(1)(C). Personal information also may be shared only if it is available to the

public. *Id.* § 7284.6(a)(1)(D). State and local law enforcement agencies may "[t]ransfer an individual to immigration authorities" only if the United States presents a "judicial warrant or judicial probable cause determination," or the individual in question has been convicted of one of a limited set of enumerated felonies or other serious crimes. Cal. Gov't Code §§ 7284.6(a)(4), 7282.5(a).

53. The limited subset of criminal violations does not match federal law governing what may serve as the predicate for inadmissibility or removability, including listing a set of crimes more narrow than those that render an alien removable. *See* 8 U.S.C. §§ 1182(a)(2), 1227(a)(2). And it does not match the set of criminal offenses that require the federal government to detain such aliens upon their release from state or local custody. *Id.* § 1226(c).

54. Upon information and belief, California law does not impose these restrictions on other forms of information sharing on other topics, nor does it restrict transfers of individuals to other law enforcement agencies in this way.

55. These provisions impermissibly prohibit even the most basic cooperation with federal officials. As noted above, federal law contemplates that criminal aliens in state custody who may be subject to removal will complete their state or local sentences first before being detained by the United States, but that federal immigration detention for immigration proceedings or for removal will begin upon the alien's release from state custody. 8 U.S.C. § 1226(c); § 1231(a)(4). Additionally, federal law contemplates that DHS will be able to inspect all applicants for admission, and take all appropriate action against those found to be inadmissible to the United States, even those that may have been transferred to the custody of state and local law enforcement pending such a state

and local prosecution. *See* 8 U.S.C. §§ 1182, 1225(b)(2); 8 C.F.R. § 235.2. And, to facilitate coordination between state and local officials and the United States, Congress expressly prohibited any federal, state, or local government entity or official from prohibiting, or in any way restricting, any government entity or official from sending to, or receiving from, DHS "information regarding the citizenship or immigration status of an individual." 8 U.S.C. § 1373(a); *see also* 8 U.S.C. § 1644. Although SB 54 purports to be consistent with section 1373, *see* Cal. Gov't Code § 7284.6(e), sections 7284.6(a)(1)(C) and (D) explicitly forbid the sharing of information covered by 8 U.S.C. § 1373.

56. The transfer restriction additionally requires that the United States present a "judicial warrant or judicial probable cause determination" before the state or locality may transfer an alien to DHS for appropriate immigration enforcement action. This provision also conflicts with federal law, which establishes a system of civil administrative warrants as the basis for immigration arrest and removal, and does not require or contemplate use of a judicial warrant for civil immigration enforcement. *See* 8 U.S.C. § 1226(a), 1231(a).

57. Upon information and belief, since January 1, 2018, law enforcement agencies in California, as defined by SB 54, will not communicate to DHS the release date or home address of aliens DHS has reason to believe are removable from the United States, or transfer such aliens to DHS custody, even where DHS presents a Congressionally-authorized civil administrative warrant of arrest or removal, *see* 8 U.S.C. § 1226(a); 1231(a), or has transferred those aliens to local law enforcement in the first instance to permit California or its subdivisions to criminally prosecute them for a state crime.

58. By restricting basic information sharing and by barring the transfer to DHS of aliens in

state or local custody upon their release through the means provided for by federal law, SB 54 requires federal immigration officers to either engage in difficult and dangerous efforts to re-arrest aliens who were previously in state custody, endangering immigration officers, the alien at issue, and others who may be nearby, or to determine that it is not appropriate to transfer an alien to state or local custody in the first place, in order to comply with their mission to enforce the immigration laws. California has no lawful interest in assisting removable aliens to evade federal law enforcement.

59. These provisions violate the Supremacy Clause by, among other things, constituting an obstacle to the United States' enforcement of the immigration laws and discriminating against federal immigration enforcement, as well as (with respect to the information-sharing restrictions) expressly violating 8 U.S.C. § 1373(a).

CLAIM FOR RELIEF

COUNT ONE – Restrictions on Cooperation with Workplace Immigration Enforcement

60. Plaintiff hereby incorporates paragraphs 1 through 26, and 27 through 35 of the Complaint as if fully stated herein.

61. Sections 7285.1, and 7285.2 of the California Government Code and Sections 90.2 and 1019.2 of the California Labor Code, violate the Supremacy Clause as applied to private employers, and are invalid.

COUNT TWO – Inspection and Review of Detention Facilities

62. Plaintiff hereby incorporates paragraphs 1 through 26, and 36 through 49 of the Complaint as if fully stated herein.

63. Section 12532 of the California Government Code violates the Supremacy Clause, and is invalid.

COUNT THREE – Restrictions on State and Local Cooperation

64. Plaintiff hereby incorporates paragraphs 1 through 26, and 50 through 59 of the Complaint as if fully stated herein.

65. Sections 7284.6(a)(1)(C) & (D) and 7284.6(a)(4) of the California Government Code violate the Supremacy Clause and 8 U.S.C. § 1373(a), and are invalid.

PRAYER FOR RELIEF

WHEREFORE, the United States respectfully requests the following relief:

1. That this Court enter a judgment declaring that Sections 7285.1 and 7285.2 of the California Government Code, and Sections 90.2 and 1019.2 of the California Labor Code violate the Supremacy Clause as applied to private employers and are therefore invalid;
2. That this Court enter a judgment declaring that Section 12532 of the California Government Code violates the Supremacy Clause and is therefore invalid;
3. That this Court enter a judgment declaring that Sections 7284.6(a)(1)(C) & (D) and 7284.6(a)(4) of the California Government Code violate the Supremacy Clause and are therefore invalid;
4. That this Court issue preliminary and permanent injunctions that prohibit Defendants as well as their successors, agents, and employees, from enforcing against private employers sections 7285.1 and 7285.2 of the California Government Code, and Sections 90.2 and 1019.2 of the California Labor Code;
5. That this Court issue preliminary and permanent injunctions that prohibit Defendants, as well as their successors, agents, and employees, from enforcing Section 12532 of the California Government Code;
6. That this Court issue preliminary and permanent injunctions that prohibit Defendants as

well as their successors, agents, and employees, from enforcing Sections 7284.6(a)(1)(C) & (D) and 7284.6(a)(4) of the California Government Code;

7. That this Court award the United States its costs in this action; and

8. That this Court award any other relief it deems just and proper.

DATED: March 6, 2018

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IN THE

Supreme Court of the United States

DONALD J. TRUMP,
President of the United States, et al.,
Petitioners,

v.

HAWAII, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE STATES OF NEW YORK, CALIFORNIA, CONNECTICUT, DELAWARE, ILLINOIS, IOWA, MAINE, MARYLAND, MASSACHUSETTS, NEW JERSEY, NEW MEXICO, OREGON, RHODE ISLAND, VERMONT, VIRGINIA, AND WASHINGTON, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether respondents' challenges to §§ 2(a)-(c), (e), (g)-(h) of Proclamation No. 9645 are justiciable.

2. Whether §§ 2(a)-(c), (e), (g)-(h) of the Proclamation exceed the President's authority under the Immigration and Nationality Act and violate the Establishment Clause.

3. Whether the nationwide scope of the preliminary injunction is proper.

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INTEREST OF THE AMICI STATES AND SUMMARY OF ARGUMENT

The States of New York, California, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Massachusetts, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Virginia, and Washington, and the District of Columbia file this brief as amici curiae to support the challenge brought by the State of Hawaii and other respondents to Proclamation No. 9645: the third in a series of presidential orders executed last year that imposed discriminatory bans on the entry into the United States of nationals from several overwhelmingly Muslim countries.[1] The district court entered a preliminary injunction that enjoined enforcement of certain sections of the Proclamation[2] based on respondents' showing of irreparable injury, the balance of the equities, and respondents' strong showing of likely success on the merits of their claims under the Immigration and Nationality Act (INA) (Pet. App. 68a-105a.) The Ninth Circuit affirmed, but narrowed the injunction's scope, limiting it to foreign nationals who have a credible bona fide relationship with a U.S.-based person or entity, citing *Trump v. IRAP*, 137 S.Ct. 2080, 2088 (2017). (Pet. App. 1a-65a.) This Court temporarily stayed the injunction in its entirety, pending the Ninth

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[1] Proclamation No. 9645, §§2(a)-(c),(e),(g)-(h) (Sept. 24, 2017), 82 FR 45,161 (Sept. 27, 2017); Executive Order No. 13,780, §§2(c),6(a)-(b) (Mar. 6, 2017); Executive Order No. 13,769, §§3(c),5(a)-(c),(e) (Jan. 27, 2017).

[2] The injunction does not cover provisions barring entry of a number of government officials from Venezuela and all North Koreans.

Circuit's review and any subsequent proceedings in this Court. 138 S.Ct. 542 (2017).

We submit this brief as amici curiae[3] to support respondents' challenge to the Proclamation, to offer the perspective and experience of sixteen additional sovereign States and the District of Columbia, and to show that the harms inflicted by the Proclamation give rise to state standing and the need for a nationwide injunction. Like its predecessors, the Proclamation's entry ban gravely and irreparably harms our universities, hospitals, businesses, and residents. The injunction—even as narrowed by the Ninth Circuit—provides critical protection against those injuries, which the Proclamation perpetuates and makes permanent. Many of the amici States have brought our own suits challenging the Proclamation's predecessors on the grounds that certain aspects of those Executive Orders violated the Establishment Clause and other constitutional and statutory provisions.[4] We have also filed briefs as amici curiae in this and related cases, including briefs supporting the entry of preliminary injunctions against the previous Orders and the Proclamation, and briefs opposing any stay of such injunctions (including in this Court).[5]

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[3] Amici States file this brief pursuant to Rule 37.4.

[4] Many of amici States challenged the March Order in *Washington v. Trump*, No.17-cv-141 (W.D. Wash. 2017). They challenged the January Order in *Washington*, No.17-cv-141 (W.D. Wash. 2017); Mass. & N.Y. Amicus Br. (15 States, D.C.), *Washington v. Trump*, No.17-35105 (CA9 2017), ECF No.58-2; *Aziz v. Trump*, 2017 WL 580855 (E.D. Va. 2017).

[5] N.Y. Amicus Br. (15 States, D.C.), *Trump v. Hawaii*, No.17A550 (U.S. 2017); N.Y. & Ill. Amicus Br. (15 States, D.C.), *Hawaii v. Trump*, No.17-17168 (CA9), ECF No.71; N.Y. Amicus

All of amici States benefit from immigration, tourism, and international travel by students, academics, skilled professionals, and business-people. The disputed provisions of the Proclamation—like the previous bans—significantly disrupt the ability of our public universities to recruit and retain students and faculty, impairing academic staffing and research, and causing the loss of tuition and tax revenues, among other costs. The Proclamation also disrupts the provision of medical care at our hospitals and harms our science, technology, finance, and tourism industries by inhibiting the free exchange of information, ideas, and talent between the designated countries and our States, causing long-term economic and reputational damage. In addition, the ban has made it more difficult for us to effectuate our own constitutional and statutory policies of religious tolerance and nondiscrimination.

The harms that the Proclamation has caused and threatens to cause amici States are representative of the injuries experienced by respondents here. And those injuries underscore respondents' standing to sue and the appropriateness of the preliminary relief provided below.

Br. (15 States, D.C.), *IRAP v. Trump*, No.17-2231(L) (CA4), ECF No.90; N.Y. & Ill. Amicus Br. (15 States, D.C.), *Hawaii v. Trump*, No.17-17168 (CA9), ECF Nos.15, 23; N.Y. Amicus Br. (17 States, D.C.), *Trump v. IRAP, Trump v. Hawaii*, Nos.16-1436, 16-1540 (U.S. 2017); N.Y. Amicus Br. (15 States, D.C.), *Trump v. Hawaii*, No.16-1540 (U.S. 2017); Va. Amicus Br. (16 States, D.C.), *Trump v. IRAP*, Nos.16A-1190, 16A-1191 (U.S. 2017); N.Y. Amicus Br. (16 States, D.C.), *Trump v. IRAP*, Nos.16A-1190, 16A-1191 (U.S. 2017); Ill. Amicus Br. (16 States, D.C.), *Hawaii v. Trump*, No.17-15589 (CA9), ECF No.125; Va. & Md. Amicus Br. (16 States, D.C.), *IRAP v. Trump*, No.17-1351 (CA4), ECF No.153.

The Proclamation has injured rights that the INA confers on States and others by impermissibly interfering with the process that Congress has set forth for our public colleges, universities, and hospitals—as employers—to petition for the approval of prospective employees' entry into the country. In addition, the Proclamation has resulted in cognizable injuries to sovereign rights of the States that the Establishment Clause protects. The disputed provisions have the purpose and effect of implementing a federal anti-Muslim policy that interferes with amici States' efforts to combat religious discrimination within our borders.

The nature of these violations and all of the systemic harms to amici States' myriad interests support the nationwide injunction issued here. The injunction will provide critical protection to the state interests endangered by the Proclamation and mitigate the extent of the harms outlined above. If this Court vacates or further narrows the injunction, amici States will face additional concrete—and likely permanent—harms. Accordingly, we have a strong interest in ensuring that the nationwide injunction continues throughout the course of this litigation. Amici States therefore urge this Court to affirm.

ARGUMENT

I. THE PROCLAMATION PERPETUATES, AND MAKES PERMANENT, THE HARM INFLICTED BY ITS PREDECESSOR ORDERS.

A. Harms to Amici States' Proprietary Interests

The Proclamation blocks the entry of all immigrants and most non-immigrants from several Muslim-majority countries, including those who seek to be students and faculty at our universities, physicians at our medical institutions, employees of our businesses, and guests who contribute to our economies when they come here as tourists or for family visits. The provisions thus irreparably harm the work of our state institutions and treasuries.[6]

Harms to State Colleges and Universities. State colleges and universities rely on faculty and students from across the world. By interfering with the entry of individuals from the designated countries, the Proclamation continues to seriously disrupt our institutions' ability to recruit and retain students and faculty—causing lost tuition revenue, increased administrative burdens, and the expenditure of additional university resources.[7]

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[6] All of amici States support the legal arguments put forth in this brief, although not every specified harm occurs in every State.

[7] *See* Third Am. Compl. ¶¶41,43-44,53,55-56,80,93,105,107-108,125, *Washington v. Trump*, No.17-cv-141 (W.D. Wash.), ECF No.198.

As with the two previous bans, the Proclamation's ban creates serious doubt about whether faculty from the designated countries will be able to obtain the visas they need to timely assume positions with universities in amici States.[8] For example, officials at the University of Massachusetts—which typically hires a dozen new employees from the affected countries annually—are concerned that the Proclamation's now indefinite ban will result in the University being "permanently unable to hire top-ranked potential faculty, lecturers or visiting scholars from the affected countries, because [the Proclamation] may preclude them from reaching the United States to fulfill their teaching obligations."[9]

The Proclamation also continues to disrupt the ability of our universities to recruit foreign students from the designated countries, imperiling hundreds of millions of tuition dollars and other revenue generated from such students, as well as important academic research projects.[10]

Before this series of bans was implemented, amici States' universities had already made numerous offers of admission for 2017-2018 to students from the affected countries and—but for the bans' interference with their continuing admissions process—might have admitted many more.[11] Some schools continued to make admissions offers, including to students from nations designated in the Proclamation. But some of

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[8] *Id*. ¶40.

[9] *Id*. ¶93.

[10] *Id.* ¶¶38,43-46,53,57,86,94-95,105,107,112.

[11] *Id*. ¶¶43-44.

these students withdrew applications; others abandoned entirely their plans to enroll in our programs; and many chose not to apply at all, resulting in a significant decline in international student applications at many of amici States' universities.[12]

In this climate of uncertainty and discrimination, 40% of colleges surveyed across the nation reported a drop in applications from foreign students in the wake of the first two bans.[13] Graduate departments in science and engineering reported that "international student applications for many programs declined by 20 to 30 percent for 2017 programs."[14] And a comprehensive study released just last month documents significant declines in both international undergraduate and graduate enrollment at American colleges and universities in Fall 2017 when compared to Fall 2016—the first such decline in several years.[15]

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[12] *Id.* ¶¶37,45-46,53,122.

[13] Carapezza, *Travel Ban's 'Chilling Effect' Could Cost Universities Hundreds of Millions*, NPR (Apr. 7, 2017) (internet). (For authorities available on the internet, URLs are listed in the table of authorities.)

[14] Petulla, *Entry Ban Could Cause Doctor Shortages in Trump Territory, New Research Finds*, NBC News (Mar. 7, 2017) (internet).

[15] Redden, *International Student Numbers Decline*, Inside Higher Ed (Jan. 22, 2018) (internet) (analyzing National Science Foundation report); *see also* Institute of Int'l Educ., *Fall 2017 International Student Enrollment Survey ("IIE Survey")* (Nov. 2017) (internet) (average decline of 7% in new international students at 500 institutions); Darling, *University of Oregon International Student Enrollment Drops Again*, Register-Guard (Jan. 13, 2018) (internet) (international enrollment dropped by 315 students, "representing a more than $6 million decrease in annual revenue").

Researchers have singled out the continuing travel ban as one of the key factors contributing to this decline, and the education community remains concerned that it "might have hampered the global competitiveness of the United States and its ability to attract the best and brightest" prospective students.[16] Countries that are perceived as more welcoming have seen a jump in both applications and enrollment.[17] This drain of highly qualified student talent will continue under the Proclamation.

The ability of state institutions of higher education to retain existing foreign students and faculty is also compromised by the Proclamation's broad, continuing ban. Amici States currently have hundreds of students and faculty members from the targeted countries. For example, Washington State University has 140 such students and 9 faculty members.[18] The University of Massachusetts has 180 similarly situated students and 25 employees.[19] There are 529 such students in the University of California system; 297 at the State

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[16] Okahana & Zhou, *International Graduate Applications and Enrollment: Fall 2017* at 5 (Council of Graduate Schs., Jan. 2018) (internet) (17% decline in applications from the Middle East and North Africa; 18% decline from Iran); *see also IIE Survey*, *supra* at 4-5 (finding visa delays and denials are primary factor contributing to international student decline among reporting institutions).

[17] Carapezza, *supra*; *see also* Meckler & Korn, *Visas Issued to Foreign Students Fall, Partly Due to Trump Immigration Policy*, Wall Street J. (Mar. 11, 2018) (internet); Adams, *UK Universities Report Rise in Applications*, Guardian (Feb. 4, 2018) (internet).

[18] Third Am. Compl. ¶¶35-36.

[19] *Id*. ¶¶91,94.

University of New York; and 61 at Portland State University.[20]

Many of these students will need to apply for additional visas during the course of their studies because only single-entry visas are permitted from some of the affected countries, and because those visas are valid only for relatively short periods.[21] Current students and faculty members will face obstacles to renewal—if renewal is even possible under the Proclamation, which prohibits the issuance of most non-immigrant visas for nationals of the affected countries. Thus, certain students who are no longer eligible for student visas (e.g., Syrians) may be required to discontinue their studies. Other students will face the prospect of not knowing whether they may be denied continued access to the institutions where they are studying, particularly if the Proclamation calls for them to be subject to heightened vetting (e.g., Iranians and Somalis).[22] Any visa delays or

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[20] *Id.* ¶¶53,58,108,124.

[21] U.S. Dep't of State, Bureau of Consular Affairs, *U.S. Visa: Reciprocity and Civil Documents by Country* (internet) (search by country and visa types F,M).

[22] Although the Proclamation gives consular officers discretion to permit entry in individual cases, it does not describe the process for applying for a waiver, specify a time frame for receiving a waiver, or set concrete guidelines for waiver issuance, beyond listing circumstances in which waivers "may be appropriate." §3(c). And there is no reason to believe that waivers are likely to be issued in the ordinary case. *Id.* Indeed, recent State Department data shows "a high refusal rate"—over 98%—for the three months since the Proclamation has been in effect. Torbati & Rosenberg, *Visa Waivers Rarely Granted Under Trump's Latest U.S. Travel Ban: Data*, Reuters (Mar. 6, 2018) (internet). Thus,

denials jeopardize not only these individuals' education or employment, but also any grant funding and research projects that depend on their work.[23]

Individuals whose visas remain valid for a longer duration will also be affected. The presumption of exclusion created by the Proclamation may chill them from participating in educational, professional, or personal obligations that require travel outside the country. And while in the country, they will face the hardship of being unable to receive visits from overseas parents, spouses, children, and other relatives—a constitutionally cognizable hardship.[24] Indeed, many faculty members at amici States' universities are contemplating leaving their current positions for opportunities in more welcoming countries in the wake of the Proclamation's now indefinite ban.[25] And the ban's chilling effect will likely reverberate beyond the designated countries to dissuade even scholars from other countries from U.S.-based research or employment.[26]

Foreign-national scholars employed or recruited by our universities typically have specialized expertise that cannot easily be replaced. Universities that are delayed in or prevented from recruiting international

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the impact of the Proclamation's ban is not mitigated by these procedures.

[23] Third Am. Compl. ¶¶36,42,55,91,94.

[24] *Id*. ¶¶24-25,37-38,54,78-79,91,94,104-112,123. *See Moore v. City of E. Cleveland*, 431 U.S. 494, 504 (1977).

[25] *Id*. ¶¶38,42,111.

[26] Donache, *Travel Bans and Deportations Threats: How a Hostile Political Climate is Impacting International Faculty Hiring, Collaboration*, Education Dive (Jan. 9, 2018) (internet).

faculty thus suffer significant financial and reputational harm, including lost funding for research.[27] Our educational institutions have needed to expend considerable amounts of scarce resources to make contingency plans for filling unexpected gaps in faculty rosters caused by the exclusion or possible departure of scholars from the designated countries. Despite this effort, there is reason to doubt that our universities will be able to meet all of their needs.[28]

While public universities are always subject to federal immigration law and policy, these successive bans have injured them unexpectedly, by upending with no advance notice the established framework around which they have designed their faculty recruitment and student enrollment processes.[29] This has left seats unfilled, tuition dollars irretrievably lost, and important academic programs and research in peril. It has also inhibited the free exchange of information, ideas, and talent that is so essential to academic life and our state universities' missions by causing the loss of students and faculty from the affected nations and beyond.[30]

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[27] Third Am. Compl. ¶¶38,43-44,55,105-106,112; *see* Donache, *supra* (experts warning of "disruptive effects" including "on hiring and collaboration with international faculty and researchers" and "damag[ing] the opportunity for advancements in research").

[28] Third Am. Compl. ¶55 (describing "disrupt[ion]" to California universities' faculty hiring); *id*. ¶93 (University of Massachusetts's ability "to hire top-ranked" faculty "severely" impacted).

[29] Petulla, *supra.*

[30] Third Am. Compl. ¶¶38,105-106.

Harms to State Hospitals and Medical Institutions. The Proclamation's ban, like its predecessors, has created staffing disruptions in state medical institutions, which employ physicians, residents, researchers, and other professionals from the designated countries.[31]

Foreign-national residents at public hospitals often provide crucial services, such as caring for some of the most underserved populations in our States.[32] They are assigned to our university hospital residency programs through a computerized "match" that, after applications and interviews, ranks and assigns candidates to programs nationwide.[33] Many programs regularly match residents from the affected countries. If a program's matched residents are precluded from obtaining a visa under the Proclamation, as many of them were under the predecessor bans, the program risks having an insufficient number of residents to meet staffing needs.[34] This continuing uncertainty is of particular concern in view of the indefinite duration of the Proclamation's ban. The practical effect of this dilemma is that our States' programs may not be able to rank highly qualified candidates from the designated countries going forward, because there is substantial reason to believe that they will not be able to begin

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[31] *Id*. ¶127.

[32] *Id*. ¶115.

[33] *Id*. ¶116.

[34] Petulla, *supra*; Carroll, *Why America Needs Foreign Medical Graduates*, N.Y. Times (Oct. 6, 2017) (internet) (United States does not have enough medical school graduates "to fill residency slots").

their residencies.[35] Echoing this very concern, the National Residency Matching Program concluded that the Proclamation's restrictions "will have a significant impact" on the 2018 match.[36]

In addition, if current residents who are nationals of the designated countries cannot renew or extend their visas—as the Proclamation threatens—state residency programs will be unable to continue to employ them; these multi-year programs will then be left with unfilled positions, and further staffing gaps will result.[37] Such disruptions will translate into uncertainty in residency programs, as well as threats to the quality of healthcare services.[38] And because patients must be cared for, our medical facilities must quickly adapt to any staffing complications resulting from the Proclamation—and must spend precious time and resources preparing to do so.[39]

Diminished Tax Revenues and Broader Economic Harms. In addition to losing the tuition and other fees paid by students at our universities, amici States have suffered—and will continue to suffer—other direct and substantial economic losses

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[35] Third Am. Compl. ¶¶60,115.

[36] National Resident Matching Program, *Statement on Presidential Proclamation 9645 and DACA* (Dec. 2017) (internet). The number of "noncitizen international medical graduates" who applied for 2018 residency programs also declined for the second consecutive year. Cosgrove, *Fewer Foreign Doctors Are Coming to Study in the United States, Report Shows*, L.A. Times (Mar. 16, 2018) (internet).

[37] Third Am. Compl. ¶115.

[38] See *infra* 18-19.

[39] Third Am. Compl. ¶59 (shortage of "even one physician" can have "serious implications" in underserved areas).

as a result of the Proclamation's ban, just as we did under its predecessors. Every foreign student, tourist, and business visitor arriving in our States contributes to our economies through purchases of goods and services and the tax receipts that their presence generates. Despite the injunctions issued against the Proclamation and its predecessors, this series of bans during the past 14 months has blocked or dissuaded thousands of individuals—potential consumers all—from entering amici States, thereby eliminating the significant tax contributions those individuals would have made.[40] That lost revenue will never be recovered and the lasting economic damage cannot be undone, even if respondents ultimately prevail.

The contribution of foreign students to our economies is immense. Nationwide, during 2016-2017, over one million international students "contributed $36.9 billion and supported more than 450,000 jobs to the U.S. economy": nearly $6 million and 70,000 jobs in California, $4.6 million and 56,000 jobs in New York, and $2.7 million and 36,000 jobs in Massachusetts.[41] And a survey conducted in the months following the issuance of the initial ban found that "more than 15,000 students enrolled at U.S. universities during 2015-16 were from the [six] countries named in" the revised Executive Order; more than half of those students attended institutions in amici States and Hawaii; and nationwide, "these students contributed $496 million to the U.S. economy, including tuition,

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[40] *Id.* ¶¶31-32,62,75,87-88,120-121.

[41] NAFSA: Ass'n of Int'l Educators, *International Student Economic Value Tool, 2016-2017 Academic Year Analysis* (internet).

room and board and other spending."[42] New York and Illinois had nearly 1,000 nationals from the countries designated in the revised Order studying in each State in 2015-2016, who collectively contributed approximately $30 million to each State's economy.[43] Those students have also brought indirect economic benefits to our States by contributing to innovation in academic and medical research.

Tourism is another critical component of amici States' economies.[44] As a result of the successive bans, including the Proclamation's ban, the United States in 2017 saw a 4% decline in the number of international travelers to the country, at a loss of $4.6 billion and 40,000 jobs.[45] For 2018, industry analysts predict 6.3 million fewer tourists and another $10.8 billion in lost revenue.[46] Industry analysts have found a direct correlation between the bans and the significant drop

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[42] Institute of Int'l Educ., *Advising International Students in an Age of Anxiety* 3 (Mar. 31, 2017) (internet).

[43] *Id.*, app. 1.

[44] Rodriguez, *Trump's Anti-Immigration Rhetoric, Policies Killing Tourism to the U.S., Industry Analysts Say*, Newsweek (Jan. 6, 2018) (internet) (in 2016, tourism generated more than $1.5 trillion in economic output and supported 7.6 million jobs, 1.2 million of which were directly supported by international traveler spending).

[45] Popken, *Tourism to U.S. Under Trump is Down*, NBC News (Jan. 23, 2018) (internet); *see also* U.S. Dep't of Commerce, National Travel and Tourism Office, *2017 Monthly Statistics* (internet).

[46] Bhattarai, *Even Canadians are Skipping Trips to the U.S. After Trump Travel Ban*, Wash. Post (Apr. 14, 2017) (internet); *see also* Third Am. Compl. ¶¶30-32 ("chilling effect" on tourism in Washington); *id.* ¶¶52,61 (decreased tourist travel to California resulting in significant losses in tourism revenues).

in tourism,[47] even from travelers from non-designated countries.[48] The now indefinite ban will also lead to the loss of hundreds of thousands more tourism-related jobs held by our residents.[49]

Absent relief from the courts, including interim relief, these broad chilling effects will likely continue. This is hardly surprising in view of petitioners' clear message to the world that foreign visitors—particularly those from certain regions, countries, or religions—are unwelcome. Indeed, the Proclamation has made this message clearer and more permanent.

The Proclamation's ban also continues the profound harms that the predecessor bans have inflicted on amici States' ability to remain internationally competitive destinations for businesses in science, technology, finance, and healthcare, as well as for entrepreneurs. Even a temporary disruption in our ability to attract the best-qualified individuals and entities world-wide—including from the affected countries—puts the institutions and businesses in our States at a competitive disadvantage in the global marketplace, particularly where the excluded individuals possess specialized skills.[50] And now that the

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[47] Petroff, *America is Missing Out on a Tourism Boom*, CNN News (Jan. 16, 2018) (internet) (Trump administration's "controversial policies on immigration and travel" one of "key factors" behind the decline in American tourism); *Spain Overtakes U.S. for Tourism After "Trump Slump"*, The Week (Jan. 17, 2018) (internet) (travel data company finds "direct correlation" between travel ban and U.S. tourism drop).

[48] Bhattari, *supra* ("[d]emand for flights to the United States has fallen in nearly every country" since January 2017).

[49] Third Am. Compl. ¶¶63-64.

[50] *Id.* ¶¶18-23,33,51-52,69-70,74,86-87,113,118,120-123.

initially temporary bans have become an indefinite ban, petitioners' message of intolerance more deeply threatens amici States' ability to attract and retain the foreign professionals, entrepreneurs, and companies that are vital to our economies.[51]

B. Harms to Amici States' Sovereign and Quasi-Sovereign Interests

Decreased Effectiveness of Anti-Discrimination Laws. Amici States have exercised their sovereign prerogatives to adopt constitutional provisions and statutes protecting their residents from discrimination. These laws prohibit our residents and businesses—and, indeed, many of amici States ourselves—from taking national origin and religion into account when extending employment offers and other opportunities.[52] The Proclamation interferes with the effectiveness of these laws by encouraging discrimination against Muslims in general, and nationals of the affected countries in particular.

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[51] *See* Center for Am. Entrepreneurship, *Report: Immigrant Founders of the 2017 Fortune 500* (internet) (43% of 2017 Fortune 500 businesses were founded by immigrants or their children, including 32 in New York; California, 25; Illinois, 18; and Virginia, 13).

[52] *See, e.g.*, Cal. Const. art.I, §§4,7-8,31; Cal. Civ. Code §51(b); Cal. Gov't Code §§11135-11137,12900 et seq.; Conn. Gen. Stat. §46a-60; 19 Del. Code §710 et seq.; Ill. Const. art. I, §§3,17; 740 Ill. Comp. Stat. 23/5(a)(1); 775 Ill. Comp. Stat. 5/1-102(A), 5/10-104(A)(1); 5 Me. Rev. Stat. §§784, 4551-4634; Md. Code, State Gov't §20-606; Mass. Gen. L. ch.93, §102; *id.* ch.151B, §§1,4; N.Y.Const. art.I, §11; N.Y. Exec. Law §§291,296; N.M.Const. art.II, §11; N.M. Stat. §28-1-7; Or. Rev. Stat. §659A.006(1); R.I. Gen. Laws §28-5-7(1)(i); 9 Vt. Stat. §§4500-4507; 21 Vt. Stat. §495; Wash. Rev. Code §49.60.030(1).

Harms to Residents Seeking Medical Care. Like its predecessors, the Proclamation's ban will harm residents seeking medical care in our States. The countries designated in the Proclamation are important sources of physicians who provide healthcare to our residents, particularly in underserved areas of our States.[53] Indeed, many such physicians work in primary care at a time when primary care physicians are in short supply in many areas across the country.[54] The Proclamation thus impedes our efforts to recruit and retain providers of essential medical services.[55]

At least 7,000 physicians practicing in the United States attended medical school in one of the six countries designated in the revised Executive Order (five of which remain designated in the Proclamation), and these physicians provide 14 million appointments a year, 2.3 million of which are in areas with "a shortage of medical residents and doctors."[56] When

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[53] Third Am. Compl. ¶26 (nearly 200 such physicians in Washington); *id*. ¶58 (191 such physicians in California); *id*. ¶114,116 (500 such physicians in New York).

[54] *Id*. ¶¶27,58-59,116,128-129; *see also* Carroll, *supra* (foreign-trained physicians comprise over 40% of the American primary care workforce, and are also more likely to work in nonurban areas with physician shortages); Span, *If Immigrants Are Pushed Out, Who Will Care For the Elderly?*, N.Y. Times (Feb. 2, 2018) (internet) (one in four direct-care workers in American nursing homes is foreign-born, including 11,000 from the designated countries).

[55] Third Am. Compl. ¶¶27-28,58,128-129; *see also* Finnegan, *Amid a National Immigration Battle, Fewer International Doctors Seek U.S. Jobs*, Fierce HealthCare (Feb. 20, 2018) (internet).

[56] Immigrant Doctors Project, https://immigrantdoctors.org; *see also* Barry-Jester, *Trump's New Travel Ban Could Affect*

physicians from the designated countries are unable to commence or continue their employment at public hospitals, the ensuing staffing disruptions will adversely affect the quality of our healthcare services and put the health of our communities at risk.[57]

II. THE PROCLAMATION'S HARMS ARE COGNIZABLE UNDER THE IMMIGRATION AND NATIONALITY ACT

To press a statutory claim, a plaintiff must show among other things that the interests the plaintiff seeks to vindicate "fall within the zone of interests protected by the law invoked." *Lexmark Int'l Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377, 1388 (2014). As the Ninth Circuit correctly held, Hawaii's "efforts to enroll students and hire faculty members who are nationals from the [targeted] countries fall within the zone of interests of the INA" (Pet. App. 22a), a statute that contains numerous provisions governing the admission of foreign-national students, scholars, and faculty into the country on temporary non-immigrant visas[58] or employment-based immigrant visas.[59]

Indeed, our state colleges and universities are in many cases the entities petitioning for approval of a

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Doctors, Especially in the Rust Belt and Appalachia, FiveThirtyEight (Mar. 6, 2017) (internet).

[57] Third Am. Compl. ¶¶27,58-59,116,128; Saleh, *Hospitals in Trump Country Suffer As Muslim Doctors Denied Visas to U.S.*, Intercept (Aug. 17, 2017) (internet); *see also* Finnegan, *supra* (medical community fearful of ban's "detrimental impact on the healthcare system").

[58] *See, e.g.*, 8 U.S.C. §1101(a)(15)(F),(H),(J),(O).

[59] *See, e.g.*, 8 U.S.C. §1153(b)(1)(A),(B); (b)(2); (b)(3)(A)(ii).

potential employee's entry into the country, bringing them directly within the ambit of the INA. As employers, our universities sponsor and file employment-based immigrant or non-immigrant/ temporary worker petitions with U.S. Citizenship and Immigration Services (USCIS) on behalf of certain of our prospective employees.[60] Only after the employer's petition is approved can the prospective employee apply for and receive a work visa. In some cases, the INA also requires the employer to obtain an approved labor certification from the Department of Labor, *see* 8 U.S.C. §1182(a)(5)(A), before filing a petition.[61]

The Proclamation, by interfering with this process, has substantially disrupted the ability of our public institutions to meet their academic staffing needs, resulting in increased administrative burdens and the expenditure of additional resources. See *supra* 5-6, 10-11. These bans have also caused the wastage of funds that amici States have spent preparing visa petitions for employees or prospective employees. For example, the State University of New York provides legal and financial support for the immigrant and non-immigrant work petitions of certain prospective employees, including teaching faculty, researchers, and physicians.[62] Specifically, the University assists in preparing "employment-based petitions and

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[60] U.S. Dep't of State, *Temporary Worker Visas* (internet); USCIS, *Temporary (Nonimmigrant) Workers* (internet); U.S. Dep't of State, *Employment-Based Immigrant Visas* (internet).

[61] USCIS, *Permanent Workers* (internet); *Employment-Based Immigrant Visas*, *supra*; *Temporary Worker Visas*, *supra*.

[62] State Univ. of N.Y., Legal and Financial Support for Immigration Petitions Policy, Doc. No.8500, §§I(C),II(A)(internet).

applications for nonimmigrant categories such as the H-1B Temporary Worker, O-1 Extraordinary Ability and the TN-1 NAFTA categories."[63] In addition to such "employment sponsorship," the University also provides "related financial support for standard processing, government filing fees and [other related] costs."[64] And for those working under employment-based immigrant visas, the University will help "prepare petitions and applications" for "permanent residence based on University employment."[65]

Because state universities acting as employers are direct and necessary participants in the INA's scheme for the filing of employment-based petitions, they fall within its zone of interests. Petitioners now claim for the first time that no respondents, including Hawaii, have any cognizable interest "in the denial of a visa or entry to an alien abroad" *under* "*the particular INA provisions they invoke*" (Pet. Br. 24-25 [emphasis added]), namely, 8 U.S.C. §§1152(a)(1)(A), 1182(f), and 1185(a)(1). But this Court has already made clear that when "considering whether the 'zone of interest' test provides or denies standing," it is "not limited to considering the statute under which respondents sued, but may consider any provision that helps [the Court] understand Congress' overall purposes" in the comprehensive scheme as a whole. *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 401 (1987); *see also id.* at 396-97 (observing the phrase "a relevant statute" in the Administrative Procedure Act, 5 U.S.C. §702, is to be interpreted "broadly"). In *Clarke*, the Court rejected an argument that focused "too narrowly" on only one

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[63] *Id.* §I(C).

[64] *Id.* §§II(A),III(F)(1)-(2).

[65] *Id.* §I(C).

section of the National Banking Act without "adequately plac[ing]" that section in the act's "overall context." *Id*. at 401. And the Court held the plaintiff had standing to sue after considering related provisions of the Act, as well as the fact that "[t]he interest [plaintiff] assert[ed] ha[d] a plausible relationship to the policies underlying [those provisions]." *Id*. at 403. Likewise, here, in evaluating whether Hawaii meets the zone-of-interests test, this Court should not consider in isolation the particular INA provisions alleged to have been violated, but should take into account the complex and inter-connected regulatory structure of the INA as a whole, as well as the INA's overall objective of facilitating the adjudication and issuance of immigrant and non-immigrant visas to those who meet its criteria for eligibility—including for family reunification and employment purposes.[66]

While the States certainly understand that there is no absolute right to the issuance or renewal of a particular individual's visa, our institutions—like other employers of foreign nationals—have come to rely on a degree of predictability in the visa system as a whole in making their faculty hiring and student admissions decisions, as well as an expectation that visa determinations will be free from discriminatory animus, including by virtue of the protection afforded by one of the specific provisions at issue here. *See* 8 U.S.C. §1152(a)(1)(A) (prohibiting discrimination "in the issuance of an immigrant visa" based on "the person's race, sex, nationality, place of birth, or place

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[66] *See Holder v. Martinez Gutierrez*, 566 U.S. 583, 594 (2012) (recognizing that the INA's purposes include "promoting family unity" and "providing relief to aliens with strong ties to the United States").

of residence"). All of this was abruptly upended by the series of successive travel bans, including the now-permanent ban enshrined in the Proclamation, injuring the States' statutorily protected interests in ways that undeniably "implicate[ ] the policies of the [INA]," *Clarke*, 479 U.S. at 403. Accordingly, petitioners are mistaken in asserting that Hawaii falls outside the INA's zone of interests and thus lacks standing to assert its statutory challenge.[67]

III. THE PROCLAMATION'S HARMS ARE COGNIZABLE UNDER THE ESTABLISHMENT CLAUSE

Petitioners' claim (Br. 26-30) that States lack cognizable Establishment Clause interests is flatly contradicted by the original meaning and purpose of the Clause. One of the Clause's original purposes was to prevent the federal government from forcing its religious preferences upon States.[68] As Justice Thomas has noted, in this regard the Clause was designed to serve as "a federalism provision." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45 (2004) (Thomas, J., concurring); *see also Town of Greece v. Galloway*, 134 S.Ct. 1811, 1836 (2014)

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[67] *See Bank of America Corp. v. City of Miami*, 137 S.Ct. 1296, 1303 (2017) (City had standing to assert statutory claim where injuries were *"arguably* within the zone of interests" protected by the statute) (emphasis in original); *Clarke*, 479 U.S. at 399 (zone-of-interests test "is not meant to be especially demanding" and only forecloses suit when a "plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute").

[68] *See* Story, *Commentaries on the Constitution of the United States*, §1879, at 633-34 (5th ed. 1891); Amar, *The Bill of Rights* 32-42, 246-57 (1998).

(Thomas, J., concurring) ("[T]he States are the particular beneficiaries of the Clause."). To be sure, States' original power over religious matters was later limited by the Fourteenth Amendment. *Everson v. Board of Educ.*, 330 U.S. 1 (1947). But while States are no longer free to establish official churches, the Constitution continues to protect state efforts to welcome diverse religious groups and combat religious discrimination to the extent allowed by federal law, including through enforcement of our own state anti-discrimination laws. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607-08 (1982) (recognizing State's interests in ensuring that its residents are "not excluded from the benefits that are to flow from participation in the federal system" and in "securing observance of the terms under which it participates in" that system).

The disputed provisions of the Proclamation are tainted by anti-Muslim animus in violation of the Establishment Clause. As respondents explain (Br. 6-12, 61-76), the Proclamation did not cure the animus that infected the prior Orders, but continues the same federal policy, paving the way for a religious test for entry into the country and affecting the religious makeup of our States and communities. Even setting aside any pre-election statements by the President and his close advisors, "the President's inauguration did not herald a new day." *IRAP v. Trump* ("*IRAP II*"), 883 F.3d 233, 266 (CA4 2018). As the Fourth Circuit has explained, in view of the President's continuing and undisputed statements of anti-Muslim bias, and the proximity of those statements to his proposed Muslim ban and his various executive actions on the subject—including the Proclamation, which he and his advisors described as having the same goal as the

prior Orders—an objective observer could only conclude that the primary purpose of the Proclamation was "to exclude Muslims from the United States." *Id.* at 264-69.[69]

Contrary to petitioners' characterization (Br. 28), amici States are not simply suffering the "indirect effects" of alleged discrimination against foreign nationals with no constitutional rights of their own. Rather, by unlawfully injecting religious bias into our Nation's immigration policy, the Proclamation impairs the constitutionally protected interest that amici States and Hawaii possess in prohibiting religious discrimination and maintaining welcoming communities where people of all faiths or no faith feel welcome. It does so not only by excluding large numbers of Muslims, but also by contributing to an environment of fear and insecurity among our residents that runs counter to amici States' deeply held commitment to inclusiveness and equal treatment.[70] Moreover, blocking the admission of

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[69] Unlike a statute, which is the act of a collective body, and therefore presents some difficulties in discerning legislative intent from the statements of individual legislators, the Proclamation is the act of a single official, and there is no such barrier to treating the President's statements as probative of his intent in promulgating it. The multi-agency review conducted by other allegedly non-biased government officials (Pet. Br. 58,63,71) does not save the Proclamation. As the Fourth Circuit explained, because "our Constitution describes a 'unitary executive'" and the President "alone had the authority to issue the Proclamation[,] he is responsible for its substance and purpose." *IRAP II*, 883 F.3d at 268 n.16.

[70] See *supra* 17-18; *see also* Williams, *Under Trump, Anti-Muslim Hate Crimes Have Increased at an Alarming Rate*, Newsweek (July 17, 2017) (internet) (91% increase in anti-

individuals based on their religious beliefs has a substantial harmful effect on amici States and Hawaii by, among other things, reducing tax revenues—an effect which by itself is sufficient to establish standing. *See, e.g., Wyoming v. Oklahoma*, 502 U.S. 437, 449-50 (1992).

Thus, under such "highly unusual facts," *IRAP II*, 883 F.3d at 269, Hawaii and amici States have standing to protect their own interests by vindicating the structural dictates of the Clause. *Cf. Massachusetts v. EPA*, 549 U.S. 497, 518–20 (2007).

IV. THE PROCLAMATION'S VIOLATIONS AND THE ACTUAL AND THREATENED HARMS TO PUBLIC INTERESTS THROUGHOUT THE COUNTRY WARRANTED A NATIONWIDE PRELIMINARY INJUNCTION

The Ninth Circuit correctly held that preliminary relief was justified to restrain the Proclamation's likely violations of the INA, and that the nationwide scope of that relief was justified by the nature of the violation, as well as the nationwide reach of the injuries to public interests in particular (Pet. App. 56a-61a). *See also IRAP II*, 883 F.3d at 270-73 (affirming similar nationwide preliminary injunction of the Proclamation based on likelihood of success of Establishment Clause challenge).

Muslim hate crimes in U.S. in first half of 2017 as compared to same period in 2016); Buncome, *Islamophobia Even Worse Under Trump Than After 9/11 Attacks*, Independent (Dec. 27, 2017) (internet) (1,851 incidents of Islamophobia between January and September 2017).

A. A Nationwide Injunction Is Essential in This Case

The Ninth Circuit properly concluded that the harms, equities, and the public interest weigh decidedly in favor of preliminary relief.[71] *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (factors to be considered); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (balancing of equities requires courts to "pay particular regard for the public consequences").[72]

This Court reached a similar conclusion when it considered petitioners' application to stay the preliminary injunctions issued against the Proclamation's predecessors. The Court there evaluated the same "relative harms" to the parties, "as well as the interests of the public at large." 137 S.Ct. at 2087. After balancing those factors, the Court left significant portions of those injunctions in place to protect "foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States," in view of the significant public interests at stake. *Id*. at 2088.

The equities at stake here weigh even more strongly in favor of preliminary relief than in the previous litigation. *See id*. at 2087 ("[c]rafting a preliminary injunction" is "often dependent as much on the equities of a given case as the substance of the

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[71] Indeed, petitioners do not advance any criticism of the balancing of the equitable factors performed by the courts below.

[72] The injunction was also appropriate because respondents have made a strong showing of the likelihood of success on the merits of their statutory and constitutional claims. Hawaii Br. 30-76; *Winter*, 555 U.S. at 20.

legal issues it presents"). Not only have defendants persisted in their failure to provide any concrete evidence of true national security risk,[73] but the Proclamation's ban is now indefinite and will likely result in permanent—as opposed to temporary—harms to respondents and others who are similarly situated, including amici States and their residents. *Id*. at 2088 (concluding that claimed national security interests did not outweigh such harms).

The Ninth Circuit adopted the precise balancing previously struck by this Court, observing that the injunction simply "preserve[s] the status quo as it existed prior to the Proclamation while the merits of the case are being decided" because petitioners have "been able to successfully screen and vet foreign nationals from the countries designated in the Proclamation under current law for years."[74] (Pet. App. 59a.)

Moreover, the scope of the injunction—even as narrowed by the Ninth Circuit—appropriately accounted for the nature of the Proclamation's violations and the need to restrain the systemic, nationwide harm perpetuated by it, including the harms to amici States. District courts exercising their equity jurisdiction enjoy broad and "sound discretion

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[73] *See* Nowrasteh, *New Government Terrorism Report Provides Little Useful Information*, Cato Inst. (Jan. 16, 2018) (internet) (most recent government report "produces little new information on immigration and terrorism and portrays some misleading and meaningless statistics as important findings").

[74] Current immigration law contains well-established, individualized vetting processes, which already permit the exclusion of foreign nationals who present a national security concern, 8 U.S.C. §1182(a)(3), or about whom officials lack adequate information, *id*. §1182(a)(7).

to consider the necessities of the public interest when fashioning injunctive relief." *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496 (2001). Indeed, "[c]ourts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than… when only private interests are involved." *Virginian Ry. v. Railway Employees*, 300 U.S. 515, 552 (1937).

Consistent with these principles, the Ninth Circuit recognized that the myriad harms flowing from the Proclamation's ban—including to the proprietary interests of States—exemplify the public interests affected, and would not fully be addressed by injunctive relief limited to redressing only respondents' individual injuries (Pet. Br. 73-74). The extensive, particularized harms to amici States thus underscore the appropriateness of the injunction's nationwide scope (Pet. App. 60a); *supra*, Point I; *see also IRAP II*, 883 F.3d at 271 (noting the Proclamation's "broad[] deleterious effect on the public interest").

As the Ninth Circuit further observed, "[a]ny application of §2 of the Proclamation would exceed the scope of §1182(f) [and] violate §1152(a)(1)(A)" (Pet. App. 62a-63a). The Fourth Circuit similarly concluded that because "the Proclamation was issued in violation of the Constitution, enjoining it only as to [the p]laintiffs would not cure its deficiencies." *IRAP II*, 883 F.3d at 273. A nationwide injunction was thus additionally warranted because "the scope of injunctive relief is dictated by the extent of the violation established." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *see Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) ("As with any equity case, the nature of the violation determines the scope of the remedy.").

The injunction is also particularly appropriate here given the immigration context—both because a nationwide scope is "necessary to provide complete relief" to respondents, *Madsen v. Women's Health Ctr. Inc.*, 512 U.S. 753, 765 (1994), and in view of the importance of uniformity in the application and enforcement of federal immigration law. Petitioners assert (Br. 74) that "[t]he desirability of uniformity has nothing to do with the extent of respondents' own putative injuries"; but this cursory statement improperly conflates the two distinct concerns.

First, as the Ninth Circuit explained (Pet. App. 62a), "it would be impracticable or impossible for [Hawaii] to name all those who would apply to the University of Hawaii… but have been chilled or prevented by the Proclamation from doing so." Thus, although a nationwide injunction may have the effect of protecting non-party individuals and entities like amici States from related harm, such an effect does not in and of itself make the injunction impermissibly overbroad where the scope is also "necessary to give [Hawaii] a full expression of [its] rights." (*Id.*)

Second—and notwithstanding the Proclamation's severability clause (Pet. Br. 74)—"piecemeal relief would fragment immigration policy" where the Constitution and Congress require that such laws "'should be enforced vigorously and *uniformly*.'" (Pet. App. 62a); *see IRAP II*, 883 F.3d at 273 (similarly invoking importance of uniform enforcement of immigration law in support of nationwide injunction). Indeed, this Court reaffirmed the importance of treating similarly situated individuals alike under the policies set forth in the Proclamation's predecessors when the Court preserved the previous preliminary

injunctions "with respect to... those similarly situated [to respondents]." 137 S.Ct. at 2087.

Uniform application of federal immigration policy by virtue of a nationwide injunction is necessary in cases like this for another reason: in the immigration context, "[g]eographically limited injunctions are sure to create confusion" or "be impossible to implement in practice."[75] For example, after a Massachusetts district court issued an injunction enjoining portions of the initial Executive Order only as to individuals arriving to the country at Boston's Logan Airport, *see Tootkabani v. Trump*, No. 17-cv-10154 (D. Ma. 2017), some foreign nationals entered the country through that point of entry and then traveled on to other States—"rendering the geographic limit on the injunction pointless" by making that part of the ban that was not enjoined functionally inoperative—while others "were barred from boarding flights headed to Logan despite the court order because airline personnel and other officials were confused about what the law required of them in light of the limited injunction."[76] Travel among the 50 States by a non-citizen lawfully present in one of them is not restricted, and immigration policies must "be comprehensible to the noncitizens who must follow them and other actors who must interpret and apply them (such as airlines)."[77] *See Lemon v. Kurtzman*, 411 U.S. 192, 200

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[75] Frost, The Role and Impact of Nationwide Injunctions By District Courts, Written Testimony for the H. Comm. on the Judiciary, at 8 (Nov. 30, 2017) (internet).

[76] *Id*. (citing Sacchetti, *Confusion Rules After Court Order Temporarily Halts Trump Immigration Ban*, Boston Globe (Jan. 30, 2017) (internet)).

[77] *Id*. at 5,7-8.

(1973) ("equitable remedies" look to "what is necessary, what is fair, and what is workable"). Anything short of a nationwide injunction in the present case will implicate these very same concerns.

B. The Need for a Nationwide Injunction in This Case Is Not Outweighed by Any Other Consideration.

Contrary to petitioners' claim (Br. 75), nationwide injunctions have long been "a regular feature of the equitable jurisprudence of federal courts."[78] And despite some commonly identified disadvantages,[79] courts adjudicating facial challenges have not hesitated to issue or affirm nationwide injunctions upon ultimately concluding that the challenged federal action is unlawful. For example, "when a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." *National Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (CADC 1998); *see also Dimension Fin. Corp. v. Board of Governors, Fed. Reserve Sys.*, 744 F.2d 1402, 1411 (CA10 1984) (enjoining Board from "attempt[ing] to enforce or implement" regulations that exceeded its rule-making authority), *aff'd*, 474 U.S. 361 (1986). But even if nationwide injunctions should not necessarily issue against the federal government every time a court upholds a challenge to a federal law or policy, there is no reason to categorically eliminate the

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[78] Siddique, *Nationwide Injunctions*, 117 Columbia L. Rev. 2095, 2097 (2017) (collecting cases).

[79] *Id.* at 2124-25; Frost, *supra* at 8-10.

availability of such relief in appropriate cases (Pet. Br. 75-76).[80] Here, in addition to being "necessary to provide complete relief," *Madsen*, 512 U.S. at 765, the injunction is essential in light of the nature of the violations, the need for uniform and workable enforcement of immigration policy, and the nationwide harm that the public would suffer in the absence of such relief. See *supra* 29-32.

Neither of petitioners' two specific concerns (Br. 75-76) casts any doubt on the propriety of the injunction in this case. *First*, contrary to petitioners' suggestion, the nationwide injunction in this case does not in any way defeat the orderly development of the law. To be sure, the percolation of legal issues in the lower courts is an important feature of our judicial process. But one of the primary rationales for seeking such diversity in judicial perspectives is "to gain the benefit of adjudication by different courts *in different factual contexts*." *Califano*, 442 U.S. at 702 (emphasis added). Here, little would be gained by additional debate in other courts on the questions presented in this appeal

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[80] *See* Frost, *supra*; Malveaux, *Class Actions, Civil Rights, and the National Injunction*, 131 Harv. L. Rev. F. 56 (2017); Amdur & Hausman, *Nationwide Injunctions and Nationwide Harm*, 131 Harv. L. Rev. F. 49 (2017). Even the contrary authority cited by petitioners (Br. 73, 75) candidly acknowledges that the "case of national injunctions is strongest for preliminary injunctions, because they preserve the status quo in the sense of ensuring that the plaintiff is not irreparably injured before judgment and the court is not robbed of its ability to decide the case." Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 476 n.333 (2017).

because the challenge does not depend on any individualized or disputed facts.[81]

Moreover, a nationwide injunction enjoining enforcement of a federal law or policy in one court does not necessarily "bring[] judicial review in all other fora" to a halt, as petitioners incorrectly contend (Br. 75). Nothing about such relief prevents other parties from pressing their own claims in other courts. For example, in the recent litigation over the Deferred Action for Childhood Arrivals program, even after district court judges in both California and New York issued nationwide injunctions enjoining the program's rescission and appellate review of those rulings is pending, a Maryland district court drew a different conclusion about the likely legality of the program's rescission.[82] And both the Hawaii district court in this case and a Maryland district court hearing the related challenge to the Proclamation in *IRAP II*, issued their own separate injunctions.

Second, petitioners are mistaken in suggesting (Br. 75-76) that Congress has expressed a preference for class actions, rather than actions by sovereign States, as a means of obtaining broad relief against unconstitutional or illegal federal action. To the contrary, when Congress has imposed limitations on class actions, it has consistently made clear that those

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[81] *See* Amdur & Hausman, *supra* at 52-53 n.26 (discussing subsequent criticism of "the notion of percolation for percolation's sake" by former Chief Justice Rehnquist, author of *United States v. Mendoza*, 464 U.S. 154 (1984)).

[82] *Compare Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011 (N.D. Cal. 2018), *and Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401 (E.D.N.Y. 2018), *with Casa de Maryland v. U.S. Dep't of Homeland Sec.*, 2018 WL 1156769 (D. Md. 2018).

limitations do not apply to actions brought by States. *See, e.g.*, 15 U.S.C. §78bb(f)(4) (federal preemption of private state court class actions for securities fraud does not apply to actions brought by States); *see also LG Display Co. v Madigan*, 665 F.3d 768 (CA7 2011) (antitrust actions brought by States not subject to restrictions of the Class Action Fairness Act, 28 U.S.C. §1332(d)). While the interests vindicated by States as plaintiffs may overlap with the interests of their residents, the States here seek to challenge a federal policy based on widespread harms to their *own* proprietary and sovereign interests. It is inconceivable that a sovereign State would be required to bring or join a class action to vindicate its own institutional interests. Moreover, the affected residents in our States are often poorly situated to file suit themselves or to form or join a class; thus, a class action is not a viable alternative.[83]

Finally, principles of judicial economy counsel against restricting relief here to Hawaii, and requiring each of amici States to file and litigate to judgment their own individual lawsuits challenging the Proclamation in order to vindicate the same interests. *See, e.g.*, *National Mining,* 145 F.3d at 1409 ("refusal to sustain a broad injunction is likely merely to generate a flood of duplicative litigation"). Indeed,

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[83] Malveaux, *supra* at 64 ("Many of the current administration's executive orders target the most vulnerable populations in our society—including various minorities, immigrants, and children."); *see* Bray, *supra* at 476 (acknowledging that in the travel ban challenges, a class might not permissibly include "everyone affected by the [ban] restricting entry from [designated] countries," but rather, only "all travel agents, for example").

although six of the undersigned States had jointly filed a separate suit, a Washington district court stayed that action once the appeal was taken from the injunction in this case,[84] and the Ninth Circuit denied the subsequent motion of those States to intervene here.[85] The interests of Hawaii are replicated throughout the Nation; the legal issues are the same everywhere, and no judicial interest would be served by restricting the geographic scope of the injunction in this case as petitioners request.

In sum, there was no abuse of discretion in fashioning the injunctive relief at issue here, *see McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 867 (2005). As we have explained, the provisional relief granted against petitioners is appropriate in light of nature of the violations, the need for uniform and practically enforceable immigration policy, and the truly irreparable nationwide harm that our States and our residents would suffer in the absence of such relief. Anything short of a nationwide injunction will allow numerous public harms to continue, or require duplicative litigation throughout the Nation. Thus, affirmance of the preliminary injunction is necessary to provide continued interim relief to amici States from the cumulative effects of petitioners' series of discriminatory bans.

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[84] *Washington v. Trump*, No.17-cv-141 (W.D. Wash. 2017), ECF No.209.

[85] *Hawaii v. Trump*, No.17-17168 (CA9 2017), ECF No.61.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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878 F.3d 662
United States Court of Appeals, Ninth Circuit.

State of HAWAII; Ismail Elshikh; John Does, 1 & 2; Muslim Association Of Hawaii, Inc., Plaintiffs-Appellees,
v.
Donald J. TRUMP, in his official capacity as President of the United States; U.S. Department of Homeland Security; Kirstjen M. Nielsen, in her official capacity as Secretary of Homeland Security; U.S. Department of State; Rex W. Tillerson, in his official capacity as Secretary of State; United States of America, Defendants-Appellants.

No. 17-17168
|
Argued and Submitted December 6, 2017—Seattle, Washington
|
December 22, 2017

Synopsis

Background: State of Hawai'i, individuals, and non-profit association of Muslims brought pre-enforcement action against President, Executive Branch officials and agencies, and the United States, seeking to prohibit implementation and enforcement of Presidential Proclamation to extent that it indefinitely barred entry by nationals from Iran, Libya, Syria, Yemen, Somalia, and Chad. The United States District Court for the District of Hawai'i, No. 1:17-cv-00050-DKW-KSC, Derrick Kahala Watson, J., 2017 WL 4639560, granted plaintiffs' motion for temporary restraining order (TRO), but TRO was stayed in part, 2017 WL 5343014 and 2017 WL 5987406. Defendants appealed.

Holdings: The Court of Appeals held that:

[1] plaintiffs did not have to wait until specific applicant was denied visa in order for their claims to be ripe;

[2] consular nonreviewability doctrine did not apply to prevent review of implementation and enforcement of Presidential Proclamation;

[3] plaintiffs' claims were reviewable under Administrative Procedure Act (APA);

[4] interests of Muslims in United States arguably fell within zone of interests protected by law, as required to be reviewable under APA;

[5] Hawai'i's efforts to enroll students and hire faculty members who were nationals from Iran, Libya, Syria, Yemen, Somalia, or Chad arguably fell within zone of interests of Immigration and Nationality Act (INA), as required for Presidential Proclamation to be reviewable under APA;

[6] Court could review President's statutory authority to issue Proclamation on basis that it was ultra vires action implemented through actions of other federal officials;

[7] Presidential Proclamation was inconsistent with text of provision for suspending entry of any aliens or of any class of aliens into United States on basis that doing so would be detrimental to interests of United States, statutory framework as whole, legislative history, and prior executive practice; and

[8] principles of separation of powers compelled conclusion that Presidential Proclamation exceeded scope of authority delegated to President.

Affirmed in part and vacated in part.

Appeal from the United States District Court for the District of Hawaii, Derrick Kahala Watson, District Judge, Presiding, D.C. No. 1:17-cv-00050-DKW-KSC.

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Before: Michael Daly Hawkins, Ronald M. Gould, and Richard A. Paez, Circuit Judges.

Opinion

OPINION

PER CURIAM:

***669** ***670** ***671** ***672** For the third time, we are called upon to assess the legality of the President's efforts ***673** to bar over 150 million nationals of six designated countries [1] from entering the United States or being issued immigrant visas that they would ordinarily be qualified to receive. To do so, we must consider the statutory and constitutional limits of the President's power to curtail entry of foreign nationals in this appeal of the district court's order preliminarily enjoining portions of § 2 of Proclamation 9645 entitled "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats" (the "Proclamation").

1 Although Proclamation 9645 imposes varying restrictions on nationals of eight countries—Chad, Iran, Libya, Somalia, Syria, Yemen, North Korea, and Venezuela—Plaintiffs challenge only the restrictions imposed on the nationals of six Muslim-majority countries.

The Proclamation, like its predecessor executive orders, relies on the premise that the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 et seq., vests the President with broad powers to regulate the entry of aliens. Those powers, however, are not without limit. We conclude that the President's issuance of the Proclamation once again exceeds the scope of his delegated authority. The Government's interpretation of 8 U.S.C. § 1182(f) not only upends the carefully crafted immigration scheme Congress has enacted through the INA, but it deviates from the text of the statute, legislative history, and prior executive practice as well. Further, the President did not satisfy the critical prerequisite Congress attached to his suspension authority: before blocking entry, he must first make a legally sufficient finding that the entry of the specified individuals would be "detrimental to the interests of the United States." 8 U.S.C. § 1182(f). The Proclamation once again conflicts with the INA's prohibition on nationality-based discrimination in the issuance of immigrant visas. Lastly, the President is without a separate source of constitutional authority to issue the Proclamation.

On these statutory bases, we affirm the district court's order enjoining enforcement of the Proclamation's §§ 2(a), (b), (c), (e), (g), and (h). We limit the scope of the preliminary injunction, however, to foreign nationals who have a bona fide relationship with a person or entity in the United States.

I. Background [2]

2 Portions of the background section have been drawn from the district court's order below. *See Hawai'i v. Trump*, 265 F.Supp.3d 1140, 1144–48 (D. Haw. 2017) ("*Hawai'i TRO*").

A. Prior Executive Orders and Initial Litigation

On January 27, 2017, one week after his inauguration, President Donald J. Trump signed an Executive Order entitled "Protecting the Nation From Foreign Terrorist Entry into the United States." Exec. Order 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) ("EO-1"). EO-1's stated purpose was to "protect the American people from terrorist attacks by foreign nationals admitted to the United States." *Id.* EO-1 took effect immediately and was challenged in several venues shortly after it was issued. On February 3, 2017, a federal district court in the State of Washington enjoined the enforcement of EO-1. *See Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017). The Government filed an emergency motion seeking a stay of the injunction, which we denied. *See Washington v. Trump*, 847 F.3d 1151, 1161–64 (9th Cir. 2017) (per curiam), *reh'g en banc denied*, 853 F.3d 933 (9th Cir. 2017). The Government later ***674** voluntarily dismissed its appeal of the EO-1 injunction.

On March 6, 2017, the President issued Executive Order 13,780, which was given the same title as EO-1 and was set to take effect on March 16, 2017. 82 Fed. Reg. 13,209 (Mar. 6, 2017) ("EO-2"). EO-2 directed the Secretary of Homeland Security to conduct a global review to determine whether foreign governments were providing adequate information about their nationals seeking entry into the United States. *See* EO-2 § 2(a). EO-2 also directed the Secretary of Homeland Security to report those findings to the President; following the Secretary's report, nations identified as providing inadequate information were to be given an opportunity to alter their practices

before the Secretary would recommend entry restrictions for nationals of noncompliant countries. *Id.* §§ 2(b), (d)–(f).

During this global review, EO-2 imposed a 90-day suspension on the entry of certain foreign nationals from six Muslim-majority countries: Iran, Libya, Somalia, Sudan, Syria, and Yemen. *Id.* § 2(c). That 90-day suspension was challenged in multiple courts and was preliminarily enjoined by federal district courts in Hawai'i and Maryland. *See Hawai'i v. Trump*, 245 F.Supp.3d 1227 (D. Haw. 2017); *Int'l Refugee Assistance Project ("IRAP") v. Trump*, 241 F.Supp.3d 539 (D. Md. 2017). Those injunctions were affirmed by the Ninth and Fourth Circuits, respectively. *See Hawai'i v. Trump (Hawai'i I)*, 859 F.3d 741 (9th Cir. 2017) (per curiam); *IRAP v. Trump*, 857 F.3d 554 (4th Cir. 2017) (en banc), *as amended* (May 31, 2017). The Supreme Court granted a writ of *certiorari* in both cases and left the injunctions in place pending its review, except as to foreign nationals who lacked a "credible claim of a bona fide relationship with a person or entity in the United States." *Trump v. IRAP*, — U.S. ——, 137 S.Ct. 2080, 2088, 198 L.Ed.2d 643 (2017).

On September 24, 2017, the President issued the Proclamation, which indefinitely suspends immigration by nationals of seven countries and imposes restrictions on the issuance of certain nonimmigrant visas for nationals of eight countries. 82 Fed. Reg. 45,161, 45,164–67 (Sept. 24, 2017). The entry restrictions were immediately effective for foreign nationals who 1) were subject to EO-2's restrictions, and 2) lack a credible claim of a bona fide relationship with a person or entity in the United States. *Id.* at 45,171. For all other affected persons, the Proclamation was slated to take effect on October 18, 2017. *Id.* On October 10, 2017, the Supreme Court vacated the Fourth Circuit's opinion in *IRAP v. Trump* as moot. *See Trump v. IRAP*, — U.S. ——, 138 S.Ct. 353, 199 L.Ed.2d 203 (2017). On October 24, 2017, the Supreme Court vacated our opinion in *Hawai'i I* on the same grounds. *See Trump v. Hawai'i*, — U.S. ——, 138 S.Ct. 377, — L.Ed.2d —— (2017). In vacating our prior decision as moot, the Supreme Court explicitly noted that it expressed no view on the merits of the case. *See id.*

B. Plaintiffs' Third Amended Complaint

On October 10, 2017, Plaintiffs sought to amend their complaint to include allegations related to the Proclamation. The third amended complaint includes statutory claims for violations of the INA, the Religious Freedom Restoration Act, and the Administrative Procedure Act, as well as constitutional claims for violations of the Establishment and Free Exercise Clauses of the First Amendment and the equal ***675** protection guarantees of the Fifth Amendment's Due Process Clause. Plaintiffs also moved for a temporary restraining order; after expedited briefing, the district court granted the motion on October 17, 2017. *Hawai'i TRO*, 265 F.Supp.3d at 1144. Relying on our now-vacated opinion in *Hawai'i I*, the district court found that the Proclamation suffered from the same deficiencies as EO-2. *Id.* at 1144, 1154–59. At the parties' request, the district court converted the temporary restraining order into a preliminary injunction on October 20, 2017, rendering it an appealable order. *Hawai'i v. Trump*, No. CV 17-00050 DKW-KSC (D. Haw. Oct. 20, 2017), ECF No. 390 (order entering preliminary injunction).

The Government timely appealed. During the pendency of this appeal, we partially stayed the district court's preliminary injunction "except as to foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States." *Hawai'i v. Trump*, No. 17-17168, 2017 WL 5343014 (9th Cir. Nov. 13, 2017). On December 4, 2017, the Supreme Court granted the Government's request for a complete stay pending review of the district court's preliminary injunction. *Trump v. Hawai'i*, — U.S. ——, 138 S.Ct. 377, — L.Ed.2d —— (2017).

C. The Proclamation

The Proclamation derives its purpose from the President's belief that he "must act to protect the security and interests of the United States." 82 Fed. Reg. at 45,161. In furtherance of this goal, the Proclamation imposes indefinite and significant restrictions and limitations on entry of nationals from eight countries whose information-sharing and identity-management protocols have been deemed "inadequate." *Id.* at 45,162–67. The Proclamation notes that screening and vetting protocols and procedures play a critical role in preventing terrorist attacks and other public safety threats by enhancing the Government's ability to "detect foreign nationals who

may commit, aid, or support acts of terrorism." *Id.* at 45,162. Thus, the Proclamation concludes, "absent the measures set forth in th[e] proclamation, the immigrant and nonimmigrant entry into the United States of persons described in section 2 of th[e] proclamation [will] be detrimental to the interests of the United States." *Id.* at 45,161–62.

The President selected eight countries for inclusion in the Proclamation based on a "worldwide review" conducted under the orders of EO-2. *Id.* at 45,161, 45,163–64. As part of that review, the Secretary of the Department of Homeland Security established global requirements for information sharing "in support of immigration screening and vetting" that included a comprehensive set of criteria on the information-sharing practices, policies, and capabilities of foreign governments. *Id.* at 45,161–63. The Secretary of State then "engaged with the countries reviewed in an effort to address deficiencies and achieve improvements." *Id.* at 45,161. The Secretary of Homeland Security, after consultation with the Secretary of State and the Attorney General, ultimately identified 16 countries as "inadequate" based on "an analysis of their identity-management protocols, information-sharing practices, and risk factors." *Id.* at 45,163. An additional 31 countries were deemed "at risk" of becoming "inadequate." *Id.*

Countries were classified as "inadequate" based on whether they met the "baseline" developed by the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence. *Id.* at 45,162. The baseline incorporated three categories of criteria: 1) identity-management information; 2) national security and public-safety ***676** information; and 3) national security and public-safety risk assessment. *Id.* Identity-management information ensures that foreign nationals seeking to enter the United States are who they claim to be. *Id.* This category "focuses on the integrity of documents required for travel to the United States," including whether the country issues passports with embedded data to confirm identity, reports lost and stolen passports, and provides additional identity-related information when requested. *Id.* National security and public-safety information includes whether the country "makes available, directly or indirectly, known or suspected terrorist and criminal-history information upon request," whether it provides identity document exemplars, and whether the country "impedes the United States Government's receipt of information about passengers and crew traveling to the United States." *Id.* Finally, national security and public-safety risk assessment focuses on whether the country is "a known or potential terrorist safe haven," whether the country participates in the Visa Waiver Program, and whether the country "regularly fails to receive its nationals" following their removal from the United States. *Id.* at 45,162–63.

After a "50-day engagement period to encourage all foreign governments ... to improve their performance," the Secretary of Homeland Security ultimately determined that Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen continued to be "inadequate" based on their identity-management protocols, information-sharing practices, and risk factors.[3] *Id.* at 45,163. The Secretary of Homeland Security also determined that Iraq did not meet the baseline requirements, but concluded that entry restrictions and limitations were not warranted because of the "close cooperative relationship between the United States and the democratically elected government of Iraq, the strong United States diplomatic presence in Iraq, the significant presence of United States forces in Iraq, and Iraq's commitment to combating the Islamic State of Iraq and Syria (ISIS)." *Id.*

3 The Proclamation does not include the other thirty-nine countries deemed either "inadequate" or "at risk" of becoming "inadequate." *See* 82 Fed. Reg. at 45,163. As the district court noted, "the explanation for how the Administration settled on the list of eight countries is obscured." *Hawai'i TRO*, 265 F.Supp.3d at 1157 n.16. This is due, in large part, to the fact that no court has been able to consider—or even view—the DHS report in question.

On September 15, 2017, the Secretary of Homeland Security submitted a report to the President recommending entry restrictions for nationals from seven countries "determined to be 'inadequate' in providing such [requested] information and in light of the other factors discussed in the report." *Id.* After consultation with "appropriate Assistants to the President and members of the Cabinet, including the Secretaries of State, Defense, and Homeland Security, and the Attorney General" and "accounting for the foreign policy, national security, and counterterrorism objectives of the United States," the President decided to "restrict and limit the entry of nationals of 7 countries found to be 'inadequate' ": Chad, Iran, Libya, North Korea, Syria,

Venezuela, and Yemen. *Id.* at 45,164. And although Somalia "generally satisfies" the information-sharing requirements of the baseline, the President also imposed entry restrictions and limitations on Somalia nationals because of "its government's inability to effectively and consistently cooperate, combined with the terrorist threat that emanates from its territory." *Id.* The President restricted entry of all immigrants from seven of the ***677** eight countries, and adopted "a more tailored approach" to the entry of nonimmigrants. *Id.* at 45,164–65.

Section 2's challenged country restrictions and proffered rationales are as follows:

Chadian nationals may not enter as immigrants or nonimmigrants on business, tourist, or business/tourist visas because, although Chad is "an important and valuable counterterrorism partner of the United States, and .... has shown a clear willingness to improve," it "does not adequately share public-safety and terrorism-related information," and several terrorist groups are active within Chad or the surrounding region. *Id.* at 45,165.

Iranian nationals may not enter as immigrants or nonimmigrants except under valid student and exchange visitor visas, and such visas are subject to "enhanced screening and vetting." *Id.* The Proclamation notes that "Iran regularly fails to cooperate with the United States Government in identifying security risks, fails to satisfy at least one key risk criterion, is the source of significant terrorist threats, and fails to receive its nationals" following final orders of removal from the United States. *Id.*

The entry of Libyan nationals as immigrants and as nonimmigrants on business, tourist, or business/tourist visas is suspended because, although Libya "is an important and valuable counterterrorism partner," it "faces significant challenges in sharing several types of information, including public-safety and terrorism-related information," "has significant deficiencies in its identity-management protocols," does not "satisfy at least one key risk criterion," has not been "fully cooperative" in receiving its nationals after their removal from the United States, and has a "substantial terrorist presence" within its territory. *Id.* at 45,165–66.

The entry of all Syrian nationals—on immigrant and non-immigrant visas alike—is suspended because "Syria regularly fails to cooperate with the United States Government in identifying security risks, is the source of significant terrorist threats, and has been designated by the Department of State as a state sponsor of terrorism." *Id.* at 45,166. Syria also has "significant inadequacies in identity-management protocols, fails to share public-safety and terrorism information, and fails to satisfy at least one key risk criterion." *Id.*

Yemeni nationals may not enter the United States as immigrants or nonimmigrants on business, tourist, or business/tourist visas because despite being "an important and valuable counterterrorism partner," Yemen "faces significant identity-management challenges, which are amplified by the notable terrorist presence within its territory." *Id.* at 45,166–67.

Somali nationals may not enter the United States as immigrants, and all nonimmigrant visa adjudications and entry decisions for Somali nationals are subject to "additional scrutiny." *Id.* at 45,167. Although Somalia satisfies information-sharing requirements, it "has significant identity-management deficiencies" and a "persistent terrorist threat also emanates from Somalia's territory." *Id.*

These restrictions apply to foreign nationals of the affected countries outside the United States who do not hold valid visas as of the effective date and who do not qualify for a visa under § 6(d)[4] of the ***678** Proclamation. *Id.* Suspension of entry does not apply to lawful permanent residents of the United States; foreign nationals who are admitted, paroled, or have a non-visa document permitting them to travel to the United States and seek entry valid or issued on or after the effective date of the Proclamation; any dual national traveling on a passport issued by a non-designated country; any foreign national on a diplomatic visa; any refugee already admitted to the United States; or any individual granted asylum, withholding of removal, advance parole, or Convention Against Torture protection. *Id.* at 45,167–68. Further, a consular officer, the Commissioner of U.S. Customs and Border Protection, or the Commissioner's designee "may, in their discretion, grant waivers on a case-by-case basis to permit the entry of foreign nationals for whom entry is otherwise suspended or limited if such foreign nationals demonstrate that waivers would

be appropriate and consistent" with certain specified guidelines. *Id.* at 45,168.

4 Section 6(d) of the Proclamation permits individuals whose visas were marked revoked or canceled as a result of EO-1 to obtain "a travel document confirming that the individual is permitted to travel to the United States and seek entry under the terms" of the revoked or canceled visa. 82 Fed. Reg. at 45,171.

II. Justiciability

We first address several of the same justiciability arguments that we found unpersuasive in *Washington v. Trump* and *Hawai'i I.* Once more, we reject the Government's contentions. The Proclamation cannot properly evade judicial review.

A. Ripeness

[1] **[2]** The Government argues that Plaintiffs' claims are speculative and not ripe for adjudication until a specific applicant is denied a visa. [5] We reject this argument. We conclude that the issues in this case are "fit for review," and that significant hardship to Plaintiffs would result from "withholding court consideration" at this point. *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808, 812, 123 S.Ct. 2026, 155 L.Ed.2d 1017 (2003).

5 The Government does not challenge Plaintiffs' Article III standing on appeal. Nonetheless, we "have an obligation to consider Article III standing independently, as we lack jurisdiction when there is no standing." *Day v. Apoliona*, 496 F.3d 1027, 1029 n.2 (9th Cir. 2007). For the reasons set forth in the district court's order, we conclude that Plaintiffs have Article III standing. *See Hawai'i TRO*, 265 F.Supp.3d at 1148–52.

[3] **[4]** "Ripeness is peculiarly a question of timing, designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1122 (9th Cir. 2009) (alteration and internal quotation marks omitted) (quoting *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000)). This case does not concern mere abstract disagreements. Instead, Plaintiffs challenge the Proclamation as implemented by the Department of State and the Department of Homeland Security. That is permissible. Under the traditional "pragmatic" approach to finality, an order may be immediately reviewable even if no "particular action [has been] brought against a particular [entity]." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, — U.S. ——, 136 S.Ct. 1807, 1815, 195 L.Ed.2d 77 (2016) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 150, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967)).

Moreover, contrary to the Government's position, the Proclamation's waiver provisions are not a "sufficient safety valve" and do not mitigate the substantial hardships Plaintiffs have already suffered and will continue to suffer due to the Proclamation. *Washington*, 847 F.3d at 1168–69. Plaintiff Muslim Association of Hawaii, for example, has already lost members as a result of the ***679** Proclamation and its predecessors, and expects to lose more. The mere possibility of a discretionary waiver does not render Plaintiffs' injuries "contingent [on] future events that may not occur." *Texas v. United States*, 523 U.S. 296, 300, 118 S.Ct. 1257, 140 L.Ed.2d 406 (1998) (internal quotation marks omitted) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580–81, 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985)). "[W]ithholding court consideration" at this juncture would undoubtedly result in further hardship to Plaintiffs. *See Nat'l Park Hosp. Ass'n*, 538 U.S. at 808, 123 S.Ct. 2026. We therefore conclude that Plaintiffs' claims are ripe for review.

B. Doctrine of Consular Nonreviewability

[5] **[6]** **[7]** **[8]** **[9]** As in the litigation over EO-1 and EO-2, the Government contends that we are precluded from reviewing the Proclamation by the consular nonreviewability doctrine. Under that doctrine, "the consular official's decision to issue or withhold a visa is not subject either to administrative or judicial review." *Li Hing of Hong Kong, Inc. v. Levin*, 800 F.2d 970, 971 (9th Cir. 1986). In other words, "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a *given* alien." *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543, 70 S.Ct. 309, 94 L.Ed. 317 (1950) (emphasis added). Although the political branches' power to exclude aliens is "largely immune from judicial control," it is not *entirely* immune; such decisions are still subject to "narrow judicial review."

Fiallo v. Bell, 430 U.S. 787, 792, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977) (citations omitted). Moreover, this case is not about individual visa denials, but instead concerns "the President's *promulgation* of sweeping immigration policy." *Washington*, 847 F.3d at 1162. Reviewing the latter "is a familiar judicial exercise," *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196, 132 S.Ct. 1421, 182 L.Ed.2d 423 (2012); courts do not hesitate to reach "challenges to the substance and implementation of immigration policy." *Washington*, 847 F.3d at 1163. Although "[t]he Executive has broad discretion over the admission and exclusion of aliens, [ ] that discretion is not boundless. It extends only as far as the statutory authority conferred by Congress and may not transgress constitutional limitations. It is the duty of the courts, in cases properly before them, to say where those statutory and constitutional boundaries lie." *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986), *aff'd by an equally divided court*, 484 U.S. 1, 108 S.Ct. 252, 98 L.Ed.2d 1 (1987).

The Government's arguments to the contrary are foreclosed by *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187–88, 113 S.Ct. 2549, 125 L.Ed.2d 128 (1993). In *Sale*, the Supreme Court reviewed on the merits whether the President had violated the INA and the United States' treaty obligations by invoking his authority under 8 U.S.C. § 1182(f) to "suspend[ ] the entry of undocumented aliens from the high seas." *Id.* at 160, 113 S.Ct. 2549. By reaching the merits, *Sale* necessarily first decided that the Court had jurisdiction to review whether the President's orders under the color of § 1182(f) were *ultra vires*. *See id.* at 187–88, 113 S.Ct. 2549. As in *Sale*, here we determine whether the Proclamation goes beyond the limits of the President's power to restrict alien entry.

[10] **[11]** **[12]** Because *Sale* did not address the Court's jurisdiction explicitly, the Government speculates that the Supreme Court "could have decided it was unnecessary to" reach this issue, "given that the Court agreed with the government on the merits." We disagree. Instead, the argument ***680** "that a court may decide [questions on the merits] before resolving Article III jurisdiction" is "readily refuted." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). "Without jurisdiction the court cannot proceed at all in any cause." *Id.* at 94, 118 S.Ct. 1003 (quoting *Ex parte McCardle*, 74 U.S. 506, 7 Wall. 506, 514, 19 L.Ed. 264 (1868)). "On every writ of error or appeal, the first and fundamental question is that of jurisdiction ...." *Id.* (quoting *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453, 20 S.Ct. 690, 44 L.Ed. 842 (1900)). While it is true that "drive-by jurisdictional rulings ... have no precedential effect," *Sale* was not a case where jurisdiction "had been assumed by the parties" and so went unaddressed. *Id.* at 91, 118 S.Ct. 1003. To the contrary, as the Government concedes, the parties in *Sale* thoroughly briefed and debated this issue. *See* U.S. Br. 13–18 (No. 92-344); Resp. Br. 50–58 (No. 92-344); Reply Br. 1–4 (No. 92-344).

[13] Judicial review of the legality of the Proclamation respects our constitutional structure and the limits on presidential power. The consular nonreviewability doctrine arose to honor Congress's choices in setting immigration policy—not the President's. *See Sing v. United States*, 158 U.S. 538, 547, 15 S.Ct. 967, 39 L.Ed. 1082 (1895). This doctrine shields from judicial review only the enforcement "through executive officers" of Congress's "declared [immigration] policy," *id.*, not the President's rival attempt to set policy. The notion that the Proclamation is unreviewable "runs contrary to the fundamental structure of our constitutional democracy."[6] *Washington*, 847 F.3d at 1161. We have jurisdiction to review such an action, and we do so here.

6 The Government argues that the President, at any time and under any circumstances, could bar entry of all aliens from any country, and intensifies the consequences of its position by saying that no federal court—not a federal district court, nor our court of appeals, nor even the Supreme Court itself—would have Article III jurisdiction to review that matter because of the consular nonreviewability doctrine. United States Court of Appeals for the Ninth Circuit, *17-17168 State of Hawaii v. Donald Trump*, YouTube (Dec. 7, 2017) at 13:01–17:33, https://www.youtube.com/watch?v=9Q0p_B40Pa8. Particularly in the absence of an explicit jurisdiction-stripping provision, we doubt whether the Government's position could be adopted without running roughshod over the principles of separation of powers enshrined in our Constitution.

C. Cause of Action and Statutory Standing

The Government also contends that Plaintiffs' statutory claims are unreviewable for lack of a cause of action and lack of statutory standing. We disagree.

1. APA Cause of Action

[14] **[15]** We begin first by examining whether Plaintiffs' claims are reviewable under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq. Although the President's actions fall outside the scope of direct review, *see Franklin v. Massachusetts*, 505 U.S. 788, 800–01, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992), "[r]eview of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive," *id.* at 828, 112 S.Ct. 2767 (Scalia, J., concurring); *see also Chamber of Commerce v. Reich*, 74 F.3d 1322, 1324, 1328 (D.C. Cir. 1996) (holding that the court could review whether an executive order conflicted with a federal statute where plaintiffs had sought to enjoin executive branch officials implementing the order). Here, Plaintiffs bring suit not just against the President, but also against the entities charged with carrying out his instructions: the Department of ***681** State and the Department of Homeland Security. Further, because these agencies have "consummat[ed]" their implementation of the Proclamation, from which "legal consequences will flow," their actions are "final" and therefore reviewable under the APA.[7] *Bennett v. Spear*, 520 U.S. 154, 177–78, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) (citation and internal quotation marks omitted).

7 The Government contends that there is no "final" agency action here because Plaintiffs' claims are unripe. For the reasons discussed previously, we reject this argument.

[16] Finally, the Government argues that the APA precludes review of actions committed to "agency discretion by law," 5 U.S.C. § 701(a)(2), and that the Proclamation is such an action. Plaintiffs counter that the Proclamation is not an unreviewable discretionary action, but rather is cabined by discernible constitutional and statutory limits. We are not persuaded by the Government's characterization of the Proclamation as an action committed to the Executive's discretion. This exception to the presumption of judicial review is "very narrow," applying only where "statutes are drawn in such broad terms that ... there is no law to apply." *Heckler v. Chaney*, 470 U.S. 821, 830, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971)). It does not apply where, as here, a court is tasked with reviewing whether an executive action has exceeded statutory authority. *See Assiniboine & Sioux Tribes v. Bd. of Oil & Gas Conservation*, 792 F.2d 782, 791–92 (9th Cir. 1986) (collecting cases).

2. Zone of Interests

[17] The Government additionally argues that even if an APA cause of action exists, Plaintiffs cannot avail themselves of it because they do not fall within the INA's zone of interests. Once again, we are tasked with determining whether Plaintiffs' interests "fall within the zone of interests protected by the law invoked." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, — U.S. ——, 134 S.Ct. 1377, 1388, 188 L.Ed.2d 392 (2014) (quoting *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984)).

We conclude that Dr. Elshikh's challenge to the Proclamation falls within the INA's zone of interests. He asserts that the Proclamation prevents his brothers-in-law from reuniting with his family. *See Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State*, 45 F.3d 469, 471–72 (D.C. Cir. 1995) ("The INA authorizes the immigration of family members of United States citizens and permanent resident aliens. In originally enacting the INA, Congress implemented the underlying intention of our immigration laws regarding the preservation of the family unit. Given the nature and purpose of the statute, the resident appellants fall well within the zone of interest Congress intended to protect." (internal citations and alterations omitted)), *vacated on other grounds*, 519 U.S. 1, 117 S.Ct. 378, 136 L.Ed.2d 1 (1996). John Does 1 and 2 fall within the same zone of interest, alleging that they will be separated from family members—a son-in-law and a mother, respectively.

The Government maintains that these interests are inadequate because a relative of an alien seeking admission has no right to participate in visa proceedings. Yet the Supreme Court has reviewed the merits of cases brought by U.S. residents with a specific interest in the entry of a foreigner, as have we. *See, e.g., Kerry v. Din*,

— U.S. ——, 135 S.Ct. 2128, 2131, 192 L.Ed.2d 183 (2015) (involving a challenge by U.S. citizen to denial of her husband's visa); ***682** *Kleindienst v. Mandel*, 408 U.S. 753, 756–60, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972) (arising from a challenge by American professors to denial of visa to journalist invited to speak at academic events); *Cardenas v. United States*, 826 F.3d 1164, 1167 (9th Cir. 2016) (addressing a U.S. citizen's challenge to denial of husband's visa). In a case similar to the one before us, *Legal Assistance for Vietnamese Asylum Seekers v. Department of State*, the D.C. Circuit found that visa sponsors had standing to sue when they alleged that the State Department's refusal to process visa applications resulted in an injury to the sponsors. 45 F.3d at 471–73.

[18] Likewise, Hawai'i's "efforts to enroll students and hire faculty members who are nationals from the six designated countries fall within the zone of interests of the INA." *Hawai'i I*, 859 F.3d at 766. The INA clearly provides for the admission of nonimmigrant students into the United States. *See* 8 U.S.C. § 1101(a)(15)(F) (identifying students qualified to pursue a full course of study); 8 C.F.R. § 214.2(f) (providing the requirements for nonimmigrant students, including those in colleges and universities). The INA also provides that nonimmigrant scholars and teachers may be admitted into the United States. *See, e.g.*, 8 U.S.C. § 1101(a)(15)(J) (identifying students, scholars, trainees, and professors in fields of specialized knowledge or skill, among others); *id.* § 1101(a)(15)(H) (identifying aliens working in specialty occupations); *id.* § 1101(a)(15)(O) (identifying aliens with extraordinary abilities in the sciences, arts, education, business, or athletics). As we have said before, "[t]he INA leaves no doubt" that Hawai'i's interests in "student- and employment-based visa petitions for its students and faculty are related to the basic purposes of the INA." *Hawai'i I*, 859 F.3d at 766.

Further, the Muslim Association of Hawai'i (the "Association") alleges that its members will suffer harms such as separation from their families, and that the Association itself will suffer the loss of its members if it is not granted a preliminary injunction.

Once again, we conclude that "Plaintiffs' claims of injury as a result of the alleged statutory violations are, at the least, '*arguably* within the zone of interests' that the INA protects" and therefore judicially reviewable. *Id.* at 767 (quoting *Bank of Am. Corp. v. City of Miami*, — U.S. ——, 137 S.Ct. 1296, 1303, 197 L.Ed.2d 678 (2017) (citation omitted) (emphasis added)).

3. Equitable Cause of Action

[19] **[20]** Even if there were no "final agency action" review under the APA, courts have also permitted judicial review of presidential orders implemented through the actions of other federal officials.[8] This cause of action, which exists outside of the APA, allows courts to review *ultra vires* actions by the President that go beyond the scope of the President's statutory authority. *See Reich*, 74 F.3d at 1327–28 (citing *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108, 110, 23 S.Ct. 33, 47 L.Ed. 90 (1902) and *Leedom v. Kyne*, 358 U.S. 184, 188–89, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958)) (permitting challenge to an Executive Order promulgated by the president and implemented by the Secretary of Labor, despite the lack of a final agency action under the APA); *see also* ***683** *Duncan v. Muzyn*, 833 F.3d 567, 577–79 (6th Cir. 2016); *R.I. Dep't Envtl. Mgmt. v. United States*, 304 F.3d 31, 40–43 (1st Cir. 2002); *cf. Armstrong v. Exceptional Child Ctr., Inc.*, — U.S. ——, 135 S.Ct. 1378, 1384, 191 L.Ed.2d 471 (2015) (citing *McAnnulty* for the proposition that federal courts may enjoin "violations of federal law by federal officials"). When, as here, Plaintiffs challenge the President's statutory authority to issue the Proclamation, we are provided with an additional avenue by which to review these claims.

8 The Supreme Court has decided the merits of such claims, including the specific claim that an action exceeded the authority granted under § 1182(f). *See Sale*, 509 U.S. at 187–88, 113 S.Ct. 2549; *see also Dames & Moore v. Regan*, 453 U.S. 654, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981).

Having concluded that Plaintiffs' claims are justiciable, we now turn to the district court's preliminary injunction.

III. The Preliminary Injunction

[21] **[22]** **[23]** A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). "A plaintiff seeking a

preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Id.* at 20, 129 S.Ct. 365. We may affirm the district court's entry of the preliminary injunction "on any ground supported by the record." *Enyart v. Nat'l Conference of Bar Exam'rs, Inc.*, 630 F.3d 1153, 1159 (9th Cir. 2011).

A. Likelihood of Success on the Merits

[24] We consider first whether Plaintiffs are likely to succeed on the merits. In so doing, we consider four arguments[9] advanced by Plaintiffs: (1) the President has exceeded his congressionally delegated authority under 8 U.S.C. § 1182(f); (2) the President has failed to satisfy § 1182(f)'s requirement that prior to suspending entry, the President must find that entry of the affected aliens would be detrimental to the interests of the United States; (3) the Proclamation's ban on immigration from the designated countries violates 8 U.S.C. § 1152(a)(1)(A)'s prohibition on nationality-based discrimination; and (4) the President lacks the authority to issue the Proclamation in the absence of a statutory grant. We address each in turn.

9 As we explain below, we decline to reach Plaintiffs' arguments other than those listed here.

1. Scope of Authority under § 1182(f)

In determining whether the President has the statutory authority to issue the Proclamation under 8 U.S.C. § 1182(f), we begin with the text. *See Sale*, 509 U.S. at 171, 113 S.Ct. 2549; *Haig v. Agee*, 453 U.S. 280, 289–90, 101 S.Ct. 2766, 69 L.Ed.2d 640 (1981). But our inquiry does not end there. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000); *see also United States v. Witkovich*, 353 U.S. 194, 199, 77 S.Ct. 779, 1 L.Ed.2d 765 (1957) (declining to "read in isolation and literally" an immigration statute that "appear[ed] to confer upon the Attorney General unbounded authority"). In *Brown & Williamson*, the Court looked beyond the "particular statutory provision in isolation," and interpreted the statute to create a "symmetrical and coherent regulatory scheme." 529 U.S. at 132–33, 120 S.Ct. 1291. The Court thus undertook a holistic review, which entailed examining the statute's legislative history, *see id.* at 146–47, 120 S.Ct. 1291, "congressional policy," *id.* at 139, 120 S.Ct. 1291, and "common sense as to the manner in ***684** which Congress is likely to delegate a policy decision of such economic and political magnitude," *id.* at 133, 120 S.Ct. 1291.

Taking guidance from the Court's instructions in *Brown & Williamson* to look beyond the challenged "provision in isolation," *id.* at 132, 120 S.Ct. 1291, we conclude that the Proclamation is inconsistent not just with the text of § 1182(f), but with the statutory framework as a whole, legislative history, and prior executive practice. Although no single factor may be dispositive, these four factors taken together strongly suggest that Plaintiffs are likely to succeed on their claim that the President has exceeded his delegated authority under section 1182(f). We discuss each factor in greater detail below.

a. Statutory Text

We turn first to the text of § 1182(f). The INA grants the President the power to "*suspend* the entry of ... any class of aliens" "for *such period* as he shall deem *necessary*." 8 U.S.C. § 1182(f) (emphasis added). We note at the outset that broad though the provision may be, the text does not grant the President an unlimited exclusion power.

Congress's choice of words is suggestive, at least, of its hesitation in permitting the President to impose entry suspensions of unlimited and indefinite duration. "The word 'suspend' connotes a temporary deferral." *Hoffman ex rel. N.L.R.B. v. Beer Drivers & Salesmen's Local Union No. 888*, 536 F.2d 1268, 1277 (9th Cir. 1976) (citing Webster's Third New International Dictionary (1966) and Bouvier's Law Dictionary (3d ed. 1914)). "[T]he word 'period,' " in turn, "connotes a stated interval of time commonly thought of in terms of years, months, and days." *United States v. Updike*, 281 U.S. 489, 495, 50 S.Ct. 367, 74 L.Ed. 984 (1930). This construction of the term "period" is reinforced by the requirement that it be "necessary."[10] § 1182(f).

10 As we discuss later, although prior executive orders or proclamations invoking § 1182(f) did not provide for a set end date, they were noticeably narrower in scope than the Proclamation. At the very least, Congress in adopting § 1182(f) likely did not contemplate that

an executive order of the Proclamation's sweeping breadth would last for an indefinite duration.

At argument, the Government contended that the indefinite duration of the Proclamation's entry restrictions is consistent with the text of § 1182(f). United States Court of Appeals for the Ninth Circuit, *17-17168 State of Hawaii v. Donald Trump*, YouTube (Dec. 7, 2017) at 22:45–23:15. Citing to § 4 of the Proclamation, which provides for a review of the restrictions every 180 days, the Government argued that because the suspensions will be "revisited" twice a year, the Proclamation is less indefinite than President Reagan's and President Carter's orders regarding Cubans and Iranians,[11] respectively. *Id.* at 23:04–23:14. This argument is unpersuasive.

11 Proclamation 5517, 51 Fed. Reg. 30,470 (Aug. 22, 1986) (Cuba order); Exec. Order 12172, 44 Fed. Reg. 67,947 (Nov. 26, 1979) (Iran order), *amended by* Exec. Order 12206, 45 Fed. Reg. 24,101 (Apr. 7, 1980).

The Government has repeatedly emphasized that the travel restrictions are necessary to incentivize and pressure foreign governments into improving their information-sharing and identity-management practices. This creates a peculiar situation where the restrictions may persist ad infinitum. To paraphrase a well-known adage, the Proclamation's review process mandates that the restrictions will continue until practices improve. The Proclamation's duration can be considered definite ***685** only to the extent one presumes that the restrictions will, indeed, incentivize countries to improve their practices. Where, as here, there is little evidence to support such an assumption, the Proclamation risks producing a virtually perpetual restriction—a result that the plain text of § 1182(f) heavily disfavors for such a far-reaching order.[12]

12 Because issuing indefinite entry restrictions under these circumstances violates § 1182(f), we further view § 1182(f) as prohibiting a series of temporary bans when it appears such serial bans are issued to circumvent the bar on indefinite entry restrictions. *See also* Brief of T.A., a U.S. Resident of Yemeni Descent, as Amicus Curiae, Dkt. No. 41 at 7–8 (arguing that § 1182(f)'s use of the singular as it relates to "proclamation" and "period" is meaningful and precludes the use of serial bans to bypass the bar on indefinite suspensions, and noting that other provisions in § 1182 specifically use plural nouns to authorize multiple actions by the executive branch).

b. Statutory Framework

[25] We next examine the statutory framework of the INA. *Brown & Williamson*, 529 U.S. at 133, 120 S.Ct. 1291. We first note that the Constitution gives Congress the primary, if not exclusive, authority to set immigration policy. *See Arizona v. United States*, 567 U.S. 387, 409, 132 S.Ct. 2492, 183 L.Ed.2d 351 (2012) (citing *Galvan v. Press*, 347 U.S. 522, 531, 74 S.Ct. 737, 98 L.Ed. 911 (1954)); *see also Fiallo*, 430 U.S. at 792, 97 S.Ct. 1473 ("[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." (citation and internal quotation marks omitted)); *Oceanic Steam Nav. Co. v. Stranahan*, 214 U.S. 320, 340, 29 S.Ct. 671, 53 L.Ed. 1013 (1909) ("[T]he authority of Congress over the right to bring aliens into the United States embraces every conceivable aspect of that subject ...."). Congress has delegated substantial power in this area to the Executive Branch, but the Executive may not exercise that power in a manner that conflicts with the INA's finely reticulated regulatory scheme governing the admission of foreign nationals.

In line with this principle, the D.C. Circuit has held that the Executive cannot use general exclusionary powers conferred by Congress to circumvent a specific INA provision without showing a threat to public interest, welfare, safety or security that was independent of the specific provision. *Abourezk*, 785 F.2d at 1057–58. The *Abourezk* court reasoned that the Executive's use of the general exclusionary provision to deny entry to members of groups proscribed in the specific provision would "rob [the general provision] of its independent scope and meaning," render the specific provision superfluous, and conflict with limits that Congress imposed on the use of the specific provision. *Id.* at 1057. We agree with the D.C. Circuit's approach and apply it to § 1182(f).

We conclude that the Proclamation conflicts with the statutory framework of the INA by indefinitely nullifying Congress's considered judgments on matters of immigration. The Proclamation's stated purposes are to prevent entry of terrorists and persons posing a threat to public safety, as well as to enhance vetting capabilities and processes to achieve that goal. *See* 82 Fed. Reg. at 45,161. Yet Congress has already acted to effectuate these purposes.

As for the prevention of entry of terrorists and persons likely to pose public-safety threats, Congress has considered these concerns, and enacted legislation to restrict entry of persons on those specific grounds. Under 8 U.S.C. § 1182(a)(3)(B), any alien who has "engaged in a terrorist activity" is inadmissible, [13] unless the Secretary ***686** of State determines in his unreviewable discretion that the alien qualifies for a waiver. *See id.* § 1182(d)(3)(B). With regard to public safety, Congress has created numerous inadmissibility grounds, including an array of crime-related grounds. *See, e.g., id.* § 1182(a)(2)(A) (crime of moral turpitude or drug offense); § 1182(a)(2)(B) (two or more offenses for which the aggregate sentences were five years or more); § 1182(a)(2)(C) (drug trafficking or benefitting from a relative who recently trafficked drugs); § 1182(a)(2)(D) (prostitution or "commercialized vice"); § 1182(a)(2)(H) (human trafficking); § 1182(a)(2)(I) (money laundering); § 1182(a)(3) ("Security and related grounds").

13 The term "engaged in a terrorist activity" is comprehensive. For example, "terrorist activity" includes any unlawful use of a weapon or dangerous device "other than for mere personal monetary gain," and "[e]ngag[ing] in terrorist activity" includes providing "material support" for any "terrorist activity" or terrorist organization. *See* 8 U.S.C. § 1182(a)(3)(B)(iii)(V)(bb), (a)(3)(B)(iv).

With respect to the enhancement of vetting capabilities and processes, we likewise conclude that Congress has considered the reality that foreign countries vary with respect to information-sharing and identity-management practices, as well as terrorism risk. In fact, Congress addressed those concerns in a neighboring section, 8 U.S.C. § 1187 (the Visa Waiver Program or "VWP"), which was amended as recently as 2015 to address the heightened risk of terrorism in certain countries. *See* Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015, Pub. L. No. 114-113, § 203, 129 Stat. 2242, 2989–91. Significantly, many of the criteria used to determine whether a foreign national's country of origin qualifies for VWP treatment are replicated in the Proclamation's list of baseline criteria. This includes that the countries use electronic passports, § 1187(a)(3)(B), report lost or stolen passports, § 1187(c)(2)(D), and not provide safe haven for terrorists, § 1187(a)(12)(D)(iii). *See* 82 Fed. Reg. 45,162. The Proclamation even makes participation in the Visa Waiver Program part of its criteria for evaluating countries. *Id.* at 45,162–63.

The Government argues that the Visa Waiver Program is irrelevant because its "specific purpose" is the "facilitation of travel," and therefore it does not foreclose the President from addressing the "separate issue of what to do about a country that fails so many criteria that its information-sharing practices and other risk factors are collectively inadequate." This argument falls short. The Visa Waiver Program's travel facilitation purpose is notable, but not for the reason advanced by the Government. As we explained above, the Visa Waiver Program utilizes many of the same criteria relied upon by the Proclamation. Congress thus expressly considered the reality that countries vary with respect to information-sharing and identity-management practices, as well as terrorism risk. In response to that reality, Congress could have enacted measures restricting travel from countries with inadequate risk factors, taken no action, or enacted provisions facilitating travel from low-risk countries. In creating the Visa Waiver Program, Congress chose the third approach. In so doing, Congress necessarily determined that the interests of the United States would be better served by facilitating *more* travel, not less. By heavily restricting travel from the affected countries, the Proclamation thus conflicts with the purpose of the Visa Waiver Program.

More broadly, the Government contends that Plaintiffs' reliance on the statutory framework is misplaced because § 1182(f) empowers the President to issue "*supplemental* ***687** " admission restrictions when he finds that the national interest so warrants. Although true, this merely begs the question of whether the restrictions at issue here are "supplemental." We conclude that the indefinite suspension of entry of all nationals from multiple countries, absent wartime or exigent circumstances, nullifies rather than "supplement[s]" the existing statutory scheme. The President is not foreclosed from acting to enhance vetting capabilities and other practices in order to strengthen existing immigration law, but must do so in a manner consistent with Congress's intent. Put another way, the President cannot effectively abrogate existing immigration law while purporting to merely strengthen it; the cure cannot be worse than the disease. Here, the President has used his § 1182(f) and § 1185(a) powers to nullify numerous specific provisions of the INA indefinitely with regard to all nationals of six countries, and has overridden Congress's legislative responses to the same concerns the Proclamation aims to address. The

Executive cannot without assent of Congress supplant its statutory scheme with one stroke of a presidential pen.

c. Legislative History

The legislative history suggests further limitations on § 1182(f)'s broad grant of authority. Prior to passing the INA, which included § 1182(f), the House of Representatives debated an amendment that would have continued to restrict the President's authority to suspend immigration only "[w]hen the United States is at war or during the existence of a national emergency proclaimed by the President." 98 Cong. Rec. 4423 (statement of Rep. Multer). [14] Speaking in opposition to the ultimately unsuccessful amendment, the sponsor of the bill urged that § 1182(f)'s broad language was "absolutely essential," because

> [W]hen there is an outbreak of an epidemic in some country, whence these people are coming, it is *impossible* for Congress to act. People might conceivably in large numbers come to the United States and bring all sorts of communicable diseases with them. More than that, suppose we have a period of great unemployment? In the judgment of the committee, it is advisable at such times to permit the President to say that for a certain time we are not going to aggravate that situation.

Id. (statement of Rep. Walter) (emphasis added).

14 Section 1182(f)'s 1941 predecessor limited the president's authority to suspend entry of aliens only to times of war or national emergency. *See* Act of June 21, 1941, 55 Stat. 252, 252–53. In anticipation of future immigration reform, the Senate Committee on the Judiciary published a comprehensive report in 1950 on the state of immigration laws in the country. *See* S. Rep. No. 81-1515, at 1–2 (1950). Although the report states that the committee was considering a provision that would "permit the President to suspend any and all immigration whenever he finds such action to be desirable in the best interests of the country," it is unclear whether the report's brief statement was in reference to what would eventually become § 1182(f) two years later. *Id.* at 381. More importantly, as Plaintiffs point out, none of the bill's supporters affirmatively voiced such a broad interpretation of § 1182(f) when pressed on the matter by members of the opposition.

Although Representative Walter and the bill's supporters did not "intend[ ] [their] list of examples to be exhaustive," *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 649, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990), "it is significant that the example[s] Congress did give" all share the common trait of exigency. *Moran v. London Records, Ltd.*, 827 F.2d 180, 183 (7th Cir. 1987). Proponents of § 1182(f) deliberately pinned the provision to examples ***688** where it would be difficult, if not impossible, for Congress to react in a timely manner, thus necessitating swift presidential action. [15] The legislative history, then, suggests that despite § 1182(f)'s facially broad grant of power, [16] the Proclamation—which cites to no exigencies, national or otherwise, and does not respond to a situation Congress would be ill-equipped to address—falls outside of the boundaries Congress set.

15 We note that hearings in 1970 and 1977 produced testimony from the Department of State that § 1182(f) (or § 212(f) of the INA) could be traced to "health prohibitions" even though the text does not explicitly limit executive use to exigencies, health or otherwise. *See, e.g.*, *United States-South African Relations: South Africa's Visa Policy: Hearing Before the Subcomm. on Africa & Int'l Org. of the Comm. on Int'l Relations H. Rep.*, 95th Cong. 10–11 (1977) (statement of Hon. Barbara M. Watson, Administrator, Bureau of Security and Consular Affairs, Dep't of State). Considering the strength of legislative history supporting use of § 1182(f) to restrict entry during epidemics, it is noteworthy that a 2014 Congressional Research Service report cautioned that the provision could only "potentially" be used to prevent entry of "foreign nationals traveling from a particular country or region from which there has been an Ebola outbreak." *See* Sarah A. Lister, *Preventing the Introduction and Spread of Ebola in the United States: Frequently Asked Questions*, Cong. Res. Serv. 3 (Dec. 5, 2014). The report noted that § 1182(f) had "never been employed so broadly" before. *Id.*

16 Several congressmen did express concerns prior to enactment that § 1182(f) would give the President "an untrammeled right, an uninhibited right to suspend immigration entirely." 98 Cong. Rec. 4423 (statement

of Rep. Celler). Their "fears and doubts," however, "are no authoritative guide to the construction of legislation[,] [because] [i]n their zeal to defeat a bill, [opponents to a bill] understandably tend to overstate its reach." *Bryan v. United States*, 524 U.S. 184, 196, 118 S.Ct. 1939, 141 L.Ed.2d 197 (1998) (internal citations and quotation marks omitted).

Moreover, there is some evidence that supporters of § 1182(f) and its predecessor provision believed the opposition's concerns unreasonably presumed executive abuse of power. *See* 87 Cong. Rec. 5049 (1941) (statement of Rep. Bloom) (dismissing a representative's concerns because "the gentleman is figuring on something that the President would not do"); *see also* 98 Cong. Rec. 4424 (statement of Rep. Halleck) ("I take it that the gentleman would not be concerned [about section 1182(f)] if he were sure he would always have a President that could not do any wrong").

d. Prior Executive Practice

Notwithstanding the aforementioned factors, the Government argues that "[h]istorical practice confirms the breadth of, and deference owed to, the President's exercise of authority under Sections 1182(f) and 1185(a)(1)." We pass no judgment on the legality or appropriateness of the Executive's past practice, but we consider such practice to the extent it bears on congressional acquiescence. *See Abourezk*, 785 F.2d at 1055 ("[E]vidence of congressional acquiescence (or the lack thereof) in an administrative construction of the statutory language during the thirty-four years since the current act was passed could be telling."); *see also Zemel v. Rusk*, 381 U.S. 1, 17–18, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965) ("We have held ... and reaffirm today, that the 1926 [Passport] Act must take its content from history: it authorizes only those passport refusals and restrictions 'which it could fairly be argued were adopted by Congress in light of prior administrative practice.' " (quoting *Kent v. Dulles*, 357 U.S. 116, 128, 78 S.Ct. 1113, 2 L.Ed.2d 1204 (1958))).

The Government is correct that presidents have suspended the entry of foreign nationals in various foreign policy and national security settings, but we nevertheless conclude that the Proclamation and its immediate predecessors, EO-1 and EO-2, stand apart in crucial respects. First, out of the forty-three proclamations or orders ***689** issued under § 1182(f) prior to EO-1, forty-two targeted only government officials or aliens who engaged in specific conduct and their associates or relatives. *See* Kate M. Manuel, Cong. Research Serv., R44743, *Executive Authority to Exclude Aliens: In Brief* 6–10, (2017) (listing prior § 1182(f) proclamations and orders).

Only one § 1182(f) proclamation suspended entry of all nationals of a foreign country. Proclamation 5517, issued in 1986, suspended entry of Cuban nationals as immigrants in response to the Cuba government's own suspension of "all types of procedures regarding the execution" of an immigration agreement between the United States and Cuba. 51 Fed. Reg. 30,470 (Aug. 22, 1986). In addition, President Carter delegated authority under § 1185(a) to the Secretary of State and the Attorney General to prescribe limitations governing the entry of Iranian nationals, but did not ban Iranian immigrants outright. *See* Exec. Order 12172, 44 Fed. Reg. 67,947 (Nov. 26, 1979), *amended by* Exec. Order 12206, 45 Fed. Reg. 24,101 (Apr. 7, 1980). These isolated instances, which applied to a single country each and were never passed on by a court, cannot sustain the weight placed on them by the Government. *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001) ("Although we have recognized congressional acquiescence to administrative interpretations of a statute in some situations, we have done so with extreme care.").

Moreover, unlike the Proclamation, the Cuba and Iran orders were intended to address specific foreign policy concerns distinct from general immigration concerns already addressed by Congress. The same holds true for the vast majority of prior § 1182(f) suspensions. *See, e.g.*, Executive Order 13606, 77 Fed. Reg. 24,571 (Apr. 22, 2012) (suspending entry of persons who facilitated cyber-attacks and human rights abuses by the Syrian or Iranian governments); Proclamation 6925, 61 Fed. Reg. 52,233 (Oct. 3, 1996) (suspending entry of persons "who formulate, implement, or benefit from policies that impede Burma's transition to democracy, and the immediate family members of such persons"); Proclamation 6569, 58 Fed. Reg. 31,897 (June 3, 1993) (suspending entry of persons "who formulate, implement, or benefit from policies that impede the progress of the negotiations designed to restore constitutional government to Haiti, and the immediate family members of such persons").

The only prior entry suspension lacking a foreign policy or national security purpose distinct from general immigration concerns is found in President Reagan's High Seas Interdiction Proclamation and its implementing executive orders. That Proclamation suspended "entry of undocumented aliens from the high seas" and ordered that such entry "be prevented by the interdiction of certain vessels carrying such aliens." Proclamation 4865, 46 Fed. Reg. 48,107 (Sep. 29, 1981). Consequently, Proclamation 4865 and its implementing executive orders, unlike the present Proclamation, applied by their terms almost entirely to aliens who were already statutorily inadmissible.[17] *See id.*; ***690** Exec. Order 12324, 46 Fed. Reg. 48,109 (Sep. 29, 1981); Exec. Order 12807, 57 Fed. Reg. 23,133 (May 24, 1992).

17 Under 8 U.S.C. § 1182(a)(7)(A)(i)(I), an alien who does not possess "a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document" is inadmissible. The High Seas Interdiction suspensions did, however, affect some aliens who could have become admissible insofar as the suspensions prevented refugees fleeing persecution from reaching United States territorial waters. *See Sale*, 509 U.S. at 187–88, 113 S.Ct. 2549 (holding that barring the entry of refugees outside the territorial waters of the United States did not violate the INA or the United Nations Convention Relating to the Status of Refugees).

We recognize that presidents ordinarily may use—and have used—§ 1182(f) to suspend the entry of aliens who might otherwise be admissible under the INA. But when, as here, a presidential proclamation addresses only matters of immigration already passed upon by Congress, the President's § 1182(f) authority is at its nadir.

The High Seas Interdiction suspensions are consistent with this principle because they apply predominantly to otherwise inadmissible aliens. In contrast, by suspending entry of a class of 150 million potentially admissible aliens, the Proclamation sweeps broader than any past entry suspension and indefinitely nullifies existing immigration law as to multiple countries. The Proclamation does so in the name of addressing general public-safety and terrorism threats, and what it deems to be foreign countries' inadequate immigration-related practices—concerns that Congress has already addressed.

We conclude that the Executive's past practice does not support the Government's position. Instead, such practice merely confirms that the Proclamation, like EO-2, "is unprecedented in its scope, purpose, and breadth." *Hawai'i I*, 859 F.3d at 779.

e. Constitutional Avoidance and Separation of Powers

[26] **[27]** Principles of separation of powers further compel our conclusion that the Proclamation exceeds the scope of authority delegated to the President under § 1182(f). It is a bedrock principle of statutory interpretation that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988); *see also INS v. St. Cyr*, 533 U.S. 289, 300, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001) ("[W]e are obligated to construe the statute to avoid [serious constitutional] problems."). Here, a conclusion that the Proclamation does not exceed the President's delegated authority under § 1182(f) would raise "serious constitutional problems" and should thus be avoided. *See DeBartolo*, 485 U.S. at 575, 108 S.Ct. 1392. Reading § 1182(f) to permit the Proclamation's sweeping exercise of authority would effectively render the statute void of a requisite "intelligible principle" delineating the "general policy" to be applied and "the boundaries of th[e] delegated authority," *Mistretta v. United States*, 488 U.S. 361, 372–73, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989). Without any meaningful limiting principles,[18] the statute would constitute an invalid delegation of Congress's "exclusive[ ]" authority, *Galvan*, 347 U.S. at 531, 74 S.Ct. 737, to formulate policies regarding the entry of aliens.

18 These limiting principles are primarily found in the text of the statute, but also include the surrounding statutory framework, the legislative history, and prior executive practice.

As discussed above, the Proclamation functions as an executive override of broad swaths of immigration laws that Congress has used its considered judgment to enact. If the Proclamation is—as the Government contends—authorized under § 1182(f), then § 1182(f)

upends the normal functioning of separation of powers. Even Congress is prohibited from enabling "unilateral Presidential action that either repeals ***691** or amends parts of duly enacted statutes." *Clinton v. City of New York*, 524 U.S. 417, 439, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998). This is true even when the executive actions respond to issues of "first importance," issues that potentially place the country's "Constitution and its survival in peril." *Id.* at 449, 118 S.Ct. 2091 (Kennedy, J., concurring). In addressing such critical issues, the political branches still do not "have a somewhat free hand to reallocate their own authority," as the "Constitution's structure requires a stability which transcends the convenience of the moment" and was crafted in recognition that "[c]oncentration of power in the hands of a single branch is a threat to liberty." *Id.* at 449–50, 118 S.Ct. 2091.

And the Proclamation's sweeping assertion of authority is fundamentally legislative in nature. Where an action "ha[s] the purpose and effect of altering the legal rights, duties and relations of persons, including the Attorney General, Executive Branch officials and [an alien], all outside the legislative branch," the Supreme Court has held that the action is "essentially legislative in purpose and effect" and thus cannot bypass the "single, finely wrought and exhaustively considered, procedure" for enacting legislation.[19] *INS v. Chadha*, 462 U.S. 919, 951–52, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). Here, the Proclamation does not merely alter the "legal rights, duties and relations" of a single alien, *id.* at 952, 103 S.Ct. 2764, but rather affects the rights, duties and relations of countless American citizens and lawful permanent residents whose ability to be reunified with, and receive visits from, their family members is inhibited by the Proclamation; the Proclamation also significantly affects numerous officials within the Department of Homeland Security and Department of State. Whereas the House's action in *Chadha* "operated ... to overrule the Attorney General," *id.*, here the Proclamation would operate to overrule Congress's "extensive and complex" scheme of immigration laws, *Arizona*, 567 U.S. at 395, 132 S.Ct. 2492, as they pertain to the eight affected countries and the over 150 million affected individuals.

19 Although the Government has not explained why the President has thus far failed to ask Congress to enact the Proclamation's policies by legislation, potential congressional inaction cannot sustain the President's authority to issue the Proclamation, as "[f]ailure of political will does not justify unconstitutional remedies" like violating the Constitution's separation of powers. *Clinton v. City of New York*, 524 U.S. at 449, 118 S.Ct. 2091 (Kennedy, J., concurring).

Decades of Supreme Court precedent support reading meaningful limitations into § 1182(f) in order to avoid striking down the statute itself as an unconstitutional delegation. For example, in *Zemel v. Rusk*, the Court opted to read in limiting principles despite statutory language that, on its face, appeared to grant the Executive complete discretion: "The Secretary of State may grant and issue passports under such rules as the President shall designate and prescribe for and on behalf of the United States." 381 U.S. at 7–8, 17, 85 S.Ct. 1271. By so doing, the Court saved the statute from constituting "an invalid delegation." *Id.* at 18, 85 S.Ct. 1271. The Court noted that principles of separation of powers still apply even in the field of foreign relations, holding that "simply because a statute deals with foreign relations" does not mean that the statute "can grant the Executive totally unrestricted freedom of choice." *Id.* at 17, 85 S.Ct. 1271. Similarly, in *United States v. Witkovich*, the Court—faced with statutory language that "if read in isolation and literally, appears to confer upon the Attorney General unbounded authority"—nonetheless ***692** adopted a more "restrictive meaning" in order to avoid the "constitutional doubts" implicated by a "broader meaning." 353 U.S. at 199, 77 S.Ct. 779.

To avoid the inescapable constitutional concerns raised by the broad interpretation the Government urges us to adopt, we interpret § 1182(f) as containing meaningful limitations—limitations that the Proclamation, in effectively rewriting the immigration laws as they pertain to the affected countries, exceeds. After all, "whether the realm is foreign or domestic, it is still the Legislative Branch, not the Executive Branch, that makes the law." *Zivotofsky ex rel. Zivotofsky v. Kerry*, —— U.S. ——, 135 S.Ct. 2076, 2090, 192 L.Ed.2d 83 (2015).

2. Compliance with § 1182(f)

[28] We next turn to whether, even assuming the President did not exceed the scope of his delegated authority under § 1182(f), the Proclamation meets § 1182(f)'s requirement that the President find that the entry of certain persons

"would be detrimental to the interests of the United States" prior to suspending their entry. 8 U.S.C. § 1182(f).

Although we considered this question in *Hawai'i I* and ultimately answered it in the negative, 859 F.3d at 770–74, the Proclamation differs from EO-2 in several ways. As we discussed above, the Proclamation's suspensions of entry apply indefinitely, rather than for only 90 days. Unlike EO-2, the Proclamation developed as a result of a multi-agency review. The justifications for the Proclamation are different, too. The Proclamation puts forth a national security interest in information sharing between other countries and the United States, explains that it imposes its restrictions as an incentive for other countries to meet the United States' information-sharing protocols, and identifies "tailored" restrictions for each designated country. And the list of affected countries differs from EO-2's: the Proclamation adds Chad, removes Sudan, and includes two non-majority Muslim countries, North Korea and Venezuela.

Although there are some differences between EO-2 and the Proclamation, these differences do not mitigate the need for the President to satisfy § 1182(f)'s findings requirement. Despite our clear command in *Hawai'i I*, the Proclamation—like EO-2—fails to "provide a rationale explaining why permitting entry of nationals from the six designated countries under current protocols would be detrimental to the interests of the United States." *Id.* at 773. In assessing the scope of the President's statutory authority, we begin with the text. The relevant portion of § 1182(f) states:

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

8 U.S.C. § 1182(f).

While § 1182(f) gives the President broad authority to suspend or place restrictions on the entry of aliens or classes of aliens, this authority is not unlimited. Section 1182(f) expressly requires that the President *find* that the entry of a class of aliens would be *detrimental* to the interests of the United States before the aliens in a class are excluded. The use of the word "find" was deliberate. Congress used "find" rather than "deem" in the immediate predecessor to § 1182(f) so that the President would be required to "base his [decision] on some fact," not on mere "opinion" or "guesses." 87 Cong. Rec. 5051 ***693** (1941) (statements of Rep. Jonkman and Rep. Jenkins).

By contrast, the Proclamation summarily concludes: "[A]bsent the measures set forth in this proclamation, the immigrant and nonimmigrant entry into the United States of persons described in section 2 of this proclamation would be detrimental to the interests of the United States." 82 Fed. Reg. 45,161–62. The Proclamation points out that screening and vetting protocols enhance the Government's ability to "detect foreign nationals who may commit, aid, or support acts of terrorism and other public-safety threats." *Id.* at 45,162. It then asserts that the travel restrictions will encourage the targeted foreign governments to improve their information-sharing and identity-management protocols and practices. The degree of desired improvement is left unstated; there is no finding that the present vetting procedures are inadequate or that there will be harm to our national interests absent the Proclamation's issuance.

[29] In assessing the merits of Plaintiffs' motion for a preliminary injunction, the district court considered whether the Government had made the requisite findings for the President to suspend the entry of aliens under § 1182(f). Relying on our decision in *Hawai'i I*, the district court concluded that the Government had not. *Hawai'i TRO*, 265 F.Supp.3d at 1154–55. Although our prior decision in *Hawai'i I* has since been vacated as moot, the Supreme Court "express[ed] no view on the merits" in ordering vacatur. *Trump*, 138 S.Ct. 377. We therefore adopt once more the position we articulated in *Hawai'i I* that § 1182(f) requires entry suspensions to be predicated on a finding of detriment to the United States. 859 F.3d at 773.

The Government argues that the "detailed findings" in the Proclamation satisfy the standard we set forth in *Hawai'i I*. Plaintiffs respond that the findings were inadequate because § 1182(f) expressly requires (1) " 'find[ings]' that support the conclusion that admission of the excluded

aliens would be 'detrimental,' " and (2) "the harm the President identifies must amount to a 'detriment to the interests of the United States.' " We agree with Plaintiffs.

The Proclamation makes no finding whatsoever that foreign nationals' nationality alone renders entry of this broad class of individuals a heightened security risk to the United States.[20] Nor does it contain a finding that the nationality of the covered individuals alone renders their entry into the United States on certain forms of visas detrimental to the interests of the United States. As such, there is no stated connection between the scope of the restriction imposed and a finding of detriment that the Government seeks to alleviate. While the district court may have imprecisely stated that the Proclamation was "unsupported by verifiable evidence," *Hawai'i TRO*, 265 F.Supp.3d at 1157, it was correct in concluding that the stated findings do not satisfy § 1182(f)'s prerequisites.

20 Rather, a declaration from former national security advisors—quoting a study from the Department of Homeland Security—states: "country of citizenship is unlikely to be a reliable indicator of potential terrorist activity."

To be sure, the Proclamation does attempt to rectify EO-2's lack of a meaningful connection between listed countries and terrorist organizations. For instance, it cites to the fact that "several terrorist groups are active" in Chad. 82 Fed. Reg. at 45,165. But the Proclamation does not tie the nationals of the designated countries to terrorist organizations. For the ***694** second time, the Proclamation makes no finding that nationality alone renders entry of this broad class of individuals a heightened security risk or that current screening processes are inadequate.[21]

21 As the statistics provided by the Cato Institute demonstrate, no national from any of the countries selected has caused any of the terrorism-related deaths in the United States since 1975. *See* Brief of the Cato Institute as Amicus Curiae, Dkt. No. 84 at 26–28.

National security is not a "talismanic incantation" that, once invoked, can support any and all exercise of executive power under § 1182(f). *United States v. Robel*, 389 U.S. 258, 263–64, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967). Section 1182(f) requires that the President make a finding that the entry of an alien or class of aliens *would be* detrimental to the interests of the United States. That requirement has not been met.

The Government argues that the district court erred by imposing a higher standard than that set forth in *Hawai'i I* by objecting to the President's stated reasons for the ban, by identifying internal inconsistencies, and by requiring verifiable evidence. We need not address the Government's argument because, as discussed above, the Proclamation has failed to make the critical finding that § 1182(f) requires. We therefore hold that Plaintiffs have shown a likelihood of success on the merits of their § 1182(f) claim that the President has failed to make an adequate finding of detriment.

3. Section 1185(a)

In addition to relying on § 1182(f), the Proclamation also grounds its authority in 8 U.S.C. § 1185(a), which states:

> Unless otherwise ordered by the President, it shall be unlawful [ ] for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe.

8 U.S.C. § 1185(a)(1).

The Government does not argue that § 1185(a) provides an independent basis to suspend entry. Instead, the Government contends that § 1185(a) permits the President to skirt the requirements of § 1182(f) because § 1185(a) does not require a predicate finding before the President prescribes reasonable rules, regulations, and orders governing alien entry and departure. The Government also argues that there is no meaningful standard for review because these matters are committed to the President's judgment and discretion. Plaintiffs respond that the Government cannot use the general authority in § 1185(a) to avoid the preconditions of § 1182(f).

[30] We conclude that the Government cannot justify the Proclamation under § 1182(f) by using § 1185(a) as a backdoor. General grants in a statute are limited by more specific statutory provisions, and § 1182(f) has a

specific requirement that there be a finding of detriment before entry may be suspended or otherwise restricted. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645, 132 S.Ct. 2065, 182 L.Ed.2d 967 (2012) ("It is a commonplace of statutory construction that the specific governs the general." (internal quotation marks and alterations omitted)). Section 1185(a) does not serve as a ground for reversal of the district court's conclusion on Plaintiffs' likelihood of success.

4. Section 1152(a)(1)(A)'s Prohibition on National Origin Discrimination

[31] Next, we consider the impact of 8 U.S.C. § 1152(a)(1)(A) on the President's ***695** authority to issue the Proclamation. Section 1152(a) states:

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

8 U.S.C. § 1152(a)(1)(A) (emphasis added).

The Government argues that the district court erred by reading § 1152(a)(1)(A) to limit the President's authority under § 1182(f), and that § 1152(a)(1)(A) has never been used as a constraint on the President's authority under § 1182(f). In making this argument, the Government once again urges us to conclude that § 1152(a)(1)(A) operates in a separate sphere from § 1182(f). This we decline to do.

Congress enacted § 1152(a)(1)(A) of the INA contemporaneously with the Civil Rights Act of 1964 and the Voting Rights Act of 1965 to eliminate the "national origins system as the basis for the selection of immigrants to the United States." H.R. Rep. No. 89-745, at 8 (1965). In so doing, Congress manifested its intent to repudiate a history of nationality and race-based discrimination in United States immigration policy.[22] *See* 110 Cong. Rec. 1057 (1964) (statement of Sen. Hart) ("[A]n immigration policy with different standards of admissibility for different racial and ethnic groups, in short, a policy with build-in bias, is contrary to our moral and ethical policy."). Recognizing that "[a]rbitrary ethnic and racial barriers [had become] the basis of American immigration policy," Senator Hart, the bill's sponsor, declared that § 1152(a)(1)(A) was necessary "[t]o restore equality and fairplay in our selecting of immigrants." *Id.*

22 The discriminatory roots of the national origins system may be traced back to 1875, when xenophobia towards Chinese immigrants produced Congress's first race-based immigration laws. *See* Brief of the National Asian Pacific American Bar Association as Amicus Curiae, Dkt. No. 126, at 5. The Page Law, passed in 1875, banned immigration of women—primarily Asian women—who were presumed, simply by virtue of their ethnicity and nationality, to be prostitutes. *Id.* at 5. The Page Law was followed in quick succession by the Chinese Exclusion Act in 1882 and the Scott Act in 1888. *Id.* at 6. These laws were justified on security grounds. *See Chae Chan Ping v. United States*, 130 U.S. 581, 606, 9 S.Ct. 623, 32 L.Ed. 1068 (1889) (declining to overturn the Scott Act because "the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security."). This underlying xenophobia eventually produced the national origins system, which clearly signaled that "people of some nations [were] more welcome to America than others," and created "token quotas" based on "implications of race superiority." 110 Cong. Rec. 1057 (statement of Sen. Hart).

The Government argues that § 1152(a)(1)(A)'s prohibition of discrimination in the issuance of visas does not cabin the President's authority to regulate entry under § 1182(f). We disagree. As the Government concedes, the Proclamation restricts the entry of affected aliens *by precluding consular officers from issuing visas* to nationals from the designated countries. *See* 82 Fed. Reg. at 45,168. Put another way, the Proclamation effectuates its restrictions by withholding immigrant visas on the basis of nationality. This directly contravenes Congress's "unambiguous[ ] direct[ions] that no nationality-based discrimination ... occur." *Legal Assistance for Vietnamese Asylum Seekers*, 45 F.3d at 473.

We are bound to give effect to "all parts of a statute, if at all possible." *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633, 93 S.Ct. 2469, 37 L.Ed.2d 207 (1973). The Government's position that § 1152(a)(1)(A) and ***696** § 1182(f) operate in different spheres—the former in issuance of immigrant

visas, the latter in entry—would strip § 1152(a)(1)(A) of much of its power. It is difficult to imagine that Congress would have celebrated the passing of the bill as "one of the most important measures treated by the Senate ... [for its] restate[ment] [of] this country's devotion to equality and freedom" had it thought the President could simply use § 1182(f) to bar Asian immigrants with valid immigrant visas from entering the country. 111 Cong. Rec. 24785 (1965) (statement of Sen. Mansfield); *see also* Lyndon B. Johnson, *Remarks at the Signing of the Immigration Bill, Liberty Island, New York*, The Am. Presidency Project (Oct. 3, 1965), http://www. presidency.ucsb.edu/ws/index.php?pid=27292 (concluding that the discriminatory national origins quota system "will never again shadow the gate to the American Nation with the twin barriers of prejudice and privilege").

[32] We do not think Congress intended § 1152(a)(1)(A) to be so easily circumvented. We therefore read § 1152(a)(1)(A) as prohibiting discrimination on the basis of nationality *throughout* the immigration visa process, including visa issuance and entry. [23]

23 Even if we assume for the sake of argument that Congress intended § 1182(f) and § 1152(a)(1)(A) to operate in entirely separate spheres, as is argued by the Government, the result would be the same. This is so because both at oral argument and in the Proclamation's text, the Government has conceded that if its entry ban were upheld, all embassy actions in issuing visas for nationals of the precluded countries would cease. 82 Fed. Reg. at 45,168 (noting that waiver by consular officers will be effective "both for *the issuance of a visa and for any subsequent entry on that visa*" (emphasis added)); United States Court of Appeals for the Ninth Circuit, *17-17168 State of Hawaii v. Donald Trump*, YouTube (Dec. 7, 2017) at 9:55–11:33; 11:59–12:12. Enforcement of the entry ban under § 1182(f) would inescapably violate § 1152(a)(1)(A)'s prohibition on nationality-based discrimination in the issuance of immigrant visas, because the Proclamation effectively bars nationals of the designated countries from receiving immigrant visas.

To the extent that § 1152(a)(1)(A) conflicts with the broader grant of authority in § 1182(f) and § 1185(a), the Government asks us to give the latter two provisions superseding effect. The Government argues that as the more recently amended and "more specific" provision, § 1185(a) ought to control over § 1152(a)(1)(A). We are unpersuaded by this argument for several reasons.

[33] First, when two statutory provisions are in irreconcilable conflict, a later-enacted, more specific provision is treated as an exception to an earlier-enacted, general provision. *See, e.g.*, *Perez-Guzman v. Lynch*, 835 F.3d 1066, 1075 (9th Cir. 2016); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 183–87 (2012). Section 1152(a)(1)(A) was enacted over a decade after § 1182(f). Section 1152(a)(1)(A) also operates at a greater level of specificity than either § 1182(f) or § 1185(a)—it eliminates nationality-based discrimination for the issuance of immigrant visas. Because the "specific provision is construed as an exception to the general one," we agree with Plaintiffs that § 1152(a)(1)(A) provides a specific anti-discrimination bar to the President's general § 1182(f) powers. *RadLAX*, 566 U.S. at 645, 132 S.Ct. 2065.

[34] Second, § 1152(a)(1)(A) clearly provides for exceptions in a number of circumstances. *See* 8 U.S.C. §§ 1101(a)(27), 1151(b)(2)(A)(i), and 1153. Neither § 1182(f) nor § 1185(a) is included in the list of enumerated exceptions. We presume that Congress's inclusion of specified items ***697** and exclusion of others is intentional. *See United States v. Vance Crooked Arm*, 788 F.3d 1065, 1075 (9th Cir. 2015) ("Under the longstanding canon *expressio unius est exclusio alterius*, we presume that the exclusion of ... phrases" by Congress was intentional). The conspicuous absence of § 1182(f) and § 1185(a) from the listed exceptions vitiates the Government's position that both provisions fall outside § 1152(a)(1)(A)'s purview.

Lastly, the Government's reliance on prior Executive practice is misplaced. The Government again points to President Reagan's Proclamation 5517 suspending immigration from Cuba in response to Cuba's own suspension of immigration practices, and President Carter's Executive Order 12172 and the accompanying visa issuance regulations as to Iranian nationals during the Iran hostage crisis. As we explained above, *supra* at § III.A.1.d, those restrictions were never challenged in court and we do not pass on their legality now. Moreover, both orders are outliers among the forty-plus presidential executive orders restricting entry, and therefore cannot support a showing of congressional acquiescence. *See Solid Waste Agency*, 531 U.S. at 169, 121 S.Ct. 675. Finally, we need not decide whether a

President may, under special circumstances and for a limited time, suspend entry of all nationals from a foreign country. *See IRAP v. Trump*, 265 F.Supp.3d 570, 607 (D. Md. 2017). Such circumstances, if they exist, have not been argued here.

For the reasons stated above, the Proclamation's indefinite entry suspensions constitute nationality discrimination in the issuance of immigrant visas. We therefore conclude that Plaintiffs have shown a likelihood of success on the merits of their claim that the Proclamation runs afoul of § 1152(a)(1)(A)'s prohibition on nationality-based discrimination.

5. Alternative Authority

[35] Having concluded that the Proclamation violates the INA and exceeds the scope of the President's delegated authority under § 1182(f), we view the Proclamation as falling into Justice Jackson's third category from *Youngstown Sheet & Tube Co. v. Sawyer*: "[w]hen the President [has] take[n] measures incompatible with the expressed or implied will of Congress." 343 U.S. 579, 637, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (Jackson, J., concurring). Under *Youngstown*'s tripartite framework, presidential actions that are contrary to congressional will leave the President's "power [ ] at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id.* We therefore must determine whether the President has constitutional authority to issue the Proclamation, independent of any statutory grant—for if he has such power, it may be immaterial that the Proclamation violates the INA. But when a President's action falls into "this third category, the President's asserted power must be both 'exclusive' and 'conclusive' on the issue" in order to succeed. *Zivotofsky ex rel. Zivotofsky*, 135 S.Ct. at 2084.

We conclude that the President lacks independent constitutional authority to issue the Proclamation, as control over the entry of aliens is a power within the exclusive province of Congress.[24] *See* ***698** *Galvan*, 347 U.S. at 531, 74 S.Ct. 737 ("[T]he formulation of these [immigration] policies is entrusted exclusively to Congress"); *see also Arizona*, 567 U.S. at 407, 132 S.Ct. 2492 (citing *Galvan*, 347 U.S. at 531, 74 S.Ct. 737). While the Supreme Court's earlier jurisprudence contained some ambiguities on the division of power between Congress and the Executive on immigration,[25] the Court has more recently repeatedly recognized congressional control over immigration policies. *See, e.g.*, *Chadha*, 462 U.S. at 940, 103 S.Ct. 2764 ("The plenary authority of Congress over aliens under Art. I, § 8, cl. 4 is not open to question"); *Fiallo*, 430 U.S. at 793, 97 S.Ct. 1473 (recognizing "the need for special judicial deference to congressional policy choices in the immigration context"); *Galvan*, 347 U.S. at 531–32, 74 S.Ct. 737 ("[T]hat the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government .... [we] must therefore under our constitutional system recognize congressional power in dealing with aliens.").

24 In *Hawai'i I*, we opted not to decide the question of "whether and in what circumstances the President may suspend entry under his inherent powers as commander-in-chief or in a time of national emergency." 859 F.3d 741, 782 n.21 (9th Cir. 2017). In holding today that the President lacked independent constitutional authority to issue the Proclamation, we again need not, and do not, decide whether the President may be able to suspend entry pursuant to his constitutional authority under *any* circumstances (such as in times of war or national emergency), as the Proclamation was issued under no such exceptional circumstances.

25 *See* Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 Yale L.J. 458, 467–482 (2009) (examining the Supreme Court's shift from viewing authority over immigration as ambiguously belonging to the political branches—without specifying the allocation of power between the two—to increasingly identifying control over immigration as the province of Congress).

Exclusive congressional authority over immigration policy also finds support in the Declaration of Independence itself, which listed "obstructing the Laws for Naturalization of Foreigners" and "refusing to pass [laws] to encourage their migrations hither" as among the acts of "absolute Tyranny" of "the present King of Great Britain." The Declaration of Independence para. 2 (U.S. 1776). As Justice Jackson noted in *Youngstown*, "The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that

they were creating their new Executive in his image." 343 U.S. at 641, 72 S.Ct. 863 (Jackson, J., concurring). This is perhaps why the Constitution vested Congress with the power to "establish an uniform Rule of Naturalization": the Framers knew of the evils that could result when the Executive exerts authority over the entry of aliens, and so sought to avoid those same evils by granting such powers to the legislative branch instead. *See* U.S. Const. art. I, § 8, cl. 4.

B. Remaining Preliminary Injunction Factors

The three remaining preliminary injunction factors also lead us to affirm the preliminary injunction. Plaintiffs have successfully shown that they are likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in their favor, and that the preliminary injunction is in the public interest. *Winter*, 555 U.S. at 20, 129 S.Ct. 365.

1. Irreparable Harm

[36] [37] The Government argues that Plaintiffs will suffer "no cognizable harm" absent the injunction because the Proclamation may only "delay" their relatives, students and faculty, and members from entering the United States. Indefinite delay, however, can rise to the level of irreparable harm. *See, e.g.*, ***699** *CBS, Inc. v. Davis*, 510 U.S. 1315, 1318, 114 S.Ct. 912, 127 L.Ed.2d 358 (1994) (Blackmun, J., in chambers) (granting emergency stay from preliminary injunction because the "indefinite delay" of a broadcast would cause "irreparable harm to the news media"). This is one such instance.

Plaintiffs have presented evidence that the Proclamation will result in "prolonged separation from family members, constraints to recruiting and retaining students and faculty members to foster diversity and quality within the University community, and the diminished membership of the Association," the last of which "impacts the vibrancy of [the Association's] religious practices and instills fear among its members." *Hawai'i TRO*, 265 F.Supp.3d at 1159. As we have said before, "[m]any of these harms are not compensable with monetary damages and therefore weigh in favor of finding irreparable harm." *Hawai'i I*, 859 F.3d at 782–83; *see also Washington*, 847 F.3d at 1168–69 ("[T]he States contend that the travel prohibitions harmed the States' university employees and students, separated families, and stranded the States' residents abroad."); *Hernandez v. Sessions*, 872 F.3d 976, 995 (9th Cir. 2017) (characterizing the "collateral harms to children of detainees whose parents are detained" as an irreparable harm); *Regents of Univ. of Cal. v. Am. Broad. Cos., Inc.*, 747 F.2d 511, 520 (9th Cir. 1984) (crediting intangible harms such as the "impairment of their ongoing recruitment programs [and] the dissipation of alumni and community goodwill and support garnered over the years"); *cf. Moore v. East Cleveland*, 431 U.S. 494, 503–04, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (explaining that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition").

We therefore conclude that Plaintiffs are likely to suffer irreparable harm in the absence of the preliminary injunction.

2. Balance of Equities

[38] [39] We next conclude that the district court correctly balanced the equities in this case. When considering the equities of a preliminary injunction, we must weigh the "competing claims of injury" and "consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24, 129 S.Ct. 365 (citation omitted). In contrast to Plaintiffs' concrete allegations of harm, the Government cites to general national security concerns.[26] National security is undoubtedly a paramount public interest, *see Haig*, 453 U.S. at 307, 101 S.Ct. 2766 ("[N]o governmental interest is more compelling than the security of the Nation."), but it cannot be used as a "talisman ... to ward off inconvenient claims." *Ziglar v. Abbasi*, — U.S. —, 137 S.Ct. 1843, 1862, 198 L.Ed.2d 290 (2017); *cf. New York Times Co. v. United States*, 403 U.S. 713, 719, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971) (Black, J., concurring) (describing "security" as a "broad, vague generality whose contours should not be invoked to abrogate" the law). When, as here, the President has failed to make sufficient findings that the "entry of certain classes of aliens would be detrimental to the national interest," "we cannot conclude that national security interests outweigh the harms to Plaintiffs." *Hawai'i I*, 859 F.3d at 783.

26 The Government additionally argues that "[t]he injunction ... causes irreparable injury by invalidating an action taken at the height of the President's authority." Not so. For the reasons discussed earlier, by acting in a manner incompatible with Congress's will, the President's power here is "at its lowest ebb." *Youngstown*, 343 U.S. at 638, 72 S.Ct. 863 (Jackson, J., concurring).

***700** The injunction here would only preserve the status quo as it existed prior to the Proclamation while the merits of the case are being decided. We think it significant that the Government has been able to successfully screen and vet foreign nationals from the countries designated in the Proclamation under current law for years. *See* Brief of the Cato Institute as Amicus Curiae, Dkt. No. 84 at 26–27 (explaining that, from 1975 through 2017, "no one has been killed in a terrorist attack on U.S. soil by nationals from any of the eight Designated Countries"); *id.* at 29 (showing that the U.S. incarceration rate for persons born in the designated countries is lower than the U.S. incarceration rates for persons born in the U.S. or other non-U.S. countries). Accordingly, the balance of equities tips in Plaintiffs' favor.

3. Public Interest

[40] Lastly, we consider whether Plaintiffs have successfully shown that "an injunction is in the public interest." *Winter*, 555 U.S. at 20, 129 S.Ct. 365. We conclude that they have.

It is axiomatic that the President must exercise his executive powers lawfully. When there are serious concerns that the President has not done so, the public interest is best served by "curtailing unlawful executive action." *Texas v. United States*, 809 F.3d 134, 187 (5th Cir. 2015), *aff'd by an equally divided court* — U.S. ——, 136 S.Ct. 2271, 195 L.Ed.2d 638 (2016). Amici provide further insight into the public interests that would be served by sustaining the district court's injunction. They have furnished us with a plethora of examples, of which we highlight a few.

Amici persuasively cite to increased violence directed at persons of the Muslim faith as one of the Proclamation's consequences. *See* Brief of Civil Rights Organizations as Amici Curiae, Dkt. No. 52 at 19–23; Brief of Members of the Clergy et al. as Amici Curiae, Dkt. No. 97 at 29–32. Amici also explain that by singling out nationals from primarily Muslim-majority nations, the Proclamation has caused Muslims across the country to suffer from psychological harm and distress, including growing anxiety, fear, and terror. Brief of Muslim Justice League et al. as Amici Curiae, Dkt. No. 68 at 21–23.

In assessing the public interest, we are reminded of Justice Murphy's wise words: "All residents of this nation are kin in some way by blood or culture to a foreign land." *Korematsu v. United States*, 323 U.S. 214, 242, 65 S.Ct. 193, 89 L.Ed. 194 (Murphy, J., dissenting). It cannot be in the public interest that a portion of this country be made to live in fear.

We note, too, that the cited harms are extensive and extend beyond the community. As Amici point out, the Proclamation, like its predecessors, "continues to disrupt the provision of medical care" and inhibits "the free exchange of information, ideas, and talent between the designated countries and [various] [s]tates, causing long-term economic and reputational damage." Brief of New York et al. as Amici Curiae, Dkt. No. 71 at 4. Moreover, because the Proclamation bans the entry of potential entrepreneurs, inventers, and innovators, the public's interest in innovation is thwarted at both the state and corporate levels. *See* Brief of Technology Companies as Amici Curiae, Dkt. No. 99 at 5–7. The Proclamation further limits technology companies' abilities to hire to full capacity by barring nationals of the designed countries from filling vacant positions. *See* Brief of Massachusetts Technology Leadership Council as Amicus Curiae, Dkt. No. 120 at 8–16 (explaining that "the technology industry is growing too rapidly to be staffed through domestic labor alone").

***701** The Proclamation also risks denying lesbian, gay, bisexual, transgender, and queer ("LGBTQ") individuals in the United States the opportunity to reunite with their partners from the affected nations. *See* Brief of Immigration Equality et al. as Amici Curiae, Dkt. No. 101 at 17–20. The Proclamation allows that it "may be appropriate" to grant waivers to foreign nationals seeking to reside with close family members in the United States. 82 Fed. Reg. at 45,168–69. But many of the affected nations criminalize homosexual conduct, and LGBTQ aliens will face heightened danger should they choose to apply for a visa from local consular officials on the basis of their same-sex relationships. Brief of Immigration

Equality at 4. The public interest is not served by denying LGBTQ persons in the United States the ability to safely bring their partners home to them.

* * *

For the foregoing reasons, we conclude that the district court did not abuse its discretion in granting an injunction.

C. Scope of the Preliminary Injunction

[41] The Government argues that the injunction is overbroad because it is not limited to redressing the Plaintiffs' "own cognizable injuries." Plaintiffs argue that the nationwide scope of the injunction is appropriate particularly in the immigration context because piecemeal relief would fragment immigration policy. Plaintiffs further argue that it would be impracticable or impossible for them to name all those who would apply to the University of Hawai'i or the Association, but who have been chilled or prevented by the Proclamation from doing so.

[42] **[43]** We review the scope of a preliminary injunction for abuse of discretion. *McCormack v. Hiedeman*, 694 F.3d 1004, 1010 (9th Cir. 2012). Although the district court has "considerable discretion in fashioning suitable relief and defining the terms of an injunction," *Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991), there are limitations on this discretion. Injunctive relief must be "tailored to remedy the specific harm[s]" shown by the plaintiffs. *Id.*

Because this case implicates immigration policy, a nationwide injunction was necessary to give Plaintiffs a full expression of their rights. *See Bresgal v. Brock*, 843 F.2d 1163, 1170–71 (9th Cir. 1987) ("[A]n injunction is not necessarily made over-broad by extending benefit or protection to persons other than prevailing parties in the lawsuit—even if it is not a class action—*if such breadth is necessary to give prevailing parties the relief to which they are entitled.*"). "[T]he Constitution requires 'an *uniform* Rule of Naturalization'; Congress has instructed that 'the immigration laws of the United States should be enforced vigorously and *uniformly*'; and the Supreme Court has described immigration policy as 'a comprehensive and *unified* system.' " *Texas*, 809 F.3d at 187–88 (citations omitted). Any application of § 2 of the Proclamation would exceed the scope of § 1182(f), violate § 1152(a)(1)(A), and harm Plaintiffs' interests. Accordingly, the district court did not abuse its discretion by granting a nationwide injunction.

Although a nationwide injunction is permissible, a worldwide injunction as to all nationals of the affected countries extends too broadly. As the Supreme Court observed in *IRAP*: "The equities relied on by the lower courts do not balance the same way in that context." 137 S.Ct. at 2088. "[W]hatever burdens may result from enforcement of § 2(c) against a foreign national who lacks any connection to this country, they are, at a minimum, a good deal less concrete than the hardships ***702** identified [previously]." *Id.* "At the same time, the Government's interest in enforcing § 2(c), and the Executive's authority to do so, are undoubtedly at their peak when there is no tie between the foreign national and the United States." *Id.*

We therefore narrow the scope of the preliminary injunction, as we did in our November 13, 2017 order on the Government's motion for emergency stay. *See Hawai'i v. Trump*, 2017 WL 5343014, at *1. We then wrote:

> The preliminary injunction is stayed except as to "foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States," as set out below.
>
> The injunction remains in force as to foreign nationals who have a "close familial relationship" with a person in the United States. Such persons include grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins. "As for entities, the relationship must be formal, documented, and formed in the ordinary course, rather than for the purpose of evading [Proclamation 9645]."

Id. (internal citations omitted).

We again limit the scope of the district court's injunction to those persons who have a credible bona fide relationship with a person or entity in the United States. The injunction remains in force as to foreign nationals who have a "close familial relationship" with a person in the United States, including grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins. As for entities, the relationship must be formal, documented, and formed in the ordinary

course of business, rather than for the purpose of evading the Proclamation.

IV. Establishment Clause Claim

Plaintiffs argue that the Proclamation also violates the Establishment Clause of the United States Constitution. They urge us to adopt the view taken by the *en banc* Fourth Circuit in its review of EO-2 that "the reasonable observer would likely conclude that EO-2's primary purpose [was] to exclude persons from the United States on the basis of their religious beliefs." *IRAP*, 857 F.3d at 601.

Because we conclude that the district court did not abuse its discretion in granting the preliminary injunction relying on Plaintiffs' statutory claims, we need not and do not consider this alternate constitutional ground. *See Am. Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153, 161, 109 S.Ct. 1693, 104 L.Ed.2d 139 (1989) ("Particularly where, as here, a case implicates the fundamental relationship between the Branches, courts should be extremely careful not to issue unnecessary constitutional rulings.").

V. Conclusion

For all of these reasons, we affirm in part and vacate in part the district court's preliminary injunction order. We narrow the scope of the injunction to give relief only to those with a credible bona fide relationship with the United States, pursuant to the Supreme Court's decision in *IRAP*, 137 S.Ct. at 2088. In light of the Supreme Court's order staying this injunction pending "disposition of the Government's petition for a writ of certiorari, if such writ is sought," we stay our decision today pending Supreme Court review. *Trump v. Hawai'i*, — U.S. —, 138 S.Ct. 542, — L.Ed.2d — (2017). Because we conclude that Plaintiffs have shown a likelihood of success on their statutory claims, we need not reach their constitutional claims.

***703 AFFIRMED IN PART, VACATED IN PART.**

All Citations

878 F.3d 662, 101 Empl. Prac. Dec. P 45,943, 17 Cal. Daily Op. Serv. 12,269, 2017 Daily Journal D.A.R. 12,181

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883 F.3d 233
United States Court of Appeals, Fourth Circuit.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, a project of the Urban Justice Center, Inc., on behalf of itself and its clients; HIAS, Inc., on behalf of itself and its clients; John Does #1 & 3; Jane Doe #2; Middle East Studies Association of North America, Inc., on behalf of itself and its members; Muhammed Meteab; Arab American Association of New York, on behalf of itself and its clients; Yemeni-American Merchants Association; Mohamad Mashta; Grannaz Amirjamshidi; Fakhri Ziaolhagh; Shapour Shirani; Afsaneh Khazaeli; John Doe #4; John Doe #5, Plaintiffs–Appellees,
and
Allan Hakky; Samaneh Takaloo; Paul Harrison; Ibrahim Ahmed Mohomed, Plaintiffs,
v.
Donald J. TRUMP, in his official capacity as President of the United States; United States Department of Homeland Security; Department of State; Office of the Director of National Intelligence; Kirstjen M. Nielsen, in her official capacity as Secretary of Homeland Security; Rex Tillerson, in his official capacity as Secretary of State; Daniel R. Coats, in his official capacity as Director of National Intelligence, Defendants–Appellants.
The American Center for Law and Justice; Alabama; Immigration Reform Law Institute; Arkansas; Arizona; Florida; Kansas; Louisiana; Missouri; Ohio; Oklahoma; South Carolina; Texas; West Virginia, Amici Supporting Appellant, T.A., A U.S. Citizen of Yemeni Descent; Roderick and Solange MacArthur Justice Center; New York; California; Connecticut; Delaware; Illinois; Iowa; Maine; Maryland; Massachusetts; New Mexico; Oregon; Rhode Island; Vermont; Virginia; Washington; District of Columbia; Cato Institute; Muslim Justice League; Muslim Public Affairs Council; Council on American-Islamic Relations, California; Immigration Equality; The New York City Gay and Lesbian Anti-Violence Project; The National Queer Asian Pacific Islander Alliance; The LGBT Bar Association of Los Angeles; The LGBT Bar Association of Greater New York; Lesbian and Gay Bar Association of Chicago; GLBTQ Legal Advocates & Defenders; Bay Area Lawyers for Individual Freedom; Immigration Law Professors on Statutory Claims; City of Chicago; City of Los Angeles; City of Philadelphia; U.S. Conference of Mayors; International Bar Association's Human Rights Institute; The American-Arab Anti-Discrimination Committee; National Asian Pacific American Bar Association; Civil Rights Organizations; International Labor Organizations; Scholars of Immigration Law; Members of Congress; Professors of Federal Courts Jurisprudence, Constitutional Law, and Immigration Law; Colleges and Universities; Interfaith Group of Religious and Interreligious Organizations and Clergy Members; Technology Companies; International Law Scholars and Nongovernmental Organizations; Karen Korematsu; Jay Hirabayashi; Holly Yasui; Fred T. Korematsu Center for Law & Equality; Civil Rights Organizations; National Bar Associations of Color; City of New York; Massachusetts Technology Leadership Counsel, Inc., Amici Supporting Appellee.
Iranian Alliances Across Borders; Jane Doe #1; Jane Doe #2; Jane Doe #3; Jane Doe #4; Jane Doe #5; John Doe #6; Iranian Students' Foundation, Iranian Alliances Across Borders Affiliate at the University of Maryland College Park, Plaintiffs–Appellees,
v.
Donald J. Trump, in his official capacity as President of the United States; Kirstjen M. Nielsen, in her official capacity as Secretary of Homeland Security; Kevin K. McAleenan, in his official capacity as Acting Commissioner of U.S. Customs and Border Protection; L. Francis Cissna, in his official capacity as Director of U.S. Citizenship and Immigration Services; Rex Tillerson; Jefferson B. Sessions III, in his official capacity as Attorney General of the United States, Defendants–Appellants.
The American Center for Law and Justice; Alabama; Immigration Reform Law Institute; Arkansas; Arizona; Florida; Kansas; Louisiana;

Missouri; Ohio; Oklahoma; South Carolina; Texas; West Virginia, Amici Supporting Appellant, T.A., A U.S. Citizen of Yemeni Descent; Roderick and Solange MacArthur Justice Center; New York; California; Connecticut; Delaware; Illinois; Iowa; Maine; Maryland; Massachusetts; New Mexico; Oregon; Rhode Island; Vermont; Virginia; Washington; District of Columbia; Cato Institute; Muslim Justice League; Muslim Public Affairs Council; Council on American-Islamic Relations, California; Immigration Equality; The New York City Gay and Lesbian Anti-Violence Project; The National Queer Asian Pacific Islander Alliance; The LGBT Bar Association of Los Angeles; The LGBT Bar Association of Greater New York; Lesbian and Gay Bar Association of Chicago; GLBTQ Legal Advocates & Defenders; Bay Area Lawyers for Individual Freedom; Immigration Law Professors on Statutory Claims; City of Chicago; City of Los Angeles; City of Philadelphia; U.S. Conference of Mayors; International Bar Association's Human Rights Institute; The American-Arab Anti-Discrimination Committee; National Asian Pacific American Bar Association; Civil Rights Organizations; International Labor Organizations; Scholars of Immigration Law; Members of Congress; Professors of Federal Courts Jurisprudence, Constitutional Law, and Immigration Law; Colleges and Universities; Interfaith Group of Religious and Interreligious Organizations and Clergy Members; Technology Companies; International Law Scholars and Nongovernmental Organizations; Karen Korematsu; Jay Hirabayashi; Holly Yasui; Fred T. Korematsu Center for Law & Equality; Civil Rights Organizations; National Bar Associations of Color; City of New York; Massachusetts Technology Leadership Counsel, Inc., Amici Supporting Appellee.

Eblal Zakzok; Sumaya Hamadmad; Fahed Muqbil; John Doe #1; Jane Doe #2; Jane Doe #3, Plaintiffs–Appellees,

v.

Donald J. Trump, in his official capacity as President of the United States; United States Department of Homeland Security; United States Department of State; Kirstjen M. Nielsen, in her official capacity as Secretary of Homeland Security; Rex Tillerson, in his official capacity as Secretary of State, Defendants–Appellants.

The American Center for Law and Justice; Alabama; Immigration Reform Law Institute; Arkansas; Arizona; Florida; Kansas; Louisiana; Missouri; Ohio; Oklahoma; South Carolina; Texas; West Virginia, Amici Supporting Appellant, T.A., A U.S. Citizen of Yemeni Descent; Roderick and Solange MacArthur Justice Center; New York; California; Connecticut; Delaware; Illinois; Iowa; Maine; Maryland; Massachusetts; New Mexico; Oregon; Rhode Island; Vermont; Virginia; Washington; District of Columbia; Cato Institute; Muslim Justice League; Muslim Public Affairs Council; Council on American-Islamic Relations, California; Immigration Equality; The New York City Gay and Lesbian Anti-Violence Project; The National Queer Asian Pacific Islander Alliance; The LGBT Bar Association of Los Angeles; The LGBT Bar Association of Greater New York; Lesbian and Gay Bar Association of Chicago; GLBTQ Legal Advocates & Defenders; Bay Area Lawyers for Individual Freedom; Immigration Law Professors on Statutory Claims; City of Chicago; City of Los Angeles; City of Philadelphia; U.S. Conference of Mayors; International Bar Association's Human Rights Institute; The American-Arab Anti-Discrimination Committee; National Asian Pacific American Bar Association; Civil Rights Organizations; International Labor Organizations; Scholars of Immigration Law; Members of Congress; Professors of Federal Courts Jurisprudence, Constitutional Law, and Immigration Law; Colleges and Universities; Interfaith Group of Religious and Interreligious Organizations and Clergy Members; Technology Companies; International Law Scholars and Nongovernmental Organizations; Karen Korematsu; Jay Hirabayashi; Holly Yasui; Fred T. Korematsu Center for Law & Equality; Civil Rights Organizations; National Bar Associations of Color; City of New York; Massachusetts Technology Leadership Counsel, Inc., Amici Supporting Appellee.

International Refugee Assistance Project, a project of the Urban Justice Center, Inc., on behalf of itself and its clients; HIAS, Inc., on behalf of itself and its clients; John Does #1 & 3; Jane Doe #2; Middle East Studies Association of North America, Inc., on behalf of itself and its members; Muhammed Meteab; Arab American Association of New York, on behalf of itself and its clients; Yemeni-American Merchants Association; Mohamad Mashta; Grannaz Amirjamshidi; Fakhri Ziaolhagh; Shapour Shirani; Afsaneh Khazaeli; John Doe #4; John Doe #5, Plaintiffs–Appellants,

and

Paul Harrison; Ibrahim Ahmed Mohomed; Allan Hakky; Samaneh Takaloo, Plaintiffs,

v.

Donald J. Trump, in his official capacity as President of the United States; United States Department of Homeland Security; Department of State; Office of the Director of National Intelligence; Kirstjen M. Nielsen, in her official capacity as Secretary of Homeland Security; Rex Tillerson, in his official capacity as Secretary of State; Daniel R. Coats, in his official capacity as Director of National Intelligence, Defendants–Appellees.

T.A., A U.S. Citizen of Yemeni Descent; Roderick and Solange MacArthur Justice Center; New York; California; Connecticut; Delaware; Illinois; Iowa; Maine; Maryland; Massachusetts; New Mexico; Oregon; Rhode Island; Vermont; Virginia; Washington; District of Columbia; Cato Institute; Muslim Justice League; Muslim Public Affairs Council; Council on American-Islamic Relations, California; Immigration Equality; The New York City Gay and Lesbian Anti-Violence Project; The National Queer Asian Pacific Islander Alliance; The LGBT Bar Association of Los Angeles; The LGBT Bar Association of Greater New York; Lesbian and Gay Bar Association of Chicago; GLBTQ Legal Advocates & Defenders; Bay Area Lawyers for Individual Freedom; Immigration Law Professors on Statutory Claims; City of Chicago; City of Los Angeles; City of Philadelphia; U.S. Conference of Mayors; International Bar Association's Human Rights Institute; The American-Arab Anti-Discrimination Committee; National Asian Pacific American Bar Association; Civil Rights Organizations; International Labor Organizations; Scholars of Immigration Law; Members of Congress; Professors of Federal Courts Jurisprudence, Constitutional Law, and Immigration Law; Colleges and Universities; Interfaith Group of Religious and Interreligious Organizations and Clergy Members; Technology Companies; International Law Scholars and Nongovernmental Organizations; Karen Korematsu; Jay Hirabayashi; Holly Yasui; Fred T. Korematsu Center for Law & Equality; Civil Rights Organizations; National Bar Associations of Color; City of New York; Massachusetts Technology Leadership Counsel, Inc., Amici Supporting Appellants,

The American Center for Law and Justice; Alabama; Immigration Reform Law Institute; Alabama; Arkansas; Arizona; Florida; Kansas; Louisiana; Missouri; Ohio; Oklahoma; South Carolina; Texas; West Virginia, Amici Supporting Appellee.

No. 17-2231, No. 17-2232, No. 17-2233, No. 17-2240

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Argued: December 8, 2017

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Decided: February 15, 2018

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Amended: February 28, 2018

Synopsis

Background: Individuals and organizations brought action for declaratory and injunctive relief against President of the United States and Executive Branch officials and agencies, challenging under the Establishment Clause and the Immigration and Nationality Act (INA) a Presidential Proclamation indefinitely barring entry by nationals from six predominantly Muslim countries (Iran, Libya, Syria, Yemen, Somalia, and Chad) as well as two other countries. The United States District Court for the District of Maryland, Theodore D. Chuang, J., 265 F.Supp.3d 570, granted in part and denied in part plaintiffs' motion for preliminary injunction. Defendants appealed. The United States Supreme Court, 138 S.Ct. 542, granted defendants' application for stay.

Holdings: The Court of Appeals, Gregory, Chief Judge, held that:

[1] individuals had standing to challenge Proclamation on Establishment Clause grounds;

[2] organizations had standing to challenge Proclamation on Establishment Clause grounds;

[3] proffered rationale for Proclamation was not bona fide;

[4] Proclamation failed to demonstrate primarily secular purpose;

[5] plaintiffs demonstrated likelihood of irreparable harm absent preliminary injunction; and

[6] nationwide preliminary injunction, extending only to individuals with credible bona fide relationship with individual or entity in United States, was warranted.

Affirmed.

Gregory, Chief Judge, concurred and filed opinion, in which Wynn, J., joined in part.

Keenan, J., concurred and filed opinion, in which Wynn, J., and Diaz, J., joined in part and Thacker, J., joined in full.

Harris, J., concurred and filed opinion, in which Motz, J., and King, J., joined.

Niemeyer, J., dissented and filed opinion, which Agee, J., and Shedd, Senior Judge, joined.

Traxler, J., dissented and filed opinion.

Agee, J., dissented and filed opinion, in which Niemeyer, J., and Shedd, Senior Judge, joined.

Appeals from the United States District Court for the District of Maryland, at Greenbelt. Theodore D. Chuang, District Judge. (8:17-cv-00361-TDC; 8:17-cv-02921-TDC; 1:17-cv-02969-TDC)

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

Opinion

Affirmed by published opinion. Chief Judge Gregory wrote the opinion of the Court, in which Judges Motz, King, Keenan, Wynn, Diaz, Floyd, Thacker, and Harris joined. Chief Judge Gregory wrote a concurring opinion, in which Judge Wynn joined as to Part I. Judge Keenan wrote a concurring opinion, in which Judge Wynn joined as to Part I, Judge Diaz joined as to Part I and Part II.A.2, and Judge Thacker joined in full. Judge Wynn wrote a concurring opinion. Judge Harris wrote a concurring opinion, in which Judges Motz and King joined. Judge Niemeyer wrote a dissenting opinion, in which Judge Agee and Senior Judge Shedd joined. Judge Traxler

wrote a dissenting opinion. Judge Agee wrote a dissenting opinion, in which Judge Niemeyer and Senior Judge Shedd joined.

GREGORY, Chief Judge:

I.

A.

***234 *235 *236 *245 *246 *247 *248 *249 *250** On January 27, 2017—seven days after taking the oath of office—President Donald J. Trump signed Executive Order 13,769, "Protecting the Nation From Foreign Terrorist Entry Into the United States" ("EO-1"), 82 Fed. Reg. 8977 (Jan. 27, 2017). Invoking his authority under 8 U.S.C. § 1182(f), President Trump immediately suspended for ninety days the immigrant and nonimmigrant entry of foreign aliens from seven predominantly Muslim countries: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen. *Int'l Refugee Assistance Project (IRAP) v. Trump*, 265 F.Supp.3d 570, 586 (D. Md. 2017). The President's national security officials were taken by surprise by EO-1. *See* J.A. 172–74 (describing confusion in the cabinet after EO-1); 455 (declaration of Former National Security Officials, stating that EO-1 did not undergo the usual deliberative process); 786 (statements of Acting Attorney General Sally Yates, explaining that she was deliberately not consulted prior to EO-1).

Immediately before signing EO-1, President Trump remarked that it was "the 'Protection of the Nation from Terrorist Entry into the United States.' We all know what that means." *IRAP v. Trump*, 265 F.Supp.3d at 586. Just after signing, President Trump stated in an interview with the Christian Broadcasting Network that EO-1 would give preference to Christian refugees. Referring to Syria, President Trump stated that "[i]f you were a Muslim you could come in, but if you were a Christian, ***251** it was almost impossible.... And I thought it was very, very unfair." J.A. 250. One day after he issued EO-1, President Trump told reporters that implementation of EO-1 is "working out very nicely and we're going to have a very, very strict ban." J.A. 173. That same day, former New York Mayor Rudy Giuliani, an advisor to the President, stated that President Trump told him that he wanted a "Muslim ban" and requested that Giuliani assemble a commission to show him "the right way to do it legally." J.A. 297.

Individuals, organizations, and states across the nation challenged EO-1 in federal court, and two federal courts issued injunctions enjoining the enforcement of EO-1. *See Washington v. Trump*, No. 17-141, 2017 WL 462040, at *2 (W.D. Wash. Feb. 3, 2017); *Aziz v. Trump*, 234 F.Supp.3d 724, 739 (E.D. Va. 2017). In response to these injunctions, then-White House Press Secretary Sean Spicer maintained that EO-1 was lawful but promised a new order would issue soon. J.A. 127. Senior Policy Advisor Stephen Miller stated that the new order would be "responsive" to recent court rulings, but described the changes as "mostly minor technical differences" that would not invalidate the "basic policy outcome" of EO-1. J.A. 128.

On March 6, 2017, President Trump issued Executive Order 13,780, which was given the same title as EO-1 and was scheduled to take effect on March 16, 2017. 82 Fed. Reg. 13,209 (Mar. 6, 2017) ("EO-2"). EO-2 revoked EO-1 but nevertheless bore many similarities to its predecessor. Invoking both 8 U.S.C. § 1182(f) and 8 U.S.C. § 1185(a), President Trump re-imposed the same ninety-day ban on entry into the United States for nationals from Iran, Libya, Somalia, Sudan, Syria, and Yemen but removed Iraq from the list. *Id.* at 13,210–12. Like its predecessor, EO-2 directed various government officials to conduct a worldwide review during the 90-day suspension period to determine whether foreign governments were providing adequate information about their nationals seeking entry into the United States. *Id.* The Secretary of Homeland Security was to report these findings to the President, and nations identified as providing inadequate information were to be given an opportunity to improve their practices. At the conclusion of this review, the Secretary of Homeland Security was to "submit to the President a list of countries recommended for inclusion in a Presidential proclamation that would prohibit the entry of appropriate categories of foreign nationals of countries that have not provided the information requested." *Id.*

Like its predecessor, EO-2 was soon challenged in multiple courts and preliminarily enjoined. *See Hawai'i v. Trump*, 245 F.Supp.3d 1227, 1239 (D. Haw. 2017); *IRAP v. Trump*, 241 F.Supp.3d at 566. This Court (sitting en banc) and the Ninth Circuit both affirmed the injunctions on appeal. *IRAP v. Trump*, 857 F.3d 554 (4th Cir. 2017) (hereinafter "*IRAP I*") (en banc); *Hawai'i v. Trump*, 859

F.3d 741 (9th Cir. 2017) (per curiam). The Supreme Court granted a writ of certiorari in both cases and left the injunctions in place pending its review except as to foreign nationals who lacked a "credible claim of a bona fide relationship with a person or entity in the United States." *Trump v. IRAP*, — U.S. —, —, 137 S.Ct. 2080, 2088, 198 L.Ed.2d 643 (2017).

B.

On September 24, 2017, President Trump issued Proclamation No. 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats (the "Proclamation"), 82 Fed. Reg. 45,161 (Sept. 24, 2017). Invoking ***252** both 8 U.S.C. § 1182(f) and 8 U.S.C. § 1185(a), the Proclamation succeeds EO-2 and indefinitely suspends the entry of some or all immigrants and nonimmigrants from eight countries: Chad, Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen (the "Designated Countries"). *Id.* at 45,165–67. Six of these countries—Chad, Libya, Iran, Somalia, Syria, and Yemen—are majority-Muslim and have a combined population of approximately 150 million people. J.A. 234–48, 852–59.

The Proclamation indicated that the worldwide review ordered by EO-2 was complete and recited some of the review's processes and results. 82 Fed. Reg. at 45,162. The Government did not make the report part of the record for the Court's review, and it conceded during oral argument that the validity of the Proclamation rises or falls on the rationale presented within its four corners. Oral Arg. 32:30–33:00.

As part of the review, the Secretary of Homeland Security reportedly created a "baseline for the kinds of information required from foreign governments to support the United States Government's ability to confirm the identity of individuals seeking entry into the United States" or other benefits under the immigration laws and "to assess whether they are a security or public-safety threat." 82 Fed. Reg. at 45,162. Three categories of baseline criteria were used to determine the quality of a country's information sharing and are listed in § 1 of the Proclamation. *Id.* at 45,162–63.

The first category involves "identity-management information," which the Proclamation states is "needed to determine whether individuals seeking benefits under the immigration laws are who they claim to be." *Id.* at 45,162. Criteria in this category "include whether the country issues electronic passports embedded with data to enable confirmation of identity, reports lost and stolen passports to appropriate entities, and makes available upon request identity-related information not included in its passports." *Id.*

The second category involves "national security and public-safety information," which the Proclamation states is needed to determine whether "persons who seek entry to this country pose national security or public-safety risks." *Id.* Criteria include "whether the country makes available, directly or indirectly, known or suspected terrorist and criminal-history information upon request, whether the country provides passport and national-identity document exemplars, and whether the country impedes the United States Government's receipt of information about passengers and crew traveling to the United States." *Id.*

The third category involves a "national security and public-safety assessment." *Id.* at 45,162–63. This category consists of various national security risk indicators, including "whether the country is a known or potential terrorist safe haven, whether it is a participant in the Visa Waiver Program ... that meets all of its requirements, and whether it regularly fails to receive its nationals subject to final orders of removal from the United States." *Id.*

Applying these baseline criteria, the Department of Homeland Security identified sixteen countries as "inadequate." *Id.* at 45,163. Thirty-one additional countries were classified as "at risk" of becoming inadequate. *Id.* Then followed a fifty-day engagement period during which all countries, including those not identified as "inadequate" or "at-risk," were encouraged to improve their information-sharing practices. *Id.*

Ultimately, the Secretary of Homeland Security recommended eight countries for ***253** entry restrictions, recommendations that President Trump adopted in full. The Secretary determined that Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen continued to be "inadequate" and recommended that nationals from these countries be subjected to entry restrictions. *Id.* Somalia

did meet the baseline criteria but was nonetheless added to the list of countries subject to entry restrictions under the Proclamation because its "government's inability to effectively and consistently cooperate, combined with the terrorist threat that emanates from its territory, present special circumstances that warrant restrictions and limitations on the entry of its nationals into the United States." *Id.* at 45,164–65, 45,167. Iraq did not meet the baseline criteria but was exempted from entry suspensions in light of "the close cooperative relationship between the United States and the democratically elected government of Iraq, the strong United States diplomatic presence in Iraq, the significant presence of United States forces in Iraq, and Iraq's commitment to combating the Islamic State of Iraq and Syria (ISIS)." *Id.* at 45,163. Instead, Iraqi nationals will face "additional scrutiny." *Id.* The Proclamation does not indicate whether any other countries that also failed the baseline were nonetheless not recommended for entry restrictions.

The Proclamation imposes different restrictions on immigrants and nonimmigrants from the eight countries, but all restrictions are indefinite. *Id.* at 45,164, 45,169. The Proclamation suspends immigration from Chad, Iran, Libya, North Korea, Somalia, Syria, and Yemen; it exempts Venezuela, which failed the baseline criteria, but includes Somalia, which passed. *Id.* at 45,165–67. The Proclamation also restricts some or all categories of nonimmigrants from all countries except Somalia, whose nationals will instead undergo additional scrutiny. *Id.* Specifically, it bars the issuance of all nonimmigrant visas to Syrian and North Korean nationals; of all nonimmigrant visas except F, M, and J visas to Iranian nationals; and of B-1, B-2, and B-1/B-2 visas to Libyan, Yemeni, and Chadian nationals. *Id.* But because the Government has "alternative sources for obtaining information to verify the citizenship and identity of nationals from Venezuela," the Proclamation only suspends B-1, B-2, and B-1/B-2 visas for "government officials ... who are responsible for the identified inadequacies." *Id.* at 45,166.

The Proclamation only applies to foreign nationals who are outside the United States on the effective date and "do not have a valid visa" or "qualify for a visa or other valid travel document." *Id.* at 45,167. The Proclamation does allow for waivers, but they are discretionary and require the foreign national to prove that denying entry would cause "undue hardship," that entry would "not pose a threat to the national security or public safety of the United States," and that entry "would be in the national interest." *Id.* at 45,168. The Proclamation does not allow any categorical exemptions, even for the immediate relatives of American citizens. *Id.* at 45,168–69.

The entry restrictions were effective immediately for foreign nationals who 1) were subject to EO-2's restrictions and 2) lack a credible claim of a bona fide relationship with a person or entity in the United States. *Id.* at 45,171. For all other affected persons, the Proclamation was scheduled to take effect on October 18, 2017. *Id.*

C.

As with EO-1 and EO-2, the Proclamation faced swift legal challenge within this circuit and in the Ninth Circuit.

***254** Three separate lawsuits were brought or amended in the District Court for the District of Maryland and are now consolidated before us on appeal. One challenge was brought by the International Refugee Assistance Project (IRAP), HIAS, Inc., Middle East Studies Association (MESA), Arab-American Association of New York (AAANY), Yemeni-American Merchants Association (YAMA), John Doe Nos. 1 and 3–5, Jane Doe No. 2, Muhammed Meteab, Mohamad Mashta, Grannaz Amirjamshidi, Fakhri Ziaolhagh, Shapour Shirani, and Afsaneh Khazaeli (collectively, the "IRAP Plaintiffs"). A second was brought by the Iranian Alliances Across Borders (IAAB), the Iranian Students' Foundation (ISF), and Doe Nos. 1–6 (collectively, the "IAAB Plaintiffs"). And a third was brought by Eblal Zakzok, Sumaya Hamadmad, Fahed Muqbil, John Doe No. 1, and Jane Doe Nos. 2–3 (collectively, the "Zakzok Plaintiffs"). [1]

1 During the pendency of the litigation, the relatives of IAAB Plaintiff Doe No. 6, Zakzok Plaintiff Sumaya Hamadmad, and IRAP Plaintiffs Grannaz Amirjamshidi, Shapour Shirani, and Fakhri Ziaolhagh received their visas. Notice 1, Dec. 6, 2017, ECF No. 160. Zakzok Plaintiff Hamadmad still has another family member who has not yet received a visa. *Id.* In addition, the mother-in-law of IAAB Plaintiff Doe No. 6 was denied a visa and a waiver pursuant to the Proclamation. Mot. Suppl. R. Ex. A, Dec. 22, 2017, ECF No. 162.

The three cases assert that the Proclamation and EO-2 violate some or all of the INA, the Establishment Clause of the First Amendment, the Free Speech and Free Association Clauses of the First Amendment, the equal protection and procedural due process components of the Due Process Clause of the Fifth Amendment, the Religious Freedom Restoration Act, the Refugee Act, and the Administrative Procedure Act (APA).

The twenty-three individual Plaintiffs are all U.S. citizens or lawful permanent residents, and most of them have close family members who are nationals of the Designated Countries and who are in the process of applying for immigrant and nonimmigrant visas to the United States. Most of the individual Plaintiffs are also members of the Muslim faith, whether practicing or non-practicing. Three organizational Plaintiffs (IRAP, HIAS, and AAANY) "primarily provide services to clients," who are primarily either refugees or members of the Arab-American and Arab immigrant community. *IRAP v. Trump*, 265 F.Supp.3d at 594. The remaining organizational Plaintiffs (MESA, YAMA, IAAB, and ISF) "convene events on issues relating to the Middle East or advocate on behalf of their members." *Id.* All Plaintiffs seek injunctive and declaratory relief.

Each of these three separate cases names some or all of the following as Defendants: President Trump in his official capacity; the U.S. Department of Homeland Security (DHS) and Kirstjen M. Nielsen in her official capacity as Secretary of Homeland Security; the U.S. Department of State and Rex W. Tillerson in his official capacity as Secretary of State; the Office of the Director of National Intelligence (ODNI) and Dan Coats in his official capacity as Director of National Intelligence; Jefferson Beauregard Sessions, III in his official capacity as Attorney General; Kevin K. McAleenan in his official capacity as Acting Commissioner of the U.S. Customs and Border Protection; and L. Francis Cissna in his official capacity as Director of U.S. Citizenship and Immigration Services.

Plaintiffs moved to preliminarily enjoin the Proclamation in its entirety before it took effect. They claimed that the Proclamation violated the Establishment Clause's ***255** prohibition on disfavoring religion, exceeded the President's authority under 8 U.S.C. § 1182(f) and 8 U.S.C. § 1185(a)(1), violated 8 U.S.C. § 1152(a)'s prohibition on nationality discrimination in the issuance of visas, and failed to comply with § 1182(f)'s procedural requirements.[2] On October 17, 2017, the district court granted a preliminary injunction against enforcement of the Proclamation's entry restrictions, subject to certain exceptions. *IRAP v. Trump*, 265 F.Supp.3d at 633. The district court held that Plaintiffs were likely to succeed on the merits of their § 1152(a) claim and their Establishment Clause claim but not on the merits of their § 1182(f) and § 1185(a)(1) claims. The district court conformed the injunction to the terms of the Supreme Court's June 2017 stay, limiting it to individuals "who have a credible claim of a bona fide relationship with a person or entity in the United States." *Id.* at 631 (citing *Trump*, 137 S.Ct. at 2088). But the court declined to enjoin the Proclamation as to travelers from Venezuela or North Korea because the balance of equities favors the Government. That same day, the U.S. District Court for the District of Hawai'I also enjoined the Proclamation, concluding that it likely violated § 1182(f) and § 1152(a)(1). *Hawai'i v. Trump*, 265 F.Supp.3d 1140, 1160–61 (D. Haw. 2017).

2 Plaintiffs also sought a preliminary injunction based on their Equal Protection claim. *IRAP v. Trump*, 265 F.Supp.3d at 594–95. Because the district court did not reach the question, *id.* at 629, and because we are able to resolve the case without it, we need not address whether the Proclamation violates the Equal Protection Clause.

[1] On December 4, 2017, the Supreme Court granted the Government's request for a complete stay pending appellate review of the two district courts' preliminary injunctions. *Trump v. IRAP*, 138 S.Ct. 542, 542 (2017) (mem.). In light of the stay, the relevant agencies have fully implemented the entry restrictions laid out in the Proclamation as of December 8, 2017.[3] Dep't of State, New Court Order on Presidential Proclamation (Dec. 4, 2017) (saved as ECF opinion attachment 1) (hereinafter "State Department Statement") ("Per the Supreme Court's orders, those restrictions will be implemented fully, in accordance with the Presidential Proclamation, around the world, beginning December 8 at open of business, local time."); *see also* DHS, Fact Sheet: The President's Proclamation on Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats (Sept. 24, 2017) (saved as ECF opinion attachment 2) (hereinafter "DHS Fact Sheet").

3 We take judicial notice of these agency statements in the public record. *See Goldfarb v. Mayor & City Council of Baltimore*, 791 F.3d 500, 508 (4th Cir. 2015); *Hall v. Virginia*, 385 F.3d 421, 424 & n.3 (4th Cir. 2004) (taking judicial notice of publicly available information on state government's website).

On December 22, 2017, the Ninth Circuit affirmed the district court, concluding that the Proclamation likely exceeded the scope of the President's authority under § 1182(f), failed to comply with § 1182(f)'s procedural prerequisites, and violated § 1152(a)(1)'s prohibition on nationality-based discrimination. *Hawai'i v. Trump*, 878 F.3d 662, 673 (9th Cir. 2017). The Government filed for a writ of certiorari on January 5, 2018, which the Supreme Court granted on January 19, 2018. *Trump v. Hawai'i*, No. 17-965, — U.S. —, 138 S.Ct. 923, — L.Ed.2d —, 2018 WL 324357, at *1 (U.S. Jan. 19, 2018).

II.

[2] **[3]** We evaluate a district court's decision to grant a preliminary injunction ***256** under an abuse-of-discretion standard. *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 366 (4th Cir. 2012). Under this standard, we review the district court's factual findings for clear error and review its legal conclusions de novo. *Dewhurst v. Century Aluminum Co.*, 649 F.3d 287, 290 (4th Cir. 2011).

[4] **[5]** **[6]** A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to relief." *Di Biase v. SPX Corp.*, 872 F.3d 224, 230 (4th Cir. 2017) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008)). The plaintiff "need not establish a certainty of success, but must make a clear showing that he is likely to succeed at trial." *Id.* (internal quotation marks and citation omitted). A plaintiff seeking a preliminary injunction must establish that (1) she is likely to succeed on the merits, (2) she is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in her favor, and (4) an injunction is in the public interest. *WV Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009) (citing *Winter*, 555 U.S. at 7, 129 S.Ct. 365).

We turn first to the Plaintiffs' likelihood of success on the merits.

III. [4]

4 Chief Judge Gregory and Judges Motz, King, Keenan, Wynn, Diaz, Floyd, Thacker, and Harris, a majority of the Court, find that Plaintiffs have shown a likelihood of success on their Establishment Clause claim. Chief Judge Gregory and Judges Keenan, Wynn, Diaz, and Thacker also find that Plaintiffs are likely to succeed on at least some of their statutory claims. Judges Motz, King, and Harris would resolve the case only on Establishment Clause grounds without reaching the statutory questions.

[7] **[8]** **[9]** **[10]** "The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." *Epperson v. Arkansas*, 393 U.S. 97, 104, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968); *accord Larson v. Valente*, 456 U.S. 228, 244, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982) (holding that Establishment Clause prohibits "one religious denomination [from being] officially preferred over another."). "When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides." *McCreary Cty. v. ACLU,* 545 U.S. 844, 860, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005). "[T]he Establishment Clause forbids subtle departures from neutrality, 'religious gerrymanders,' as well as obvious abuses." *Gillette v. United States*, 401 U.S. 437, 452, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 696, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970)). Similarly, "any covert suppression of particular religious beliefs" is unconstitutional. *See Bowen v. Roy*, 476 U.S. 693, 703, 106 S.Ct. 2147, 90 L.Ed.2d 735 (1986) (plurality opinion).

The Plaintiffs allege that the Proclamation violates the Establishment Clause by disfavoring Muslims. We begin by considering (and rejecting) the Government's challenges to the justiciability of Plaintiffs' claim. We then turn to Plaintiffs' likelihood of succeeding on the merits. We find that Plaintiffs have met their high burden of demonstrating that the Proclamation's purported purpose is not "bona fide" under *Mandel* and therefore proceed to determine whether the Proclamation has a primarily secular purpose. Examining official statements

from President Trump and other *257 executive branch officials, along with the Proclamation itself, we conclude that the Proclamation is unconstitutionally tainted with animus toward Islam.

A.

[11] "Concerns of justiciability go to the power of the federal courts to entertain disputes, and to the wisdom of their doing so." *Renne v. Geary*, 501 U.S. 312, 316, 111 S.Ct. 2331, 115 L.Ed.2d 288 (1991). The Government raises two challenges to the justiciability of Plaintiffs' Establishment Clause claim: first, Plaintiffs lack standing under Article III, and second, Plaintiffs' claim is not ripe. [5] As we explain below, we reject both arguments and find Plaintiffs' Establishment Clause claim justiciable.

5 The Government concedes that this Court has jurisdiction to review an alleged violation of constitutional rights. First Cross-Appeal Br. 25; *see Bell v. Hood*, 327 U.S. 678, 684, 66 S.Ct. 773, 90 L.Ed. 939 (1946) (noting that "it is established practice" for the Supreme Court "to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution"). The Government also concedes that the doctrine of consular nonreviewability does not bar judicial review of Plaintiffs' constitutional claim. *See* First Cross-Appeal Br. 25–26 (citing *Kleindienst v. Mandel*, 408 U.S. 753, 765, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972), and *Kerry v. Din*, —— U.S. ——, 135 S.Ct. 2128, 192 L.Ed.2d 183 (2015)); *see also Fiallo v. Bell*, 430 U.S. 787, 793 n.5, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977) ("Our cases reflect acceptance of a limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens[.]"). Finally, the Government does not argue that Plaintiffs lack a cause of action to sue for injunctive relief under the Constitution. *See Bell*, 327 U.S. at 684, 66 S.Ct. 773; *see also Ziglar v. Abbasi*, —— U.S. ——, 137 S.Ct. 1843, 1862, 198 L.Ed.2d 290 (2017) (denying post-9/11 detainees damages action but stating that they could seek injunctive relief); *Franklin v. Massachusetts*, 505 U.S. 788, 801, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992) (stating that President's actions can always be reviewed for constitutionality).

1.

First, the Government claims that Plaintiffs have not properly alleged an injury-in-fact sufficient to satisfy Article III's standing requirement. We disagree. For many of the same reasons as in *IRAP I*, we find that many of the individual Plaintiffs and two of the organizational Plaintiffs have standing because they have sufficiently alleged personal contact with unconstitutional religious animus. *See* 857 F.3d at 582–86.

[12] [13] [14] Article III of the Constitution gives this Court jurisdiction only over "Cases" and "Controversies." U.S. Const. art. III, sec. 2, cl. 1. One element of a "case" or "controversy" is that the plaintiff have standing—that is, "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." *Massachusetts v. EPA*, 549 U.S. 497, 517, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007) (quoting *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)). The Supreme Court has articulated three requirements that together are the "irreducible constitutional minimum of standing." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The 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." *258 *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) (citing *Lujan*, 504 U.S. at 560–61, 112 S.Ct. 2130); *accord Spokeo, Inc. v. Robins*, —— U.S. ——, 136 S.Ct. 1540, 1547–48, 194 L.Ed.2d 635 (2016). An organization has associational standing to sue "on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Laidlaw*, 528 U.S. at 180–81, 120 S.Ct. 693.

[15] [16] [17] We review de novo the district court's finding of standing. *Peterson v. Nat'l Telecomms. & Info. Admin.*, 478 F.3d 626, 631 n.2 (4th Cir. 2007). Plaintiffs

must have standing for every claim. *Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014) (citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006)). They also must have standing for every form of relief. *Laidlaw*, 528 U.S. at 185, 120 S.Ct. 693. But the "Supreme Court has made it clear that 'the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement.' " *Bostic*, 760 F.3d at 370–71 (quoting *Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 52 n.2, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006)). And the same injury can provide Plaintiffs with standing for multiple claims. *E.g.*, *id.* at 371–72 (finding same injury provided standing for both Due Process and Equal Protection claims).

[18] When evaluating standing, we "must be careful not to decide the questions on the merits for or against the plaintiff, and must therefore assume that on the merits the plaintiffs would be successful in their claims." *Cooksey v. Futrell*, 721 F.3d 226, 239 (4th Cir. 2013) (quoting *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003)); *see also Meese v. Keene*, 481 U.S. 465, 473, 107 S.Ct. 1862, 95 L.Ed.2d 415 (1987). Plaintiffs here have alleged that the Proclamation violates the Establishment Clause, which bars government action that establishes or disfavors religion. U.S. Const. amend. I; *Everson v. Bd. of Educ.*, 330 U.S. 1, 15, 67 S.Ct. 504, 91 L.Ed. 711 (1947). Thus, we must assume that the Proclamation does harbor unconstitutional animus against Islam.

[19] **[20]** The "concept of injury for standing purposes is particularly elusive in Establishment Clause cases." *Suhre v. Haywood Cty.*, 131 F.3d 1083, 1085 (4th Cir. 1997) (quoting *Murray v. City of Austin*, 947 F.2d 147, 151 (5th Cir. 1991)). Unlike Free Exercise Clause claims, Establishment Clause claims do not require "proof that particular religious freedoms are infringed." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 224 n.9, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) (citing *McGowan v. Maryland*, 366 U.S. 420, 429–30, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961)). Instead, Establishment Clause injuries are often "spiritual and value-laden, rather than tangible and economic." *Moss v. Spartanburg Cty. Sch. Dist. Seven*, 683 F.3d 599, 607 (4th Cir. 2012) (internal quotation marks and citation omitted).

[21] **[22]** **[23]** **[24]** As a result, Establishment Clause injury-in-fact "may be shown in various ways," *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 129, 131 S.Ct. 1436, 179 L.Ed.2d 523 (2011), including through "noneconomic or intangible injury," *Suhre*, 131 F.3d at 1086. For example, "[f]eelings of marginalization and exclusion are cognizable forms of injury, particularly in the Establishment Clause context, because one of the core objectives of modern Establishment Clause jurisprudence has been to prevent the State from sending a message to non-adherents of a ***259** particular religion 'that they are *outsiders,* not full members of the political community.' " *Moss*, 683 F.3d at 607 (quoting *McCreary,* 545 U.S. at 860, 125 S.Ct. 2722). A plaintiff can also suffer cognizable injury from: paying money damages to the government, *McGowan*, 366 U.S. at 424–25, 81 S.Ct. 1101; having one's employees pay money damages to the government, *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 592, 81 S.Ct. 1135, 6 L.Ed.2d 551 (1961); receiving a letter that promotes a religious education course, *Moss*, 683 F.3d at 607; paying taxes, when Congress enacts legislation pursuant to its taxing and spending powers, *Flast v. Cohen*, 392 U.S. 83, 106, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968); changing one's behavior or assuming special burdens, *Suhre*, 131 F.3d at 1088–89; participating in state-mandated religious exercises, such as school prayer, *Schempp*, 374 U.S. at 224–26 & n.9, 83 S.Ct. 1560; being exposed to state-sponsored religious exercises, such as legislative prayer, *Marsh v. Chambers*, 463 U.S. 783, 786 n.4, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983); experiencing employment discrimination, *In re Navy Chaplaincy*, 534 F.3d 756, 760 (D.C. Cir. 2008); and having personal contact with state-sponsored religious displays, *Suhre*, 131 F.3d at 1086. A cognizable injury need not rest on a single isolated fact but can instead arise from multiple related factors. *See Moss*, 683 F.3d at 607.

[25] **[26]** **[27]** The common thread among these different forms of cognizable legal injury is "personal contact" with the alleged establishment or disfavoring of religion. *Suhre*, 131 F.3d at 1086. In other words, Establishment Clause injuries—like all injuries-in-fact—must be particularized: they "must affect the plaintiff in a personal and individual way." *Spokeo*, 136 S.Ct. at 1548. This is because a "mere abstract objection to unconstitutional conduct is not sufficient to confer standing." *Suhre*, 131 F.3d at 1086. Nor is a "firm[ ] commit[ment] to the constitutional principle of separation of church and State," *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 486, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982) (citation omitted), nor a general disagreement with government

policy, *Moss*, 683 F.3d at 604. Instead, Plaintiffs must allege a "personal injury suffered by them *as a consequence* of the alleged constitutional error." *Valley Forge*, 454 U.S. at 485, 102 S.Ct. 752. [6]

6 The Government cites *Allen v. Wright* for the proposition that "the stigmatizing injury often caused by racial [or other invidious] discrimination ... accords a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct." First Cross-Appeal Br. 27 (quoting 468 U.S. 737, 755, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984), *abrogated in nonrelevant part by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, — U.S. —, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014)). *Allen*, of course, was an equal protection case; therefore, the stigmatic injury necessarily related to the denial of equal treatment. Because this is an Establishment Clause case, Plaintiffs must allege "a stigmatic injury suffered as a direct result of having" personal contact with *unconstitutional religious animus*. *Allen*, 468 U.S. at 755, 104 S.Ct. 3315; *accord Suhre*, 131 F.3d at 1086.

[28] The district court concluded that numerous individual Plaintiffs had "asserted specific, intangible injuries resulting from [their] personal contact with the alleged Establishment Clause violation." *IRAP v. Trump*, 265 F.Supp.3d at 600. We agree. The Plaintiffs have plausibly alleged that the Proclamation—which we must assume does unconstitutionally disfavor Islam, *Cooksey*, 721 F.3d at 239—has caused many Plaintiffs to suffer two related personal injuries. First, they, as members of ***260** the disfavored religion, are the "victims of this alleged religious intolerance" who are suffering "[f]eelings of marginalization and exclusion." *Moss*, 683 F.3d at 606–07; *cf. id.* (finding certain plaintiffs lacked standing because they were members of favored religion and so were "seeking to vindicate ... the rights of others"). Second, they are experiencing prolonged separation from close family members who have been rendered categorically ineligible for visas. *See Bostic*, 760 F.3d at 371–72 (finding same injury provided standing for two different claims). Because these are actual, concrete injuries that "affect the plaintiff[s] in a personal and individual way," Plaintiffs have suffered a cognizable injury-in-fact. *Spokeo*, 136 S.Ct. at 1548 (citation omitted); *see Moss*, 683 F.3d at 607 (locating cognizable injury-in-fact in several related facts).

For example, IRAP Plaintiff John Doe No. 5 is a Muslim and U.S. citizen of Yemeni origin who is sponsoring his mother, also Yemeni, in her application for an immigrant visa. J.A. 573–75. His uncle is sponsoring his grandmother, who has Alzheimer's disease. *Id.* "Since the ban," John Doe No. 5 has "heard anti-Islamic comments more frequently," and he or someone he knows experiences Islamophobia "[a]lmost every week." *Id.* He says that "in the days after the ban, a man came into my grocery store and said that I make this country worse, and that he was happy with the ban." *Id.* IRAP Plaintiff John Doe No. 4 is a non-practicing Muslim whose Iranian wife is seeking an immigrant visa to the United States. J.A. 587–89. He states that he felt "insulted" and "demeaned" by the travel restrictions because they "felt like collective punishment" and that the Proclamation "has made [him] feel this more strongly." *Id.* He also notes that since the first travel ban was issued in January 2017, he gets "more suspicious looks from people" and feels that he is "being labeled as a Muslim more often." *Id.* IAAB Plaintiff Doe No. 6 is an Iranian Muslim and lawful permanent resident whose mother-in-law's nonimmigrant visa application was recently denied pursuant to the Proclamation. J.A. 1174–76; Mot. Suppl. R. 2, Ex. A, Dec. 22, 2017, ECF No. 162. He states that he feels "personally attacked, targeted, and disparaged by this new Proclamation, which shows hostility to Iranians generally and to Muslims in particular." J.A. 1175. He feels "like an outsider in the country that I call my home" and fears for his safety and the safety of his loved ones. *Id.* Zakzok Plaintiff Fahed Muqbil is a U.S. citizen of Yemeni origin and a practicing Muslim who is sponsoring his wife, also Yemeni, for an immigrant visa. J.A. 1244–48. He states that the Proclamation makes him feel as if he and his fellow American Muslims "are unwanted, different, and somehow dangerous merely because of [their] religion." *Id.* He feels "condemned and penalized for practicing Islam" and treated "as a second class citizen simply because of [his] Islamic faith." *Id.* [7] These are personal, particularized injuries cognizable under Article III because they are suffered "*as a consequence* of the ***261** alleged constitutional error." *Valley Forge*, 454 U.S. at 485, 102 S.Ct. 752.

7 Although one Plaintiff with cognizable injuries suffices to confer Article III standing, *Bostic*, 760 F.3d at 370–71, we note that other Plaintiffs with family members seeking visas have expressed similar sentiments of fear and marginalization. J.A. 105–09,

581–84 (IRAP Plaintiff Jane Doe No. 2); J.A. 590–93 (IRAP Plaintiff Afsaneh Khazaeli); J.A. 1162–64 (IAAB Plaintiff Doe No. 2); J.A. 1166–68 (IAAB Plaintiff Doe No. 3); J.A. 1170–72 (IAAB Plaintiff Doe No. 5); J.A. 1249–53 (Zakzok Plaintiff Eblal Zakzok); J.A. 1254–58 (Zakzok Plaintiff Sumaya Hamadmad); J.A. 1259–62 (Zakzok Plaintiff John Doe No. 1); J.A. 1263–67 (Zakzok Plaintiff Jane Doe No. 2); J.A. 1268–69 (Zakzok Plaintiff Jane Doe No. 3).

The Government argues that the district court erred by conflating the "injury-in-fact from an alleged Establishment Clause violation with the question whether the violation was of the individual's own Establishment Clause rights." First Cross-Appeal Br. 27 (hereinafter "First Br.") (emphasis omitted). We disagree. A cognizable Establishment Clause injury need "not include proof that particular religious freedoms are infringed," *Schempp*, 374 U.S. at 225 n.9, 83 S.Ct. 1560, nor direct regulation or discrimination by the government. Article III standing in this context can arise from paying taxes, *Flast*, 392 U.S. at 106, 88 S.Ct. 1942; hearing legislative prayer as a member of that body, *Marsh*, 463 U.S. at 786 n.4, 103 S.Ct. 3330; or looking at a religious display, *Suhre*, 131 F.3d at 1086. Indeed, in *Moss*, we found standing based in part on simply receiving a letter promoting a religious education course. 683 F.3d at 607. [8]

8 The Government also argues that "a U.S. Christian could challenge the Proclamation's exclusion of his relatives who are Syrian Christians as a violation of his own Establishment Clause rights." Third Cross-Appeal Br. 10 (emphasis omitted). Because there are Plaintiffs who have suffered both stigma and prolonged separation from close family members, which we conclude is *sufficient* to confer standing, we need not determine whether both stigma and prolonged separation are *necessary* to confer standing.

Nor is this case similar to *In re Navy Chaplaincy*, in which the plaintiffs based their standing on hearing a " 'message' of religious preference." 534 F.3d at 759. There, the plaintiffs' expansive theory of message-based standing would have permitted "any recipient of the Navy's 'message,' " including "the judges on th[e] panel," to have standing to challenge the allegedly unconstitutional conduct. *Id.* at 764. But Plaintiffs do not claim standing solely because they heard about the Proclamation—mere awareness of religious animus, without more, is insufficient.

[29] **[30]** **[31]** **[32]** Instead, many of the individual Plaintiffs here have alleged a violation of their own Establishment Clause rights, and they have presented evidence that the violation is particular to them: they have articulated specific feelings of "marginalization and exclusion," *Moss*, 683 F.3d at 607, and they are facing prolonged separation from family members deemed categorically ineligible to enter the country. [9] Both injuries are caused by the Proclamation, which at this stage we must assume excludes Plaintiffs' relatives based on religious animus. *Cooksey*, 721 F.3d at 239. And both injuries can be remedied if the Proclamation is enjoined. Whether these Plaintiffs' relatives are issued visas and admitted to the country is beyond the scope of this litigation and ultimately not subject to judicial review. But a plaintiff need "not show that a favorable decision will relieve his *every* injury." *Larson*, 456 U.S. at 242–43 & n.15, 102 S.Ct. 1673 (holding that plaintiffs had standing to challenge one part of state law requiring registration under charitable solicitation statute, even if plaintiffs might ultimately be required to register for different reasons); *accord Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 280 n.14, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978). Instead, "a plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself," *Larson*, 456 U.S. at 242–43 & n.15, 102 S.Ct. 1673—here, the discrete ***262** expression of government animus against Islam and the prolonged (verging on permanent) separation of family members. Thus, the individual Plaintiffs have standing under Article III to bring their Establishment Clause claim.

9 "[T]hat an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance." *Spokeo*, 136 S.Ct. at 1548 n.7.

[33] For the same reasons, we adopt and affirm the district court's finding that MESA and YAMA have associational standing to assert an Establishment Clause claim on behalf of their members. *IRAP v. Trump*, 265 F.Supp.3d at 601. Both have identified at least one member who has suffered feelings of marginalization and exclusion in his community and who has a close family member actively seeking an immigrant visa. J.A. 556 (MESA), 612–13 (YAMA). The interests are "germane to the organization's purpose" and there is no reason the individual members must participate in the lawsuit. *Laidlaw*, 528 U.S. at 180–81, 120 S.Ct. 693; *IRAP v.*

Trump, 265 F.Supp.3d at 601. Thus, MESA and YAMA have associational standing as to the Establishment Clause claim.

Unlike the plaintiffs in *Valley Forge*, Plaintiffs here have not "roam[ed] the country in search of governmental wrongdoing." 454 U.S. at 487, 102 S.Ct. 752. Instead, the purported government wrongdoing has found them. We conclude that many of the individual and two of the organizational Plaintiffs have standing to bring an Establishment Clause claim.

2.

[34] Second, the Government argues that Plaintiffs' claim is not ripe until one of their relatives has been rejected for a visa and a waiver. During the pendency of this litigation, the mother-in-law of IAAB Plaintiff Doe No. 6 was denied both. Mot. Suppl. R. Ex. A, Dec. 22, 2017, ECF No. 162 ("This is to inform you that a consular officer found you ineligible for a visa under Section 212(f) of the Immigration and Nationality Act, pursuant to Presidential Proclamation 9645."). The Government's argument is therefore moot and by its own statements the claim of IAAB Plaintiff Doe No. 6 is ripe. First Br. 23 ("If any alien in whose entry a U.S. plaintiff has a cognizable interest is found otherwise eligible for a visa and denied a waiver, then that plaintiff can bring suit at that time[.]"). Nevertheless, we must also reject the Government's contention on the merits because it rests on a misapprehension of Plaintiffs' claim.

[35] **[36]** **[37]** **[38]** **[39]** The doctrine of ripeness is designed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). "To determine if a case is ripe, we 'balance the fitness of the issues for judicial decision with the hardship to the parties of withholding court consideration.' " *Lansdowne on the Potomac Homeowners Ass'n, Inc. v. OpenBand at Lansdowne, LLC*, 713 F.3d 187, 198 (4th Cir. 2013) (quoting *Miller v. Brown*, 462 F.3d 312, 319 (4th Cir. 2006)). "A case is fit for judicial decision when the issues are purely legal and when the action in controversy is final and not dependent on future uncertainties." *Miller*, 462 F.3d at 319. And a case will cause hardship when it "create[s] adverse effects of a strictly legal kind." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733, 118 S.Ct. 1665, 140 L.Ed.2d 921 (1998). "When considering hardship, we may consider the cost to the parties of delaying judicial review." *Miller*, 462 F.3d at 319.

***263** **[40]** Ripeness here comes from the "imposition of the barrier," not the ultimate denial of a visa or waiver. *Gratz v. Bollinger*, 539 U.S. 244, 262, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003) (finding that a student had standing to challenge a school's affirmative action program even though the student had not actually applied, much less been rejected). As of December 8, 2017, the relevant agencies have fully implemented the travel restrictions detailed in the Proclamation. State Department Statement, *supra*. Accordingly, Plaintiffs' family members are now *categorically* inadmissible unless they meet the high standard for a waiver. *Id.* The relief Plaintiffs seek is not the issuance of a visa or waiver to their relatives, which is subject to the many limitations established by Congress in the INA and to the discretion of consular officials. 8 U.S.C. §§ 1104(a)(1), 1201; 6 U.S.C. § 236(b)(1). Instead, Plaintiffs merely ask that their relatives go through the same individualized vetting process that the executive branch applies to nationals from all other countries—an individualized vetting process that has already been denied them.

Because the agencies have fully implemented the travel restrictions, the legality of those restrictions is "fit for judicial decision." *Miller*, 462 F.3d at 319.[10] The issues raised by Plaintiffs—including whether the Proclamation's travel restrictions violate the Constitution—are "purely legal." *Id.* And the agencies' implementation of these restrictions is certainly "final." *Id.* Therefore, the cost to the parties of delaying judicial review would be to functionally deprive them of *any* judicial review. Indeed, if we waited until all of Plaintiffs' family members were denied visas, the Government would surely argue that the claim is then moot because they cannot demonstrate that their relatives would apply again. We reject this circular interpretation of ripeness.

10 That the travel restrictions were not fully implemented before December 8, 2017, is not critical to our analysis. The agencies had already taken the

> final steps necessary to implement the restrictions and were only kept from doing so by two nationwide injunctions, one of which we review here. *See, e.g.*, DHS Fact Sheet, *supra*; State Department Statement, *supra* ("The preliminary injunctions had prohibited the government from fully enforcing or implementing the entry restrictions of Presidential Proclamation 9645[.]").

We conclude that Plaintiffs' claim is ripe for review.

B.

In assessing Plaintiffs' Establishment Clause challenge, we first ask whether the proffered reason for the Proclamation is "facially legitimate and bona fide." *Kleindienst v. Mandel*, 408 U.S. 753, 770, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972); *see IRAP I*, 857 F.3d at 588–93. The Proclamation's stated purpose is "to protect [U.S.] citizens from terrorist attacks and other public-safety threats" and "to encourage foreign governments to improve their information-sharing and identity-management protocols and practices and to regularly share identity and threat information with our immigration screening and vetting systems." 82 Fed. Reg. at 45,162.

[41] The *Mandel* standard, read through the lens of Justice Kennedy's opinion in *Kerry v. Din*,[11] imposes a heavy ***264** burden on Plaintiffs, but not an insurmountable one. *See* —— U.S. ——, 135 S.Ct. 2128, 2139–41, 192 L.Ed.2d 183 (2015) (Kennedy, J., concurring in judgment). It clearly affords the political branches substantial deference. Yet it also accounts for those very rare instances in which a challenger plausibly alleges that a government action runs so contrary to the basic premises of our Constitution as to warrant more probing review. Plaintiffs argue that the Proclamation is one of those rare instances.

11 As we explained in *IRAP I*, 857 F.3d at 590 n.15, we join the Ninth Circuit in finding that Justice Kennedy's concurrence in *Din* is the controlling opinion because it sets forth the narrowest grounds for the Court's judgment. *See Cardenas v. United States*, 826 F.3d 1164, 1171 (9th Cir. 2016) (citing *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977)).

[42] Assuming without deciding that the proffered purpose of the Proclamation is "facially legitimate," we turn to the question of whether it is "bona fide" as required by *Mandel*.[12] Justice Kennedy's concurrence in *Din* elaborated on this "bona fide" requirement. An action is not considered "bona fide" if Plaintiffs make an "affirmative showing of bad faith," which they must "plausibly allege[ ] with sufficient particularity." *See id.* at 2141 (Kennedy, J., concurring in the judgment); *Mandel*, 408 U.S. at 770, 92 S.Ct. 2576. Upon such a showing, a court may "look behind" the Government's proffered justification for its action. *See Din*, 135 S.Ct. at 2141 (Kennedy, J., concurring in the judgment); *see also Marczak v. Greene*, 971 F.2d 510, 516–18 (10th Cir. 1992). Therefore, to advance their First Amendment claim, Plaintiffs must have "plausibly alleged with sufficient particularity" that the Proclamation's invocation of national security is a pretext for an anti-Muslim religious purpose.

12 Contrary to Judge Niemeyer's assertion, *Mandel* does not demand that "a lack of good faith ... appear on the face of the government's action." If that were the case, the Court would not have needed to examine the record evidence to determine if the Government's reason for denying Mandel's requested waiver—violation of his prior visas—was true. *See* 408 U.S. at 756–58, 769, 92 S.Ct. 2576. Nor would it have been necessary in *Din* to emphasize that the plaintiff "*admit[ted]* in her Complaint" facts that demonstrated the Government "relied upon a bona fide factual basis for denying" the requested visa. *See* 135 S.Ct. at 2140–41 (Kennedy, J., concurring in judgment) (emphasis added).

[43] In the extraordinary case before us, resolution of that question presents little difficulty. Unlike *Din* and *Mandel*, in which the Government had a "bona fide factual basis" for its actions, *Din*, 135 S.Ct. at 2140 (Kennedy, J., concurring in the judgment), here the Government's proffered rationale for the Proclamation lies at odds with the statements of the President himself. Plaintiffs here do not just plausibly allege with particularity that the Proclamation's purpose is driven by anti-Muslim bias, they offer undisputed evidence of such bias: the words of the President. This evidence includes President Trump's disparaging comments and tweets regarding Muslims; his repeated proposals to ban Muslims from entering the United States; his subsequent explanation that he would effectuate this "Muslim" ban by targeting "territories" instead of Muslims directly; the issuance of EO-1 and EO-2, addressed only to majority-Muslim nations; and

finally the issuance of the Proclamation, which not only closely tracks EO-1 and EO-2, but which President Trump and his advisors described as having the same goal as EO-1 and EO-2. *See IRAP I*, 857 F.3d at 591; *see, e.g.*, J.A. 168, 756, 779, 791, 794, 808–12, 815–17, 820.

The President's own words—publicly stating a constitutionally impermissible reason for the Proclamation—distinguish this case from those in which courts have found that the Government had satisfied *Mandel*'s "bona fide" prong. In *Bustamante v. Mukasey*, for example, the court held that "the reason given by the consular official in support of the visa denial was ***265** ... bona fide" because there was "no reason to believe that the consular official acted ... in anything other than good faith" in relying on information that the visa applicant "was involved in drug trafficking." 531 F.3d 1059, 1063 (9th Cir. 2008). Similarly, in *Cardenas v. United States*, the court held that a consular official "provided a bona fide factual reason" for denying a visa, and plaintiff made no allegations to "raise a plausible inference that the officer acted in bad faith." 826 F.3d 1164, 1172 (9th Cir. 2016). In no prior cases have plaintiffs alleged—let alone offered undisputed evidence—that *any* government official made public statements contradicting the asserted "bona fide" reason for the governmental action.[13] Plaintiffs have done so here.[14]

13 Judge Niemeyer unpersuasively contends that in *Mandel* and *Din*, "the plaintiffs alleged bad faith with at least as much particularity as do the plaintiffs here." But in neither case did the plaintiffs' *allegations* come close to the *undisputed facts* relied on by Plaintiffs here. In *Mandel*, the plaintiffs did not dispute that Mandel had violated the conditions of his previous visa, and their allegation of bad faith rested largely on their claim that the Attorney General lacked a sufficient basis to characterize that violation as *"flagrant."* *See* 408 U.S. at 759–60, 92 S.Ct. 2576 (emphasis added). In *Din*, the plaintiff argued that the State Department denied Din's visa on the basis of "bad faith" or "illegitimate reasons," but did not describe or offer *any* evidence of what those underlying "bad faith" or "illegitimate reasons" might be. *See* J.A. at 37, 40, *Kerry v. Din*, —— U.S. ——, 135 S.Ct. 2128, 192 L.Ed.2d 183, 2015 WL 2473334, at *37, *40. Here, Plaintiffs offered detailed, undisputed evidence of the illegitimate reason motivating the Proclamation, demonstrating that the Proclamation's proffered rationale was offered in bad faith.

14 The Government argues that this application of the bona fide inquiry "conflicts with ... *Sessions v. Morales-Santana*, —— U.S. ——, 137 S.Ct. 1678, 1693, 198 L.Ed.2d 150 (2017), which described *Mandel* 's standard as 'minimal scrutiny (rational-basis review).' " First Br. 41. We see no conflict. *Morales-Santana* did not even cite *Mandel* nor involve a First Amendment challenge. The Court used this parenthetical in a very different equal protection case to contrast the "minimal scrutiny" applied in *Fiallo v. Bell*, 430 U.S. 787, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977), to congressionally established gender-based entry preferences with the more rigorous review it applied to gender-based citizenship criteria in *Morales-Santana*. *See* 137 S.Ct. at 1693–94.

[44] **[45]** This, of course, does not mean that Plaintiffs have established that the Proclamation violates the Constitution. As we explained in *IRAP I*, 857 F.3d at 592–93, to do so, Plaintiffs must show that the Government cannot meet the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). To prevail under *Lemon*, a governmental entity must show that its challenged action (1) "ha[s] a secular legislative purpose," (2) with "its principal or primary effect ... one that neither advances nor inhibits religion," and (3) which does "not foster 'an excessive government entanglement with religion.' " *Lemon*, 403 U.S. at 612–13, 91 S.Ct. 2105 (quoting *Walz*, 397 U.S. at 674, 90 S.Ct. 1409). Moreover, the Government must satisfy all three prongs of *Lemon* to fend off an Establishment Clause challenge. *Edwards v. Aguillard*, 482 U.S. 578, 583, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987).

[46] Plaintiffs' challenge centers on the first prong. They maintain that the Government has failed to demonstrate that the Proclamation "has 'a secular legislative purpose' " that is "genuine, not a sham, and not merely secondary to a religious objective." *McCreary*, 545 U.S. at 860, 864, 125 S.Ct. 2722 (quoting *Lemon*, 403 U.S. at 612, 91 S.Ct. 2105). To meet this requirement, the Government must show that the *primary* purpose, not just *a* purpose, of the Proclamation is secular. *See Edwards*, 482 U.S. at 594, 107 S.Ct. 2573.

***266** **[47]** **[48]** The Supreme Court has instructed that, to determine the primary purpose of a challenged government action, judges must view the challenged government action as a reasonable "objective observer."

McCreary, 545 U.S. at 862, 125 S.Ct. 2722. To that end, when a court examines the purpose of a challenged government action, it acts as an "objective observer" to discern the "official objective ... from readily discoverable fact, without any judicial psychoanalysis of the drafter's heart of hearts." *Id.* In this role, a court must look to "openly available data" and make a "commonsense conclusion" to determine whether a "religious objective permeated the government's action." *Id.* at 863, 125 S.Ct. 2722. The court should examine the "historical context" of the government action and the "specific sequence of events" leading to the government action. *Edwards*, 482 U.S. at 595, 107 S.Ct. 2573.

[49] The Government maintains that the Proclamation's facial neutrality establishes that it is "not intended to discriminate on the basis of religion." First Br. 43. But even if the Proclamation's "stated objective is religiously neutral," that cannot be "dispositive" as "the entire premise of our review under *Lemon* is that even facially neutral government actions can violate the Establishment Clause." *IRAP I*, 857 F.3d at 595. No "reasonable observer" would accept such a "transparent claim to secularity" without also considering context and history. *See McCreary*, 545 U.S. at 863–84, 869, 125 S.Ct. 2722. The President's own statements provide the relevant history and context here.

Perhaps in implicit recognition of the rawness of the religious animus in the President's pre-election statements,[15] the Government urges us to disregard them. This is a difficult argument to make given that the President and his advisors have repeatedly relied on these pre-election statements to explain the President's post-election actions related to the travel ban. *See, e.g.*, J.A. 1502–03. And, in *McCreary*, the Supreme Court reminded us that "the world is not made brand new every morning." *McCreary*, 545 U.S. at 866, 125 S.Ct. 2722. Because "reasonable observers have reasonable memories," these statements certainly provide relevant context when examining the purpose of the Proclamation. *Id.* However, we need not and thus do not rely on pre-election statements in assessing the constitutionality of the Proclamation.

15 As a candidate or President-elect, the President "call[ed] for a total and complete shutdown of Muslims entering the United States," J.A. 135; stated that "Islam hates us," J.A. 814–15; called for excluding Muslims because "we're having problems with the Muslims, and we're having problems with Muslims coming into the country," J.A. 311; suggested that he would attempt to circumvent scrutiny of the Muslim ban by formulating it in terms of nationality, rather than religion; and, when asked about his plans "to create a Muslim register or ban Muslim immigration to the United States," replied, "You know my plans all along, and I've proven to be right, 100 percent correct," J.A. 815–20. *See IRAP I*, 857 F.3d at 594–95.

We need not do so because the President's inauguration did not herald a new day. Rather, only a week after taking office, President Trump issued EO-1, which banned the entry of citizens of six Muslim majority countries, provided exemptions for Christians, and lacked any asserted evidence indicating a genuine national security purpose. The very next day, January 28, 2017, Rudy Giuliani, an advisor to President Trump, explained that EO-1's *purpose* was to discriminate against Muslims. J.A. 808–10, 815–16. A reasonable observer could certainly conclude that in banning entry into the United States of ***267** 180 million Muslims, approximately 10% of the world Muslim population, EO-1 was crafted to deliver, as Giuliani said, on President Trump's promise to "ban Muslim immigration to the United States." *See* J.A. 809, 820. This is particularly so given that every federal judge who considered the matter enjoined EO-1, finding that it likely violated the Constitution.

Shortly after issuance of these injunctions of EO-1, President Trump issued EO-2, which he and his advisors characterized as being substantially similar to EO-1. The President described EO-2 as "a watered down version of the first order." J.A. 779. Senior Policy Advisor Stephen Miller similarly explained that the changes to EO-2 were "mostly minor technical differences," and promised that they would result in "the same basic policy outcomes for the country." J.A. 756. Then-White House Press Secretary Sean Spicer confirmed that "[t]he principles of the [second] executive order remain the same." J.A. 168. We subsequently found EO-2 also impermissibly motivated by religion, and upheld an injunction of it. *IRAP I*, 857 F.3d 554.

In the months that followed, the President continued to express his desire to return to "the original Travel Ban," rather than "the watered down, politically correct version" in EO-2. J.A. 791. On June 5, 2017, President Trump stated that the "Justice Dept. should ask for an

expedited hearing of the watered down Travel Ban before the Supreme Court—& seek much tougher version!" and that "The Justice Dept. should have stayed with the original Travel Ban, not the watered down, politically correct version they submitted to [the Supreme Court]." *Id.* (statements issued via Twitter). The very next day, then-White House Press Secretary Spicer explained that President Trump's tweets are "official statements by the president of the United States." J.A. 794, 1521. Only nine days before issuing the Proclamation, President Trump tweeted, "The travel ban into the United States should be far larger, tougher and more specific-but stupidly, that would not be politically correct!" J.A. 832.

The President also continued to express what any reasonable observer could view as general anti-Muslim bias. In an August 17, 2017, tweet, the President endorsed an apocryphal story involving General Pershing and a purported massacre of Muslims with bullets dipped in a pig's blood, advising people to "[s]tudy what General Pershing ... did to terrorists when caught. There was no more Radical Islamic Terror for 35 years!" J.A. 806. On November 29, 2017, President Trump retweeted three disturbing anti-Muslim videos entitled: "Muslim Destroys a Statue of Virgin Mary!" "Islamist mob pushes teenage boy off roof and beats him to death!" and "Muslim migrant beats up Dutch boy on crutches!" J.A. 1497–99. The three videos were originally tweeted by an extremist political party whose mission is to oppose "all alien and destructive politic or religious doctrines, including ... Islam." J.A. 1508. When asked about the three videos, President Trump's deputy press secretary Raj Shah responded by saying that the "President has been talking about these security issues for years now, from the campaign trail to the White House" and "the President has addressed these issues with the travel order that he issued earlier this year and the companion proclamation." J.A. 1502–03. The Government does not—and, indeed, cannot—dispute that the President made these statements. Instead, it argues that the "statements that occurred after the issuance of EO-2 do not reflect any religious animus" but reflect "the compelling secular goal of protecting national security from an amply-documented present threat." First Br. 52. We cannot agree.

***268** Rather, an objective observer could conclude that the President's repeated statements convey the primary purpose of the Proclamation—to exclude Muslims from the United States. In fact, it is hard to imagine how an objective observer could come to any other conclusion when the President's own deputy press secretary made this connection express: he explained that President Trump tweets extremist anti-Muslim videos as part of his broader concerns about "security," which he has "addressed ... with ... the proclamation." J.A. 1502–03.

The Government correctly points out that the President's past actions cannot "forever taint" his future actions. *See McCreary*, 545 U.S. at 874, 125 S.Ct. 2722; First Br. 18. President Trump could have removed the taint of his prior troubling statements; for a start he could have ceased publicly disparaging Muslims. But "an implausible claim that governmental purpose has changed should not carry the day in a court of law any more than in a head with common sense." *McCreary*, 545 U.S. at 874, 125 S.Ct. 2722. In fact, instead of taking *any* actions to cure the "taint" that we found infected EO-2, President Trump continued to disparage Muslims and the Islamic faith.

The Government unconvincingly claims that the substantive differences between the Proclamation and EO-1 and EO-2 reflect the elimination of any anti-Muslim bias. To be sure, the Proclamation does differ in some respects from the previous Executive Orders. For example, the Proclamation bans citizens from two non-majority Muslim countries, North Korea and Venezuela. Although the Proclamation affects only very few persons from those countries as opposed to the many tens of thousands from the other Muslim-majority countries, the Government asserts that "[t]he inclusion of those [two] non-Muslim-majority countries in the Proclamation underscores [a] religion-neutral purpose." First Br. 50. Again, we disagree. In *McCreary*, the Supreme Court found that despite the court-ordered addition of secular texts to a twice-challenged display of the Ten Commandments in state courthouses, "[n]o reasonable observer could swallow the claim that the Counties had cast off the objective so unmistakable in the earlier displays." 545 U.S. at 872, 125 S.Ct. 2722. Here, a reasonable observer could hardly "swallow the claim" that the addition of North Korea and Venezuela to the twice-enjoined travel ban was anything more than an attempt to "cast off" the "unmistakable" religious objective of the earlier executive orders. *See id.*

[50] Nor does the "months-long" "multi-agency review,"[16] First Br. 43, 47, on which the Proclamation assertedly rests, establish that its primary purpose is

secular. Although in its briefs the Government repeatedly invoked this review, the Government chose not to make the review publicly available and so provided a reasonable observer no basis to rely on the review. Perhaps in recognition of this, at oral argument before us the Government expressly disavowed any claim that the ***269** review could save the Proclamation. Instead, the Government conceded that the Proclamation rises and falls on its own four corners. Oral Arg. at 32:27–33:00. Even if we considered the review, we could not conclude that it demonstrates that the Proclamation has a secular purpose. This is because the criteria allegedly used in the review to identify problematic countries lie at odds with the list of countries actually included in the Proclamation.[17]

16 The Government rather remarkably argues that because there is no suggestion that Cabinet secretaries and other government officials acted in bad faith or harbored anti-Muslim animus when conducting the review, the Proclamation must have a secular purpose. First Br. 43. Our Constitution describes a unitary executive, and "a President, though able to delegate duties to others, cannot delegate ultimate responsibility or the active obligation to supervise that goes with it." *Clinton v. Jones*, 520 U.S. 681, 713, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997) (Breyer, J., concurring in the judgment). President Trump alone had the authority to issue the Proclamation; he is responsible for its substance and purpose.

17 For example, although the Proclamation acknowledges that the review showed that Somalia, a majority-Muslim country, satisfied "the information-sharing requirements of the baseline," Somalian citizens are subject to entry restrictions. 82 Fed. Reg. at 45,167. Similarly, although Immigration and Customs Enforcement has determined that many countries regularly fail to receive deportees from the United States, J.A. 1295, a risk indicator considered in the review, the Proclamation only designates Iranian citizens for entry restrictions for this reason, 82 Fed. Reg. at 45,163, 45,165. Thus, as the district court recognized, the Proclamation's provisions have a greater "disproportionate impact on majority-Muslim countries" than "would otherwise flow from the objective factors considered in the review." *IRAP v. Trump*, 265 F.Supp.3d at 626.

Like the district court, we do not note "the apparent disconnect between the identified problem[s]" in the review and "the broad, nationality-based travel ban to evaluate the merits" of the Proclamation as a policy. *See IRAP v. Trump*, 265 F.Supp.3d at 626–27. Rather, we do so "only to assess whether the Proclamation persuasively establishes that the primary purpose of the travel ban is no longer religious animus." *See id.* The contradiction between what the Proclamation *says*—that it merely reflects the results of a religion-neutral review—and what it *does* "raises serious doubts" about the Proclamation's proffered purpose, and undermines the Government's argument that its multi-agency review cured any earlier impermissible religious purpose. *See The Florida Star v. B.J.F.*, 491 U.S. 524, 540, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989).

In sum, the face of the Proclamation, read in the context of President Trump's official statements, fails to demonstrate a primarily secular purpose. To the objective observer, the Proclamation continues to exhibit a primarily religious anti-Muslim objective.

Our constitutional system creates a strong presumption of legitimacy for presidential action and we often defer to the political branches on issues related to immigration and national security. But the disposition in this case is compelled by the highly unusual facts here. Plaintiffs offer undisputed evidence that the President of the United States has openly and often expressed his desire to ban those of Islamic faith from entering the United States. The Proclamation is thus not only a likely Establishment Clause violation, but also strikes at the basic notion that the government may not act based on "religious animosity." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532, 535, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993).

We have long recognized that "[o]ur jurisprudence in this area is of necessity one of line-drawing, of determining at what point [an individual's] rights of religious freedom are infringed by the State." *Lee v. Weisman*, 505 U.S. 577, 598, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992). And the line we draw "between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers." *Schempp*, 374 U.S. at 294, 83 S.Ct. 1560 (Brennan, J., concurring). We therefore agree with the district court that Plaintiffs have demonstrated that they will likely ***270** succeed on the merits of their Establishment Clause claim.

IV.

Having held that Plaintiffs are likely to succeed on the merits of their Establishment Clause claim, we now consider the three remaining *Winter* factors. *See* 555 U.S. at 20, 129 S.Ct. 365. We review the district court's decision for abuse of discretion and affirm that the likelihood of irreparable harm, the balance of equities, and the public interest all favor granting injunctive relief. *See id.*; *Aggarao*, 675 F.3d at 366.

A.

[51] As the district court rightly states, irreparable harm occurs when the threatened injury impairs the court's ability to grant an effective remedy. *IRAP v. Trump*, 265 F.Supp.3d at 629 (citing 11A Charles Alan Wright, et al., *Federal Practice and Procedure* § 2948.1 (3d ed. 1998)). The Supreme Court has held that the irreparable harm must be "likely," not merely possible. *Winter*, 555 U.S. at 22, 129 S.Ct. 365.

[52] **[53]** **[54]** As the Supreme Court has stated, the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (plurality opinion); *see also Johnson v. Bergland*, 586 F.2d 993, 995 (4th Cir. 1978) ("Violations of first amendment rights constitute per se irreparable injury."). Our sister circuits have interpreted *Elrod* to apply not just to freedom of speech and association but equally to Establishment Clause violations. *See, e.g.*, *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 302 (D.C. Cir. 2006); *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996); *Parents' Ass'n of P.S. 16 v. Quinones*, 803 F.2d 1235, 1242 (2d Cir. 1986); *ACLU of Ill. v. City of St. Charles*, 794 F.2d 265, 275 (7th Cir. 1986) ("[A]n erosion of religious liberties cannot be deterred by awarding damages to the victims of such erosion."). We agree with these courts that Establishment Clause violations create the same type of immediate, irreparable injury as do other types of First Amendment violations. *Chaplaincy of Full Gospel Churches*, 454 F.3d at 303–04. Because the Proclamation violates the Establishment Clause and is already in full effect, we conclude that the injury is not only threatened and likely but already ongoing. *See id.* at 303 ("[W]hen an Establishment Clause violation is alleged, infringement occurs the moment the government action takes place[.]").

We further agree with the district court that the individual Plaintiffs whose family members are categorically rendered ineligible for visas have demonstrated a likelihood of irreparable harm. Prolonged and indefinite separation of parents, children, siblings, and partners create not only temporary feelings of anxiety but also lasting strains on the most basic human relationships cultivated through shared time and experience. IRAP Plaintiff John Doe No. 5's grandmother, a Yemeni national, has Alzheimer's disease and is currently living in uncertain conditions in Jordan. J.A. 574. Zakzok Plaintiff Fahed Muqbil has a one-year-old daughter who, due to severe birth defects, has been undergoing multiple life-threatening surgeries in the United States without her mother, a Yemeni national, by her side. J.A. 1244. IAAB Plaintiff Doe No. 6's wife is separated from her family and will be "completely devastated" if her mother, an Iranian national, is unable to visit her in the United States. J.A. 1175. These injuries are "not compensable with monetary damages." *See Hawai'i v. Trump*, 878 F.3d at 699. These injuries are ***271** also likely to occur, if not already occurring, because the Proclamation is fully in effect and being enforced; indeed, IAAB Plaintiff John Doe No. 6's mother-in-law has already been denied a visa and waiver pursuant to the Proclamation during the pendency of this litigation.

We therefore affirm the district court's determination that Plaintiffs have sufficiently demonstrated a likelihood of irreparable harm.

B.

[55] We now balance the harms likely to be suffered by the parties. We agree with the district court that the balance of equities weighs in favor of Plaintiffs, who are likely to continue suffering a violation of their Establishment Clause rights (the combination of religious marginalization with familial separation), rather than the Government, which is not likely to be harmed by an injunction against the enforcement of a likely unconstitutional Proclamation. *IRAP v. Trump*, 265 F.Supp.3d at 630.

While the Government asserts a national security interest behind the Proclamation, the district court did not abuse its discretion in concluding that the Government has not shown that national security cannot be maintained without the unprecedented multi-nation ban. *Id.* For one, the injunction does not result in the entry of any particular individual. It simply precludes the use of a nationality-based ban. Foreign nationals from the Designated Countries must still proceed through the standard individualized vetting process and prove that they are not inadmissible. *See* 8 U.S.C. § 1361. The INA provides numerous means to exclude individuals who present a risk to the United States. *See, e.g.*, 8 U.S.C. § 1182(a). The injunction, therefore, neither opens our borders nor creates any vulnerabilities, and the balance of equities, overall, favors injunctive relief.

However, as the district court recognized, we are obligated to follow the Supreme Court's rationale in partially staying the injunction of EO-2. *See IRAP v. Trump*, 265 F.Supp.3d at 630 (citing *Trump*, 137 S.Ct. at 2088). There, the Supreme Court concluded that the balance of equities will vary depending on the strength of the affected foreign national's connection to the United States. *See Trump*, 137 S.Ct. at 2088. Just as the Supreme Court tailored that injunction to those individuals who possess "a credible claim of a bona fide relationship with a person or entity in the United States," we adopt the same approach here. We therefore affirm the district court and conclude that the balance of equities supports an injunction only to the extent that it affords relief to foreign nationals with a bona fide relationship with an individual or entity in the United States. *See infra* Part V.

C.

[56] Finally, we consider whether Plaintiffs have shown that the injunction is in the public interest. We conclude that it cannot be in the public interest for the President to violate the Establishment Clause. We also agree with the district court and the Ninth Circuit that the unlawfully issued Proclamation has a much broader deleterious effect on the public interest than the simple fact that certain foreign nationals are excluded. *IRAP v. Trump*, 265 F.Supp.3d at 630–31; *Hawai'i v. Trump*, 878 F.3d at 700–01.

On a human level, the Proclamation's invisible yet impenetrable barrier denies the possibility of a complete, intact family to tens of thousands of Americans. J.A. 868–69. On an economic level, the Proclamation inhibits the normal flow of information, ideas, resources, and talent between ***272** the Designated Countries and our schools, hospitals, and businesses.[18] On a fundamental level, the Proclamation second-guesses our nation's dedication to religious freedom and tolerance. "The basic purpose of the religion clause of the First Amendment is to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end." *Schempp*, 374 U.S. at 305, 83 S.Ct. 1560 (Goldberg, J., concurring). When we compromise our values as to some, we shake the foundation as to all. *Schempp*, 374 U.S. at 225, 83 S.Ct. 1560 ("The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.' " (citation omitted)).

18 As fifteen states and the District of Columbia have submitted to the Court, they "all benefit from immigration, tourism, and international travel by students, academics, skilled professionals, and businesspeople." Br. for States of New York, California, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Massachusetts, New Mexico, Oregon, Rhode Island, Vermont, Virginia, and Washington, and the District Of Columbia as Amici Curiae at 4. They summarize the effects of the Proclamation as follows:

> [T]he Proclamation ... disrupt[s] the ability of our States' public colleges and universities to recruit and retain students and faculty, impairing academic staffing and research needs, and causing the loss of tuition and tax revenues, among other costs. The Proclamation ... disrupt[s] the provision of medical care at amici States' hospitals and further harms our science, technology, finance, and tourism industries by inhibiting ... the free exchange of information, ideas, and talent between the designated countries and our States, causing long-term economic and reputational damage.

Id. The Proclamation's categorical treatment of foreign nationals as potential threats necessarily overlooks their invaluable contributions to our country as individuals and, in doing so, hurts the public interest.

For those reasons, we affirm the district court's conclusion that enjoining the unlawful Proclamation is in the public interest.

V.

Finally, we review for abuse of discretion the district court's grant of a nationwide injunction against enforcement of § 2 of the Proclamation, excepting North Korea and Venezuela. *Aggarao*, 675 F.3d at 366. We affirm.

[57] In its opinion granting the preliminary injunction, the district court narrowed the scope of its nationwide injunction to apply to only those individuals "who have a credible claim of a bona fide relationship with a person or entity in the United States." *IRAP v. Trump*, 265 F.Supp.3d at 631 (quoting *Trump*, 137 S.Ct. at 2088). The district court did so in accordance with the Supreme Court's partial stay of the prior nationwide injunction against EO-2 that this Court and the Ninth Circuit had affirmed. *Trump*, 137 S.Ct. at 2088. Under the Supreme Court's framework, a bona fide relationship with a person requires "a close familial relationship," which encompasses immediate family members such as parents, children, siblings, "grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins of persons in the United States." *Hawai'i v. Trump*, 871 F.3d 646, 658 & n.8 (9th Cir. 2017) (clarifying scope of injunction against EO-2); *see Trump v. Hawai'i*, —— U.S. ——, 138 S.Ct. 1, 1, 198 L.Ed.2d 776 (2017) (mem.) (declining to stay the Ninth Circuit's clarification of familial relationships). A bona fide relationship with an entity or organization must be "formal, documented, and formed in the ordinary ***273** course, rather than for the purpose of evading EO-2." *Trump*, 137 S.Ct. at 2088.

The district court's injunction adopts the scope laid out by the Supreme Court—with one potential exception. *IRAP v. Trump*, 265 F.Supp.3d at 631. The district court concluded that "clients of IRAP and HIAS, and those similarly situated, are not covered by the injunction absent a separate bona fide relationship as defined above." *Id.* In support, the district court referenced the Supreme Court's stay of the Ninth Circuit's decision "that a refugee with a formal sponsorship assurance from a U.S. resettlement agency" *categorically* had "a bona fide connection to the United States." *Id.*; *see Hawai'i v. Trump*, 871 F.3d at 661–64 (concluding that refugees who have formal assurances from resettlement agencies have bona fide relationships); *Trump v. Hawai'i*, 138 S.Ct. at 1 (staying the Ninth Circuit's holding "with respect to refugees covered by a formal assurance"). Like Plaintiffs, who asked the district court to clarify its order, J.A. 49 (No. 17-cv-361, ECF No. 226), we find the district court's holding subject to several different interpretations. To the extent that the district court held that IRAP, HIAS, and similar organizations *categorically* lack a qualifying bona fide relationship with their clients, we conclude that this would be an abuse of discretion. We see no need to read more into the Supreme Court's grant of a stay than what it held: that refugees with formal assurances do not categorically enjoy a bona fide relationship with a U.S. entity. Instead, IRAP, HIAS, and other organizations that work with refugees or take on clients are subject to the same requirements as all other entities under the Supreme Court's bona fide relationship standard: a relationship that is "formal, documented, and formed in the ordinary course, rather than for the purpose" of evading the travel restrictions imposed by the Proclamation. *See Trump*, 137 S.Ct. at 2088.

[58] With this caveat, we conclude that the district court did not abuse its discretion in enjoining §§ 2(a)–(c), (e), and (g)–(h) of the Proclamation, narrowed by the Supreme Court's bona fide relationship standard. *IRAP v. Trump*, 265 F.Supp.3d at 631–32 (citing *Trump*, 137 S.Ct. at 2088). We agree that the balance of the equities favor the Government and that the injunction should not extend to § 2(d) (North Korea) and § 2(f) (Venezuela) because there is no alleged Establishment Clause violation as to either. We also agree that the injunction does not apply to the President himself but instead to the other Defendants (agencies and agency heads) charged with implementing the Proclamation. *IRAP I*, 857 F.3d at 605.

For the same reasons as in *IRAP I*, we conclude that the district court did not abuse its discretion in adopting a nationwide injunction. *Id.*; *IRAP v. Trump*, 265 F.Supp.3d at 632. First, Plaintiffs are scattered throughout the country, making piecemeal injunctive relief difficult. *Richmond Tenants Org., Inc. v. Kemp*, 956 F.2d 1300, 1308–09 (4th Cir. 1992). Second, "Congress has instructed that 'the immigration laws of the United States should be enforced vigorously and *uniformly*.' " *Texas v. United States*, 809 F.3d 134, 187–88 (5th Cir. 2015) (quoting Immigration Reform and Control Act of 1986, Pub. L.

No. 99-603, § 115(1), 100 Stat. 3359, 3384), *affirmed by equally divided court*, — U.S. ——, 136 S.Ct. 2271, 195 L.Ed.2d 638 (2016). Finally, because we find that the Proclamation was issued in violation of the Constitution, enjoining it only as to Plaintiffs would not cure its deficiencies. *IRAP I*, 857 F.3d at 605.

Finally, we have adopted the bona fide relationship limitation only because this case comes to us in an interlocutory posture. ***274** We are reviewing the entry of a *preliminary* injunction and so must balance the equities, including the Government's interest in enforcing the Proclamation. *See Trump*, 137 S.Ct. at 2088. But if a court eventually holds *on the merits* that the Proclamation was issued in contravention of the Constitution (as we believe it should), then the unlawful portions of the Proclamation should be voided.

VI.

For all of these reasons, we affirm the preliminary injunction granted by the district court. In light of the Supreme Court's order staying this injunction pending "disposition of the Government's petition for a writ of certiorari, if such writ is sought," we stay our decision today pending the Supreme Court's decision. *Trump v. IRAP*, 138 S.Ct. at 542.

AFFIRMED

GREGORY, Chief Judge, with whom Judge Wynn joins as to Part I, concurring:

The statutory question is this: whether the President has the congressionally delegated authority to enact modern-day analogs of the repealed Chinese Exclusion Act or nationality-based quota system. In light of legislative and executive practice spanning centuries, I conclude that he does not.

I.

Plaintiffs argue that, in issuing the Proclamation, [1] the President exceeded his authority under the Immigration and Nationality Act (INA), *see* 8 U.S.C. §§ 1182(f), 1185(a)(1), and violated the INA's prohibition on nationality discrimination in the issuance of immigrant visas, *see* 8 U.S.C. § 1152. Before considering Plaintiffs' arguments on the merits, I must first determine that their statutory claims are justiciable.

1 Proclamation No. 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats (the "Proclamation"), 82 Fed. Reg. 45,161 (Sept. 24, 2017).

The Government makes several arguments to the contrary. First, it claims that Congress has stripped the Court of subject-matter jurisdiction to hear the claims. Second, it argues that the doctrine of consular nonreviewability bars judicial review. Third, it argues that Plaintiffs lack Article III standing to sue. And fourth, it argues that Plaintiffs do not have a cause of action to bring their statutory claims, under the APA or otherwise. I address these arguments in turn and conclude that the statutory claims are justiciable. [2]

2 The Government also argues that Plaintiffs' claims are not ripe. I adopt the Majority Opinion's ripeness analysis and conclude that the claims are ripe. *Ante* 261–63.

A.

Subject to limitations imposed by Congress, the Constitution extends the federal judicial power "to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties Made, or which shall be made, under their Authority." U.S. Const. art. III, § 2, cl. 1. Since 1875, Congress has provided the federal courts with original jurisdiction over civil claims "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331; Judiciary Act of 1875, Pub. L. No. 43-137, § 1, 18 Stat. 470. Since 1980, Congress has provided federal courts with this original jurisdiction over federal questions irrespective of the amount in controversy. 28 U.S.C. § 1331; Federal Question Jurisdictional Amendments ***275** Act of 1980, Pub. L. No. 96-486, § 2, 94 Stat. 2369.

In their motion for a preliminary injunction, Plaintiffs allege that the Proclamation violates the Establishment Clause and the INA. These questions are on the face of Plaintiffs' Complaints, substantial, and central to their

claims. *See* 13D Charles Alan Wright, et al., *Federal Practice and Procedure* § 3562 (3d ed. Supp. 2017). Thus, Plaintiffs have squarely presented two questions that "aris[e] under the Constitution" and "laws ... of the United States." 28 U.S.C. § 1331.

But, even where a plaintiff squarely presents federal questions, a district court may still lack jurisdiction to resolve the dispute if Congress has precluded judicial review. *See, e.g.*, *Elgin v. Dep't of Treasury*, 567 U.S. 1, 8–10, 132 S.Ct. 2126, 183 L.Ed.2d 1 (2012). Absent "clear congressional language mandating preclusion of federal jurisdiction and the nature of respondents' requested relief," federal courts have jurisdiction under § 1331 to hear "constitutional and statutory challenges" to immigration procedures. *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 483–84, 111 S.Ct. 888, 112 L.Ed.2d 1005 (1991); *see also Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 643–44, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002) (holding that statute does not strip federal courts of federal question jurisdiction absent plain statement or fair implication); *Webster v. Doe*, 486 U.S. 592, 603, 108 S.Ct. 2047, 100 L.Ed.2d 632 (1988) (requiring "clear" showing of intent if Congress seeks to preclude judicial review of "colorable constitutional claim"); *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670, 681 n.12, 106 S.Ct. 2133, 90 L.Ed.2d 623 (1986) (reaffirming "strong presumption that Congress intends judicial review of administrative action"); *cf. Elgin*, 567 U.S. at 10, 132 S.Ct. 2126 (holding that congressional intent need only be "fairly discernible in the statutory scheme" in cases where Congress has not foreclosed *all* judicial review but merely limited or redirected it (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207, 114 S.Ct. 771, 127 L.Ed.2d 29 (1994))).

The Government argues that the INA forecloses any judicial review of Plaintiffs' statutory claims. First Cross-Appeal Br. 19–20 (hereinafter "First Br."). In support, it points to two discreet statutory provisions: 6 U.S.C. § 236(f) and 8 U.S.C. § 1201(i). But neither provision applies to this case, much less provides the clear expression of congressional intent needed to strip this Court of subject-matter jurisdiction here.

The first, § 236(f), does not actually strip federal courts of anything. Instead, it denies prospective plaintiffs a cause of action to challenge individual decisions by consular officers in granting and denying visas. 6 U.S.C. § 236(f) ("Nothing in this section shall be construed to create or authorize a cause of action to challenge a decision of a consular officer or other United States official or employee to grant or deny a visa."). But the absence of a statutory cause of action is irrelevant to this Court's exercise of subject-matter jurisdiction. To the contrary, it is "firmly established in our cases that the absence of a valid ... cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case." *Verizon*, 535 U.S. at 642–43, 122 S.Ct. 1753 (quoting *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998)); *see Michigan v. Bay Mills Indian Cmty.*, —— U.S. ——, 134 S.Ct. 2024, 2029 n.2, 188 L.Ed.2d 1071 (2014) (noting that § 1331 "gives a district court subject-matter jurisdiction to decide any claim alleging a violation of" federal Indian Gaming Regulatory ***276** Act, even if plaintiffs may ultimately lack statutory cause of action). Moreover, as I discuss in Part I.B, Plaintiffs are not challenging a consular officer's *denial* of visas to their family members; instead, they are challenging the President's *authority* to issue a policy that makes Plaintiffs' family members categorically ineligible to be considered for visas. Section 236(f) therefore does not affect this Court's subject-matter jurisdiction.

The second provision that the Government cites, § 1201(i), strips federal courts of jurisdiction to review decisions by a consular officer or the Secretary of State to "revoke" a visa that has already been issued. 8 U.S.C. § 1201(i). But the Proclamation explicitly states that "[n]o immigrant or nonimmigrant visa issued before the applicable effective date under section 7 of this proclamation shall be revoked pursuant to this proclamation." 82 Fed. Reg. at 45,171. And the Proclamation applies only to foreign nationals who "do not have a valid visa on the applicable effective date." *Id.* at 45,167. Because no visa can or will be revoked under the Proclamation, Plaintiffs' claims do not fall within § 1201(i).

That the Government cannot point to an INA provision clearly stripping this Court of jurisdiction over Plaintiffs' statutory claims is not surprising. One need only glance through the INA to see that Congress has taken a careful and narrow approach to jurisdiction, precluding judicial review over only discrete exercises of executive authority. *See, e.g.*, *McNary*, 498 U.S. at 492, 111 S.Ct. 888 (finding that INA provision stripping jurisdiction to review individual denials of Special Agricultural Worker (SAW)

279 F.Supp.3d 401
United States District Court, E.D. New York.

Martín Jonathan BATALLA VIDAL et al., Plaintiffs,
v.
Kirstjen M. NIELSEN, Secretary, Department of Homeland Security, et al., Defendants.
State of New York et al., Plaintiffs,
v.
Donald Trump, President of the United States, et al., Defendants.

16–CV–4756 (NGG) (JO)
|
17–CV–5228 (NGG) (JO)
|
Signed 02/13/2018

Synopsis

Background: Sixteen states, individuals, and nonprofit organization brought action against President of the United States, Secretary of Department of Homeland Security (DHS), and United States Attorney General, alleging that decision to end Deferred Action for Childhood Arrivals (DACA) program, which provided protections for certain individuals without lawful immigration status who had entered the United States as children, violated Administrative Procedure Act (APA) and the Due Process Clause of the Fifth Amendment. Plaintiffs moved for preliminary injunction barring defendants from ending DACA program pending a final adjudication of cases on the merits.

Holdings: The District Court, Nicholas G. Garaufis, J., held that:

[1] plaintiffs were substantially likely to succeed on merits of claim that decision to end DACA was arbitrary and capricious in violation of APA;

[2] plaintiffs were likely to suffer irreparable harm if court did not issue preliminary injunction; and

[3] balance of equities and public interest weighed in favor of issuing preliminary injunction.

Motion granted.

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Opinion

MEMORANDUM & ORDER

NICHOLAS G. GARAUFIS, United States District Judge.

In 2012, the Department of Homeland Security created the Deferred Action for Childhood Arrivals ("DACA") program. That program permitted certain individuals

without lawful immigration status who entered the United States as children to obtain "deferred action"—contingent, discretionary relief from deportation—and ***407** authorization to work legally in this country. Since 2012, nearly 800,000 DACA recipients have relied on this program to work, study, and keep building lives in this country.

On September 5, 2017, Defendants announced that they would gradually end the DACA program. [1] (Letter from Jefferson B. Sessions III to Elaine C. Duke (Admin. R. (Dkt. 77–1) [2] 251) ("Sessions Ltr."); Mem. from Elaine C. Duke, Acting Sec'y, DHS, Rescission of the June 15, 2012 Memorandum Entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children" (Sept. 5, 2017) (Admin. R. 252) ("DACA Rescission Memo").) The Department of Homeland Security ("DHS") would consider pending DACA applications and renewal requests, as well as promptly filed renewal requests by DACA beneficiaries whose benefits were set to expire within six months, but would reject all other applications and renewal requests. (DACA Rescission Memo at 4.) Plaintiffs in the above-captioned cases promptly challenged Defendants' decision on a number of grounds, including, most relevant for purposes of this Memorandum and Order, that the decision violated the Administrative Procedure Act, 5 U.S.C. § 551 et seq. (the "APA"). (2d Am. Compl. (Dkt. 60)); Compl. (Dkt. 1, No. 17–CV–5228).) Plaintiffs now seek a preliminary injunction barring Defendants from ending the DACA program pending a final adjudication of these cases on the merits. (Mem. in Supp. of Mot. for Prelim. Inj. (Dkt. 123–1) ("BV Pls. Mot."); Mem. in Supp. of Mot. for Prelim. Inj. (Dkt. 96–1, No. 17–CV–5228) ("State Pls. Mot.").)

1 Plaintiffs have named as defendants President Donald J. Trump, Secretary of the Department of Homeland Security Kristjen Nielsen, and Attorney General Jefferson B. Sessions III. Plaintiffs allege that the President terminated the DACA program because of unlawful discriminatory animus, in violation of the Fifth Amendment to the U.S. Constitution. (3d Am. Compl. (Dkt. 113, No. 16–CV–4756) ¶¶ 89–100, 195–98; Am. Compl. (Dkt. 54, No. 17–CV–5228) ¶¶ 57–70, 233–39.) Because the APA does not permit direct review of Presidential decisionmaking, Franklin v. Massachusetts, 505 U.S. 788, 800–01, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992), only the Attorney General and Secretary Nielsen are defendants with respect to Plaintiffs' substantive APA claims, which are the focus of this opinion. (3d Am. Compl. (Dkt. 113, No. 16–CV–4756) at ECF p.40.)

2 All record citations refer to the docket in Batalla Vidal v. Nielsen, No. 16–CV–4756, except as otherwise noted.

[1] [2] [3] [4] "Congress passed the [APA] to ensure that agencies follow constraints even as they exercise their powers. One of these constraints is the duty of agencies to find and formulate policies that can be justified by neutral principles." FCC v. Fox Television Stations, Inc., 556 U.S. 502, 537, 129 S.Ct. 1800, 173 L.Ed.2d 738 (2009) (Kennedy, J., concurring in part and in the judgment). To that end, the APA authorizes parties harmed by federal agencies to obtain judicial review of agency decisions. 5 U.S.C. § 702. The reviewing court must set aside "action, findings, [or] conclusions" that are, among other things, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Id. § 706(2)(A). [3] Review under this "arbitrary and capricious" standard is "narrow," and the court may not "substitute its judgment for that of the agency"; instead, the court considers only whether the agency's decision "was the product of reasoned decisionmaking." ***408** Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 52, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) ("State Farm"). If the agency decision "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made,' " the court will uphold the agency's decision. Id. at 43, 103 S.Ct. 2856 (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962)). If, however, the agency's decision "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise," that decision must be set aside. Id.

3 On November 9, 2017, the court rejected Defendants' arguments that judicial review under the APA was unavailable because the decision to rescind the DACA program was "committed to agency discretion by law." (Nov. 9, 2017, Mem. & Order (Dkt. 104) at 20–28.)

[5] [6] Review under the arbitrary-and-capricious standard is generally limited to the agency's stated rationale for its decision, State Farm, 463 U.S. at 43, 103 S.Ct. 2856; Camp v. Pitts, 411 U.S. 138, 143, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973) (per curiam), and to the "full administrative record that was before the [agency] at the time [it] made [its] decision." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971) ("Overton Park"). The court "may not supply a reasoned basis for the agency's action that the agency itself has not given." State Farm, 463 U.S. at 43, 103 S.Ct. 2856 (citing SEC v. Chenery Corp., 332 U.S. 194, 196, 67 S.Ct. 1760, 91 L.Ed. 1995 (1947) ("Chenery II")); SEC v. Chenery Corp., 318 U.S. 80, 87, 63 S.Ct. 454, 87 (L.Ed. 626 1943) ("Chenery I"). Nor may the court uphold agency action based on "post hoc rationalizations of agency action." State Farm, 463 U.S. at 50, 103 S.Ct. 2856; see also Williams Gas Processing—Gulf Coast Co., L.P. v. FERC, 373 F.3d 1335, 1345 (D.C. Cir. 2004) (Roberts, J.) ("It is axiomatic that [the court] may uphold agency orders based only on reasoning that is fairly stated by the agency in the order under review; post hoc rationalizations by agency counsel will not suffice." (internal quotation marks and citation omitted)).

The APA thus sometimes places courts in the formalistic, even perverse, position of setting aside action that was clearly within the responsible agency's authority, simply because the agency gave the wrong reasons for, or failed to adequately explain, its decision. E.g., State Farm, 463 U.S. at 42–43, 48–56, 103 S.Ct. 2856; Overton Park, 401 U.S. at 416, 420, 91 S.Ct. 814. Based on the present record, these appears to be just such cases.

Defendants indisputably can end the DACA program. Nothing in the Constitution or the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq. (the "INA"), requires immigration authorities to grant deferred action or work authorization to individuals without lawful immigration status. The DACA program, like prior deferred-action and similar discretionary relief programs, simply reflected the Obama Administration's determination that DHS's limited enforcement resources generally should not be used to deport individuals who were brought to the United States as children, met educational or military-service requirements, and lacked meaningful criminal records. (Mem. from Janet Napolitano, Sec'y, DHS, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children at 1–2 (June 15, 2012) (Admin. R. 1–2) (the "2012 DACA Memo").) New Administrations may, however, alter or abandon their predecessors' policies, even if these ***409** policy shifts may impose staggering personal, social, and economic costs. [4]

4 These costs are detailed in greater length in the exhibits to Plaintiffs' motions for preliminary injunction, and in the many helpful briefs filed by amici in these cases. (See, e.g., Brief of Amici Curiae 114 Companies (Dkt. 160) (estimating the costs of the DACA rescission over the next decade at $460.3 billion in lost GDP and $24.6 billion in lost Social Security and Medicare tax contributions).)

The question before the court is thus not whether Defendants could end the DACA program, but whether they offered legally adequate reasons for doing so. Based on its review of the record before it, the court concludes that Defendants have not done so. First, the decision to end the DACA program appears to rest exclusively on a legal conclusion that the program was unconstitutional and violated the APA and INA. Because that conclusion was erroneous, the decision to end the DACA program cannot stand. Second, this erroneous conclusion appears to have relied in part on the plainly incorrect factual premise that courts have recognized "constitutional defects" in the somewhat analogous Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") program. Third, Defendants' decision appears to be internally contradictory, as the means by which Defendants chose to "wind down" the program (namely, by continuing to adjudicate certain DACA renewal applications) cannot be reconciled with their stated rationale for ending the program (namely, that DACA was unconstitutional). Any of these flaws would support invalidating the DACA rescission as arbitrary and capricious.

Before this court, Defendants have attempted to reframe their decision as motivated by "litigation risk." They contend that the decision to end the DACA program was reasonable in light of the prospect that Texas and several other states would seek to amend their complaint in Texas v. United States, No. 14–CV–254 (S.D. Tex.), to challenge the DACA program; that the U.S. District Court for the Southern District of Texas would issue a nationwide injunction ending the program; and that the U.S. Court of Appeals for the Fifth Circuit and the U.S. Supreme Court would affirm that injunction.

(Defs. Opp'n to Pls. Mots. for Prelim. Inj. (Dkt. 239) at 1, 10–11, 21–24.) The Administrative Record does not support Defendants' contention that they decided to end the DACA program for this reason. Even if it did, reliance on this "litigation risk" rationale would have been arbitrary and capricious, in light of Defendants' failure to explain their decision or to consider any factors that might have weighed against ending the DACA program. And even if this "litigation risk" rationale were both supported by the Administrative Record and a reasonable basis for rescinding the DACA program, the court would nevertheless likely set Defendants' decision aside, as the court cannot say that any of the aforementioned errors were harmless, for purposes of review under the APA.

Accordingly, the court concludes that Plaintiffs are likely to succeed on the merits of their substantive APA claims. Because Plaintiffs also satisfy the remaining requirements for the court to issue a preliminary injunction, the court ENJOINS Defendants from rescinding the DACA program, pending a decision on the merits of these cases. Defendants thus must continue processing both initial DACA applications and DACA renewal requests under the same terms and conditions that applied before September 5, 2017, subject to the limitations described below. The scope of this preliminary injunction conforms to that previously issued by the U.S. District Court of the Northern District of California. ***410** See Order Denying Defendants' Motion to Dismiss for Lack of Subject–Matter Jurisdiction and Granting Provisional Relief (Dkt. 234), Regents of the Univ. of Calif. v. U.S. Dep't of Homeland Sec., No. 3:17–CV–5211, 279 F.Supp.3d 1011, 2018 WL 339144 (N.D. Cal. Jan. 9, 2018) ("Regents") (Alsup, J.), pet. for cert. before judgment filed, No. 17–1003.

The court makes clear, however, what this order is not.

- **This order does not hold that the rescission of DACA was unlawful.** That question is for summary judgment, not motions for a preliminary injunction. Cf. Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 742 (2d Cir. 1953) ("[A] preliminary injunction ... is, by its very nature, interlocutory, tentative, provisional, ad interim, impermanent, mutable, not fixed or final or conclusive, characterized by its for-the-time-beingness.").

- **This order does not hold that Defendants may not rescind the DACA program.** Even if the court ultimately finds that Defendants' stated rationale for ending the DACA program was legally deficient, the ordinary remedy is for the court to remand the decision to DHS for reconsideration. See Chenery I, 318 U.S. at 94–95, 63 S.Ct. 454. On remand, DHS "might later, in the exercise of its lawful discretion, reach the same result for a different reason." FEC v. Akins, 524 U.S. 11, 25, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998).

- **This order does not require Defendants to grant any particular DACA applications or renewal requests.** Restoring the DACA program to the status quo as of September 4, 2017, does not mean that every DACA recipient who requests renewal of his or her deferred action and work authorization will receive it. The DACA program identified "criteria [that] should be satisfied before an individual is considered for an exercise of prosecutorial discretion." (2012 DACA Memo at 1.) It did not require immigration officials to defer action against any individuals who met these criteria; to the contrary, the 2012 DACA Memo stated that DHS would exercise prosecutorial discretion "on an individual basis" and would not "provide any assurance that relief will be granted in all cases." (Id. at 2–3.) Preserving the status quo means only that Defendants must continue considering DACA applications and renewal requests, not that they must grant all such applications and requests. (See U.S. Citizenship & Immigration Servs., Frequently Asked Questions at Q6 (Apr. 25, 2017) ("Apr. 25 DACA FAQs"), Ex. 41 to State Pls. Mot. (Dkt. 97–2, No. 17–CV–5228) at ECF p.186.)

- **This order does not prevent Defendants' from revoking individual DACA recipients' deferred action or work authorization.** Under the 2012 DACA Memo, DHS may terminate a DACA recipient's deferred action "at any time, with or without a Notice of Intent to Terminate, at [its] discretion." (Apr. 25 DACA FAQs at Q27.) Maintaining the status quo does nothing to alter that.

Because the court issues the preliminary injunction requested by Plaintiffs, the Batalla Vidal Plaintiffs' Motion for Class Certification (Dkt. 124) is DENIED

as moot. The court will address by separate order Defendants' motions to dismiss Plaintiffs' operative complaints. (Defs. Mot. to Dismiss Third Am. Compl. (Dkt. 207); *411 Defs. Mot. to Dismiss (Dkt. 71, No. 17–CV–5228).)

I. BACKGROUND

The court provides a brief history of immigration authorities' use of "deferred action" and similar discretionary-relief programs, the DACA and DAPA programs, and this litigation to offer context for the discussion that follows. For further background, the reader may consult this court's prior orders (see Oct. 3, 2017, Order (Dkt. 72); Oct. 17, 2017, Mem. & Order (Dkt. 86); Oct. 19, 2017, Mem. & Order (Dkt. 90); Nov. 9, 2017, Mem. & Order (Dkt. 104); Nov. 20, 2017, Order (Dkt. 109); Dec. 15, 2017, Order (Dkt. 122); Jan. 8, 2018, Mem. & Order (Dkt. 233)), the Northern District of California's opinion in Regents, 279 F.Supp.3d at 1018–27, 2018 WL 339144, at *1–8, and the opinion of the Office of Legal Counsel regarding DAPA (see The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others, 38 Op. O.L.C. at 1 (2014) (Admin. R. 4) ("OLC Op.")).

A. History of Deferred Action

[7] "The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens." Arizona v. United States, 567 U.S. 387, 394, 132 S.Ct. 2492, 183 L.Ed.2d 351 (2012). That power derives from the Constitution, which authorizes Congress "[t]o establish a uniform Rule of Naturalization," U.S. Const. art. I., § 8, cl. 4, and from the Government's "inherent power as sovereign to control and conduct relations with foreign nations." Arizona, 567 U.S. at 395, 132 S.Ct. 2492. Acting under this authority, the Government has created an "extensive and complex" statutory and regulatory regime governing, among other things, who may be admitted to the United States, who may work here, and who may be removed from the country. Id.; see id. at 395–97, 132 S.Ct. 2492.

Not all "removable" aliens are, in fact, deported from this country. Immigration officials "cannot act against each technical violation of the statute[s they are] charged with enforcing," but must determine which enforcement actions are worthwhile. Heckler v. Chaney, 470 U.S. 821, 831, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985); Arpaio v. Obama, 797 F.3d 11, 15–16 (D.C. Cir. 2015). "A principal feature of the removal system is the broad discretion exercised by immigration officials," who "as an initial matter, must decide whether it makes sense to pursue removal at all," and, "[i]f removal proceedings commence," may decide whether removable aliens warrant asylum or "other discretionary relief allowing them to remain in the country or at least to leave without formal removal." Arizona, 567 U.S. at 396, 132 S.Ct. 2492; see also Reno v. Am.–Arab Anti–Discrimination Comm., 525 U.S. 471, 483, 119 S.Ct. 936, 142 L.Ed.2d 940 (1999) ("AAADC") (observing that throughout the removal process, immigration officials have "discretion to abandon the endeavor"). Immigration officials' enforcement discretion is a practical necessity as well as a legal reality: By one recent estimate, there are approximately 11.3 million undocumented aliens present in the United States, of whom DHS has the resources to remove fewer than 400,000 per year—about 3.5 percent of the total. (OLC Op. at 1.)

Over the years, Congress and the Executive Branch have developed a number of means by which immigration officials may exercise their discretion not to deport removable aliens. "Some of these discretionary powers have flowed from statute," such as "parole," see 8 U.S.C. § 1182(d)(5)(A), and "temporary protected *412 status," see id. § 1254a. Regents, 279 F.Supp.3d at 1019, 2018 WL 339144, at *2; see also, e.g., 8 U.S.C. § 1229b (cancellation of removal); id. § 1229c (voluntary departure). Others, such as "deferred enforced departure" or "extended voluntary departure," have been ad hoc exercises of executive authority, grounded in the Executive Branch's responsibility for conducting foreign relations and enforcing immigration laws, rather than in express congressional authorization. Regents, 279 F.Supp.3d at 1019–20, 2018 WL 339144, at *2; OLC Op. at 12 & n.5.

[8] [9] The cases before this court concern one such form of discretionary relief. "Deferred action" is a longstanding practice by which the Executive Branch exercises its discretion to abandon, or to decline to undertake, deportation proceedings "for humanitarian reasons or simply for its own convenience." AAADC, 525 U.S. at 484, 119 S.Ct. 936; see also Arpaio, 797 F.3d at 16 (" '[D]eferred action'... entails temporarily postponing the removal of individuals unlawfully present in the United States."). By granting a removable alien deferred action,

immigration officials convey that they do not currently intend to remove that individual from the country. As such, deferred action offers the recipient some assurance —however non-binding, unenforceable, and contingent on the recipient's continued good behavior—that he or she may remain, at least for now, in the United States. Additionally, recipients of deferred action may apply for authorization to work legally in the United States, provided that they "establish[ ] an economic necessity for employment." 8 C.F.R. § 274a.12(c)(14); see also 8 U.S.C. § 1324a(h)(3) (excluding from the definition of "unauthorized aliens," who may not be knowingly employed in the United States, aliens "authorized to be ... employed ... by the Attorney General"). Deferred action does not, however, confer lawful immigration status, a pathway to citizenship, or a defense to removal, and is revocable by immigration authorities. United States v. Arrieta, 862 F.3d 512, 514 (5th Cir. 2017); Ariz. Dream Act Coal. v. Brewer, 757 F.3d 1053, 1058 (9th Cir. 2014). (2012 DACA Memo at 3.)

"Although the practice of granting deferred action 'developed without express statutory authorization,' it has become a regular feature of the immigration removal system that has been acknowledged by both Congress and the Supreme Court." (OLC Op. at 13 (quoting AAADC, 525 U.S. at 484, 119 S.Ct. 936).) DHS and its predecessor, the Immigration and Naturalization Service, have employed deferred action and similar discretionary-relief programs, such as "nonpriority status" and "extended voluntary departure," since at least the 1960s. Arpaio, 797 F.3d at 16 (citing OLC Op. at 7–8, 12–13). (Br. of Amicus Curiae Former Federal Immigration and Homeland Security Officials (Dkt. 198–1) ("Former Fed. Officials Amicus Br.") at 6–11; Andorra Bruno et al., Cong. Res. Serv., Analysis of June 15, 2012 DHS Memorandum, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children, at 20–23 (July 13, 2012), https://edsource.org/wp-content/uploads/old/Deferred-Action-Congressional-Research-Service-Report1.pdf ("CRS Rep.").) These programs were used to provide relief to, among dozens of examples, refugees from war-torn and communist countries; spouses and children of aliens granted legal status under the Immigration Reform and Control Act of 1986, Pub. L. No. 99–603, 100 Stat. 3359; aliens eligible for relief under the Violence Against Women Act ("VAWA") or the Victims of Trafficking and Violence Protection Act of 2000; foreign students affected by Hurricane Katrina; and certain widows ***413** and widowers of U.S. citizens. (OLC Op. at 14–17; Former Fed. Officials Amicus Br. at 8–10.)

Congress has repeatedly ratified immigration officials' practice of according deferred action to certain aliens without lawful immigration status. See, e.g., 8 U.S.C. § 1151 note (certain immediate family members of certain alien U.S. combat veterans are "eligible for deferred action, advance parole, and work authorization"); id. § 1154(a)(1)(D)(i)(II) (VAWA petitioners "eligible for deferred action and work authorization"); id. § 1227(d)(2) (denial of administrative stay of removal "shall not preclude the alien from applying for ... deferred action"); USA PATRIOT Act of 2001, Pub. L. No. 107–56, § 423(b), 115 Stat. 272, 361 (certain immediate family members of lawful permanent residents killed in the terrorist attacks of September 11, 2001, "may be eligible for deferred action and work authorization").

B. DACA and DAPA

On June 15, 2012, then-DHS Secretary Janet Napolitano issued the 2012 DACA Memo, which stated that DHS would consider granting deferred action to certain individuals without lawful immigration status who entered the United States as children. (2012 DACA Memo at 1.) Secretary Napolitano stated that DHS was implementing this program as an "exercise of prosecutorial discretion" in the enforcement of immigration laws, to "ensure that ... enforcement resources are not expended on ... low priority cases." (Id.) Under the 2012 DACA Memo, individuals were eligible for consideration for deferred action if they (1) "came to the United States under the age of sixteen"; (2) had "continuously resided in the United States for a[t] least five years preceding the date of this memorandum and [were] present in the United States" on that date; (3) were "in school," had "graduated from high school," had obtained GEDs, or were honorably discharged veterans of the Armed Forces or Coast Guard; (4) had not been convicted of felonies, significant misdemeanors, or multiple misdemeanors, or been deemed to "otherwise pose[ ] a threat to national security or public safety"; and (5) were not above the age of thirty. (Id.) DACA applications from individuals meeting these criteria would be evaluated "on an individual" or "case-by-case" basis and would not necessarily be "granted in all cases." (Id. at 2.) The 2012 DACA Memo "confer[red] no substantive

right, immigration status or pathway to citizenship." (Id. at 2–3.)

In late 2014, DHS announced the DAPA program, which would have granted deferred action to certain parents of U.S. citizens and lawful permanent residents. (Mem. from Jeh Charles Johnson, Sec'y of DHS, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014) (the "2014 DAPA Memo") (Admin R. 40).) As part of that program, then-DHS Secretary Jeh Johnson directed U.S. Citizenship and Immigration Services ("USCIS") "to establish a process, similar to DACA, for exercising prosecutorial discretion through the use of deferred action, on a case-by-case basis," to certain individuals who, among other things, lacked formal immigration status and had a son or daughter who was a U.S. citizen or lawful permanent resident. (Id. at 1.) Secretary Johnson also announced that the DACA program would be expanded by (1) removing the requirement that DACA applicants be under the age of 30 as of June 2012; (2) extending the duration of the deferred action and work authorization obtained through the program from two to three years; and (3) adjusting the date-of-entry requirement to open DACA to individuals ***414** brought to the United States between June 15, 2007, and January 1, 2010. (Id. at 3–4 (the "DACA Expansion").)

C. The Texas Litigation

Following DHS's issuance of the 2014 DAPA Memo, Texas and 25 other states filed suit in the U.S. District Court for the Southern District of Texas, alleging that the DAPA program violated the APA and the Take Care Clause of the U.S. Constitution, U.S. Const. art. II, § 3. See Texas v. United States, 86 F.Supp.3d 591, 598 (S.D. Tex. 2015). On February 16, 2015, after concluding that Texas and its fellow plaintiffs had standing to sue, Judge Andrew Hanen determined that they were likely to succeed on the merits of their claim that DAPA constituted a "legislative" or "substantive" rule that, under the APA, should have been made through notice-and-comment rulemaking procedures. Id. at 664–72. In particular, Judge Hanen found that the 2014 DAPA Memo, "[a]t a minimum,... 'severely restrict[ed]' any discretion that Defendants argue exists" in the adjudication of DAPA applications, and that DHS had not genuinely exercised discretion in reviewing DACA applications. Id. at 669 & n.101. The court issued a nationwide injunction against the implementation of both the DAPA program and the DACA Expansion. Id. at 677–78.

The Fifth Circuit denied a stay of the preliminary injunction, 787 F.3d 733, 743 (5th Cir. 2015), and affirmed the district court on two independent, alternative grounds, 809 F.3d 134, 178 (5th Cir. 2015) (revised). First, the Fifth Circuit upheld the district court's ruling that the plaintiff states were likely to prevail on the merits of their claim that the DAPA program was invalid because it was not developed through notice-and-comment rulemaking. See id. at 170–78. In particular, the Fifth Circuit found that Judge Hanen did not clearly err in finding that "[n]othing about DAPA genuinely leaves the agency and its [employees] free to exercise discretion," based partly on evidence that supposedly showed that USCIS exercised little case-by-case discretion in adjudicating DACA applications. Id. at 172 (quoting 86 F.Supp.3d at 670 (alterations in original)); see id. at 172–78.

Second, the Fifth Circuit concluded that the plaintiff states were likely to prevail on the merits of their claim that the DAPA program was substantively arbitrary and capricious because, in that court's view, the program was contrary to the INA. See id. at 178–86. The Fifth Circuit observed that "Congress has enacted an intricate process for illegal aliens to derive a lawful immigration classification from their children's immigration status," in the form of family-preference visas, id. at 179, and cancellation of removal and adjustment of status, id. at 180. While admitting that DAPA did not "confer the full panoply of benefits that a visa gives," the Fifth Circuit held that DAPA nevertheless conflicted with these statutory forms of relief by permitting "illegal aliens to receive the benefits of lawful presence" without meeting the stringent requirements applicable to these provisions. See id. at 180. Similarly, the Fifth Circuit held that DAPA conflicted with the INA by providing an easier path to "lawful presence" and work authorization for approximately four million undocumented immigrants—a question of great national importance that Congress could not have intended to delegate implicitly to DHS. See id. at 180–81. The Fifth Circuit acknowledged that there was a long history of discretionary-relief programs but held that past practice was not dispositive of DAPA's legality and distinguished DAPA from past programs on the grounds that such programs were " 'done on a country-

specific basis, usually in response to war, civil unrest, or natural disasters,' " *415 id. at 184 (quoting CRS Rep. at 9); used as a "bridge[ ] from one legal status to another," id.; or "interstitial to a statutory legalization scheme," such as the Family Fairness program enacted by the Reagan and George H.W. Bush Administrations, id. at 185. Accordingly, "DAPA [wa]s foreclosed by Congress's careful plan... and therefore was properly enjoined." Id. at 186.

The Supreme Court granted the Government's petition for a writ of certiorari, — U.S. ——, 136 S.Ct. 906, 193 L.Ed.2d 788 (2016), and affirmed the decision of the Fifth Circuit by an equally divided court, 136 S.Ct. 2271 (Mem.).

D. The DACA Rescission

On January 25, 2017, the newly inaugurated President Donald Trump issued an executive order stating that "[i]t is the policy of the executive branch to ... [e]nsure the faithful execution of the immigration laws of the United States," and that "[w]e cannot faithfully execute the immigration laws of the United States if we exempt classes or categories of removable aliens from potential enforcement." Exec. Order 13,768, Enhancing Public Safety in the Interior of the United States (Jan. 25, 2017), 82 Fed. Reg. 8799. Shortly thereafter, then-DHS Secretary John F. Kelly issued a memorandum implementing this executive order by rescinding "all existing conflicting directives, memoranda, or field guidance regarding enforcement of our immigration laws and priorities for removal," except for the DACA and DAPA programs, which he left in place. (Mem. from John F. Kelly, Sec'y, DHS, Enforcement of the Immigration Laws to Serve the National Interest at 2 (Feb. 20, 2017) (Admin. R. 230).)

Four months later, Secretary Kelly issued another memorandum rescinding DAPA and the DACA Expansion in light of "the preliminary injunction in this matter, the ongoing litigation, the fact that DAPA never took effect, and our new immigration enforcement priorities." (Mem. from John F. Kelly, Sec'y, DHS, Rescission of November 20, 2014, Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") at 3 (June 15, 2017) (Admin. R. 237).) This memo left the original DACA program in place and did not affect the remaining three-year grants of deferred action that were issued under the DACA Expansion prior to Judge Hanen's issuance of a preliminary injunction in Texas. (Id. at 2 & n.3).

Following the rescission of the 2014 DAPA Memo, Texas Attorney General Ken Paxton, joined by the attorneys-general of ten other states, wrote to Attorney General Jefferson B. Sessions to insist that the Executive Branch rescind the 2012 DACA Memo. (Ltr. from Ken Paxton, Att'y Gen. of Tex., to Hon. Jeff Sessions, Att'y Gen. of the U.S. (June 29, 2017) (Admin. R. 238).) Paxton threatened that if DHS did not stop issuing or renewing deferred action and work authorization under DACA or the DACA Expansion, the plaintiff states would amend their complaint in the Texas litigation "to challenge both the DACA program and the remaining Expanded DACA permits." (Id. at 2.) If, however, Defendants agreed to rescind the 2012 DACA Memo and to cease "renew[ing] or issu[ing] any new DACA or Expanded DACA permits in the future," the plaintiffs would voluntarily dismiss their complaint. (Id.)

On September 5, 2017, Defendants announced that the DACA program would be brought to a gradual end. In an undated letter (the "Sessions Letter"), the Attorney General wrote to then-Acting DHS Secretary Elaine C. Duke to "advise that [DHS] ***416** should rescind" the 2012 DACA Memo.[5] (Sessions Ltr.) The Attorney General opined that DACA was unlawful, unconstitutional, and likely to be invalidated in court:

> DACA was effectuated by the previous administration through executive action, without proper statutory authority and with no established end-date, after Congress' repeated rejection of proposed legislation that would have accomplished a similar result. Such an open-ended circumvention of immigration laws was an unconstitutional exercise of authority by the Executive Branch. The related Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) policy was enjoined on a nationwide basis in a decision affirmed by the Fifth Circuit

> on the basis of multiple legal grounds and then by the Supreme Court by an equally divided vote. Then Secretary of Homeland Security John Kelly rescinded the DAPA policy in June. Because the DACA policy has the same legal and constitutional defects that the courts recognized as to DAPA, it is likely that potentially imminent litigation would yield similar results with respect to DACA.

(Id. (citation omitted).)

5 While the Sessions Letter is not dated, the bookmarks in the electronic PDF file of the Administrative Record ascribe a date of September 4, 2017, to this letter.

Thereafter, Acting Secretary Duke issued a memorandum (the "DACA Rescission Memo") instructing her subordinates to "execute a wind-down of the program." (DACA Rescission Memo at 1.) Acting Secretary Duke briefly summarized the creation of the DACA and DAPA programs and stated that, although the DACA program "purported to use deferred action —an act of prosecutorial discretion meant to be applied only on an individualized case-by-case basis," "USCIS has not been able to identify specific denial cases where an applicant appeared to satisfy the programmatic categorical criteria as outlined in the [2012 DACA Memo] but still had his or her application denied based solely upon discretion." (Id. at 2 & n.1.) Acting Secretary Duke then described the history of the Texas litigation, noting that the Fifth Circuit had affirmed the injunction against the implementation of the DAPA program based on the finding "that DACA decisions were not truly discretionary," and observed that Secretary Kelly had acted to end categorical or class-based exemptions of aliens from potential enforcement of the immigration laws and to rescind the DAPA program while leaving the DACA program "temporarily ... in place." (Id. at 2; see id. at 2–3.)

The Acting Secretary then noted that Texas and several other states had threatened to challenge the DACA program, and she briefly summarized the Attorney General's opinion that DACA was unconstitutional, unlawful, and likely to be struck down because it shared "the same legal and constitutional defects that the courts recognized as to DAPA." (Id. at 3 (quoting Sessions Ltr.).) "Taking into consideration the Supreme Court's and the Fifth Circuit's rulings in the ongoing litigation, and the September 4, 2017 letter from the Attorney General," she concluded, "it is clear that the June 15, 2012, DACA program should be terminated." (Id. at 4.)

In light of "the complexities associated with winding down the program," however, Acting Secretary Duke directed that the program should be wound down gradually. (Id.) Initial applications, renewal requests, and associated applications for work authorization that had been "accepted" by ***417** DHS by September 5, 2017, would be adjudicated "on an individual, case-by-case basis." (Id.) Likewise, all DACA renewal requests and associated applications for work authorization submitted by "current beneficiaries whose benefits will expire between [September 5, 2017] and March 5, 2018," would be adjudicated, provided that these requests were "accepted by [DHS] as of October 5, 2017." (Id.) DHS would, however, "reject all DACA initial requests and associated applications for [work authorization] filed after the date of this memorandum" and "all DACA renewal requests and associated applications for [work authorization] filed outside of the[se] parameters." (Id.) Existing DACA benefits would not be terminated immediately but would not be renewed, and DHS would no longer approve further applications for advance parole." (Id.)

E. Procedural History

The court will not restate the procedural history of these cases prior to November 2017, which is set forth in the court's November 9 Memorandum and Order. The court will, however, provide the following timeline of recent developments in these cases.

On December 11, 2017, the Batalla Vidal Plaintiffs filed their Third Amended Complaint (Dkt. 113), which largely tracked their Second Amended Complaint but added a claim that Defendants Nielsen and Sessions violated the Due Process Clause of the Fifth Amendment by rejecting DACA renewal applications that (1) were promptly mailed but received by USCIS after October 5, 2017, due to U.S. Postal Service delays; (2) were delivered to USCIS by October 5, 2017, but rejected because they arrived too late in the day; or (3) contained "minor perceived or actual

clerical errors." (Third Am. Compl. (Dkt. 113) ¶ 203; see id. ¶¶ 199–205.)

On December 20, 2017, the Supreme Court vacated the decision of the U.S. Court of Appeals for the Ninth Circuit denying Defendants' petition for a writ of mandamus to the Northern District of California in similar litigation challenging Defendants' decision to end the DACA program. In re United States, — U.S. —, 138 S.Ct. 443, 199 L.E.2d 351 (2017) (per curiam). The Supreme Court held that the "Government [has made] serious arguments that at least portions of the District Court's order are overly broad" and that, "[u]nder the specific facts of [that] case," the district court should have resolved the Government's arguments that the decision to rescind the DACA program was not subject to judicial review before ordering the Government to produce a complete administrative record. Id. at 445. The Court suggested that the district court "may consider certifying that ruling for interlocutory appeal under 28 U.S.C. § 1292(b) if appropriate." Id. at 445.

One week later, the U.S. Court of Appeals for the Second Circuit denied Defendants' petition for a writ of mandamus to this court and lifted its stay of record-related orders entered by this court and by Magistrate Judge James Orenstein. (Dec. 27, 2017, USCA Order (Dkt. 210).) The Second Circuit rejected Defendants' position that they could unilaterally determine which portions of the administrative record the court could consider, and determined that, in light of the "strong suggestion that the record before the [District Court] was not complete," plaintiffs were entitled to discovery as to whether Defendants had produced a full administrative record. (Id. at 2 (quoting Dopico v. Goldschmidt, 687 F.2d 644, 654 (2d Cir. 1982)) (alteration in original).) Rejecting Defendants' contention that compliance with this court's and Judge Orenstein's record-related orders would burden the Executive ***418** Branch, the Second Circuit noted that this court had repeatedly limited the scope of those orders, such that, as the Government conceded, "the number of documents, covered by the order, as modified, is approximately 20,000, a far smaller number than the Government's papers led this court to believe." (Id. at 3–4.) The Second Circuit distinguished In re United States on the grounds that this court had already considered and rejected Defendants' jurisdictional arguments, clarified that the orders in question did not apply to White House documents, and limited the orders to apply to dramatically fewer documents than were at issue in the cases before the Northern District of California. (Id. at 4–5.)

Defendants then moved for the court to certify its November 9 Memorandum and Order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). (Mot. to Certify Order for Appeal (Dkt. 219).) They argued that certification would "materially advance the disposition of the litigation" by either "terminat[ing] the litigation" or "clarify[ing] the rights of the parties" and "limiting the claims going forward in this litigation." (Mem. in Supp. of Mot. to Certify Order for Appeal (Dkt. 219–1) at 14.) On January 8, 2018, the court granted Defendants' motion to certify the November 9 Memorandum and Order for interlocutory appeal because, among other things, there was "substantial ground for difference of opinion" on the question of whether the DACA rescission was committed to agency discretion by law. (Jan. 8, 2018, Mem. & Order (Dkt. 233) at 4–6.) Defendants then argued that the court should delay an oral argument scheduled for January 18, 2018, pending the Second Circuit's consideration of the interlocutory appeal, as "all (or at least most) of [the] district-court proceedings [regarding Defendants' motions to dismiss, Plaintiffs' motions for a preliminary injunction, and the Batalla Vidal Plaintiffs' motion for class certification] will be unnecessary if the Second Circuit accepts some or all of the government's arguments on jurisdiction and justiciability." (Defs. Jan. 11, 2018, Ltr. (Dkt. 236) at 1.) Before the Second Circuit, however, Defendants abruptly changed tack, agreeing with Plaintiffs "that holding the petition [for interlocutory appeal] in abeyance would be the most efficient course of action," pending this court's consideration of Defendants' motion to dismiss and Plaintiffs' motions for preliminary relief and class certification. (Reply in Supp. of Pet. for Permission to Appeal (Dkt. 28, Nielsen v. Vidal, No. 18–122 (2d Cir.)) at 2.) [6]

6 Defendants' new litigation position is thus directly at odds with its arguments for why this court should certify the November 9 Memorandum and Order. The court is uncertain whether the inconsistency in Defendants' position should be ascribed to lack of coordination between the Department of Justice's Federal Programs Branch and Civil Appellate staff, or instead to a deliberate attempt to delay the resolution of these cases. In any event, the court is not pleased that Defendant have requisitioned judicial

> resources to decide a motion for relief that they seem not to have actually wanted.

On January 9, 2018, the Northern District of California denied Defendants' motion to dismiss Regents and its companion cases and granted the plaintiffs a preliminary injunction. (Nov. 9, 2018, Order Denying FRCP 12(b)(1) Dismissal and Granting Provisional Relief (Dkt. 234, Regents).) Like this court, Judge William Alsup rejected Defendants' contentions that the decision to end the DACA program was committed to agency discretion by law and that 8 U.S.C. § 1252(g) barred judicial review of that decision. (Id. at 18–23.) Judge Alsup further concluded that the plaintiffs were entitled to a preliminary injunction because they were likely to prevail on the ***419** merits of their claim that the decision to rescind the DACA program was substantively "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," because that decision "was based on a flawed legal premise" that the DACA program was illegal. (Id. at 29; see id. at 29–38.) Judge Alsup rejected Defendants' argument that "DHS acted within its discretion in managing its litigation exposure in the Fifth Circuit, weighing its options, and deciding on an orderly wind down of the program so as to avoid a potentially disastrous injunction in the Fifth Circuit" as a "classic post hoc rationalization" and, in any event, insufficient to support the decision to rescind the DACA program because Defendants had neither considered defenses to Texas's potentially imminent suit nor weighed supposed litigation risks against "DACA's programmatic objectives as well as the reliance interests of DACA recipients." (Id. at 38–43.)

II. LEGAL STANDARD

[10] **[11]** **[12]** **[13]** **[14]** "[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997) (per curiam) (quoting 11A Charles A. Wright et al., Federal Practice and Procedure § 2948, at 130 (2d ed. 1995)) (emphasis omitted). A party "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).[7] To establish a likelihood of success on the merits, the party seeking an injunction "need only make a showing that the probability of his prevailing is better than fifty percent." Eng v. Smith, 849 F.2d 80, 82 (2d Cir. 1988); see also Nken v. Holder, 556 U.S. 418, 434, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009) ("It is not enough that the chance of success on the merits be 'better than negligible.' " (quoting Sofinet v. INS, 188 F.3d 703, 707 (7th Cir. 1999))). When an injunction is "mandatory," however—that is, when the injunction "alter[s] the status quo by commanding some positive act"—the movant must demonstrate a "clear" or "substantial" showing of likelihood of success. Tom Doherty Assocs., Inc. v. Saban Entm't, Inc., 60 F.3d 27, 34 (2d Cir. 1995). To obtain a mandatory injunction, a movant ***420** must also "make a strong showing of irreparable harm." State of New York ex rel. Schneiderman v. Actavis PLC, 787 F.3d 638, 650 (2d Cir. 2015) (internal quotation marks and citations omitted).

7 The Second Circuit has, at times, formulated this standard differently. For example, a party seeking a preliminary injunction may demonstrate the existence of "a serious question going to the merits to make them a fair ground for trial, with a balance of hardships tipping decidedly in [its] favor," rather than a likelihood of success on the merits. Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd., 598 F.3d 30, 35 (2d Cir. 2010); see also id. at 35–38 (holding that this "serious questions" standard survives Winter and other Supreme Court cases applying a "likelihood of success on the merits" standard). The Second Circuit's "serious questions" standard does not apply, however, "[w]hen ... a preliminary injunction will affect government action taken in the public interest pursuant to a statute or regulatory scheme." Friends of the East Hampton Airport, Inc. v. Town of East Hampton, 841 F.3d 133, 143 (2d Cir. 2016) (internal quotation marks and citation omitted). The court need not decide whether the more permissive "serious questions" standard applies here, as Plaintiffs concede that the "likelihood of success" standard applies here and have met this standard. See generally Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1326, 1338–39 (2d Cir. 1992) ("serious questions" standard applies when challenged governmental action is not specifically authorized by statute or regulation), cert. granted and judgment vacated as moot, Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 918, 113 S.Ct. 3028, 125 L.Ed.2d 716 (1993).

III. DISCUSSION

For the reasons that follow, Plaintiffs have demonstrated that they are entitled to a preliminary injunction against implementation of the DACA Rescission Memo.

A. Likelihood of Success on the Merits

[15] First, Plaintiffs are substantially likely to succeed on the merits of their claim that Defendants' decision to end the DACA program was substantively arbitrary and capricious.[8] Plaintiffs contend that this decision violated APA § 706(2)(A) because, among other things, it was based on an erroneous legal conclusion that DACA was unlawful, failed to consider important aspects of the problem, and was internally contradictory. (BV Pls. Mot. at 11–20, 23–27; State Pls. Mot. at 5–13.) Defendants aver, however, that the decision reflects a reasonable assessment of litigation risk. (Defs. Opp'n at 1, 10–13, 15–24.) Based on the record before it, the court concludes that Plaintiffs, not Defendants, are substantially likely to be correct.

8 The court need not decide whether the injunction sought by Plaintiffs is "mandatory," in that it would compel Defendants to take affirmative acts to adjudicate DACA applications and renewal requests, or non-mandatory, in that it would only preserve the status quo as of September 4, 2017. Because Plaintiffs have demonstrated a "clear" or "substantial" likelihood of success on the merits, they are entitled to a preliminary injunction regardless of the standard that applies.

1. The Stated Rationale for Rescinding DACA Appears To Be Arbitrary and Capricious

Plaintiffs have identified at least three respects in which Defendants' decision to rescind the DACA program appears to be arbitrary, capricious, and an abuse of discretion. First, the decision rests on the erroneous legal conclusion that the DACA program is unlawful and unconstitutional. Second, the decision rests on the erroneous factual premise that courts have determined that the DACA program violates the Constitution. Third, the stated rationale for that decision is internally contradictory, as Defendants have continued to grant DACA renewal requests despite ending the DACA program on the grounds that it is, by their lights, unconstitutional. The court addresses each of these reasons in turn.

a. The Decision Relies on the Legally Erroneous Premise that DACA Is Illegal

[16] An agency decision that is based on an erroneous legal premise cannot withstand arbitrary-and-capricious review. See 5 U.S.C. § 706(2)(A). It is well-established that when "[agency] action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law." Chenery I, 318 U.S. at 94, 63 S.Ct. 454. Accordingly, numerous courts have recognized that agency action based on a misconception of the applicable law is arbitrary and capricious in substance. See, e.g., Yale–New Haven Hosp. v. Leavitt, 470 F.3d 71, 86–87 (2d Cir. 2006); Transitional Hosps. Corp. of La., Inc. v. Shalala, 222 F.3d 1019, 1029 (D.C. Cir. 2000) (Garland, J.); see also Planned Parenthood Fed. of Am., Inc. v. Heckler, 712 F.2d 650, 666 (D.C. Cir. 1983) (Bork, J., concurring in part and dissenting in part) ("If a regulation is based on an incorrect view of applicable law, the regulation ***421** cannot stand as promulgated ...." (internal quotation marks and citation omitted)). That is no less true when an agency takes some action based on an erroneous view that the action is compelled by law, notwithstanding that the agency could have taken the same action on policy grounds. "An agency action, however permissible as an exercise of discretion, cannot be sustained 'where it is based not on the agency's own judgment but on an erroneous view of the law.' " Sea–Land Serv., Inc. v. Dep't of Transp., 137 F.3d 640, 646 (D.C. Cir. 1998) (quoting Prill v. NLRB, 755 F.2d 941, 947 (D.C. Cir. 1985)). This rule is consistent with cases from outside the administrative-law context, which make clear that a decision based on "an erroneous view of the law" is "by definition" or "necessarily" an abuse of discretion. Koon v. United States, 518 U.S. 81, 100, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996); Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990). This rule also ensures that agencies are accountable for their decisions: If an agency makes a decision on policy grounds, it must say so, not act as if courts have tied its hands. The court therefore considers whether Defendants' decision to rescind the DACA program relied on an erroneous view of the law. This review is de novo. 5 U.S.C.

§ 706; J. Andrew Lange, Inc. v. FAA, 208 F.3d 389, 391 (2d Cir. 2000).[9]

9 While in other contexts, an agency's interpretation of a statute it is charged with administering may be entitled to deference, Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), Defendants have not argued that their interpretation of the legality of the DACA program is entitled to formal or controlling deference. That is for good reason. Because neither the Sessions Letter nor the DACA Rescission Memo carry the "force of law," they do not warrant Chevron deference. United States v. Mead Corp., 533 U.S. 218, 226–27, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001). Moreover, Defendants' views about the legality of the DACA program turn not only on whether that program was consistent with the INA (their interpretations of which are entitled to deference, see INS v. Aguirre–Aguirre, 526 U.S. 415, 424–25, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999)), but also whether that program constituted a "substantive rule" under the APA. Because Defendants are not charged with implementing the APA, their views about whether the DACA program should have been implemented through notice-and-comment rulemaking are not entitled to deference. See Shell Offshore Inc. v. Babbitt, 238 F.3d 622, 627 (5th Cir. 2001). Finally, it almost goes without saying that, to the extent Defendants determined that the DACA program was unconstitutional, that determination does not warrant Chevron deference.

Some academic commentators have offered interesting arguments as to why courts should review deferentially Defendants' decision to end the DACA program. See, e.g., Josh Blackman, Understanding Sessions's Justification to Rescind DACA, Lawfare (Jan. 16, 2018, 8:00 AM), https://www.lawfareblog.com/understanding-sessionss-justification-rescind-daca (arguing, based on an "admittedly charitable" reading of the Sessions Letter, that Regents erred by, among other things, failing to consider how the Attorney General's independent duty to defend the Constitution supported his decision to recommend ending the DACA program); Zachary Price, Why Enjoining DACA's Cancellation Is Wrong, Take Care Blog (Jan. 12, 2018), https://takecareblog.com/blog/why-enjoining-daca-s-cancellation-is-wrong (arguing that "[i]nsofar as DACA was simply an exercise of enforcement discretion, any explanatory burden with respect to its reversal must be minimal"). Defendants themselves have not pressed these arguments before this court, arguing instead that, if their decision is indeed subject to judicial review, it should be reviewed under the ordinary arbitrary-and-capricious standard of APA § 706(2)(A). (Defs. Opp'n at 10–11.)

Fairly read, the Sessions Letter and DACA Rescission Memo indicate only that Defendants decided to end the DACA program because they believed that it was illegal. (While Defendants now argue that the decision was based on "litigation risk," ***422** the record does not support this contention, as the court explains below.) The DACA Rescission Memo offers no independent legal reasoning as to why Defendants believed the DACA program to be unlawful, so the court turns to the Sessions Letter. In that letter, the Attorney General offered two discernible bases for his opinion that the DACA program violated the law and should end: first, that it was unconstitutional, and second, that it "has the same legal and constitutional defects that the courts recognized as to DAPA." (Sessions Ltr.) Neither conclusion is sustainable.

i. The Attorney General Erred in Concluding that DACA Is Unconstitutional

As noted above, the Attorney General concluded that DACA was unconstitutional because it "was effectuated by the previous administration through executive action, without proper statutory authority and with no established end-date, after Congress' repeated rejection of proposed legislation that would have accomplished a similar result" and "an open-ended circumvention of immigration laws." (Sessions Ltr.) This conclusory statement does not support the proposition that DACA is unconstitutional.

DACA is not unconstitutional simply because it was implemented by unilateral, executive action without express congressional authorization. The Executive Branch has wide discretion not to initiate or pursue specific enforcement actions. Chaney, 470 U.S. at 831–32, 105 S.Ct. 1649. Immigration officials have particularly "broad discretion" in deciding whom to deport, deriving both from the considerations specific to the Executive Branch in the foreign-policy arena, Arizona, 567 U.S. at 396, 132 S.Ct. 2492, and from the fact that far more removable aliens reside in this country than DHS has resources to deport, OLC Op. at 1; see also Adam B. Cox & Cristina M. Rodriguez, The President and Immigration

Law, 119 Yale L.J. 458, 510–19 (2009). Every modem presidential administration has relied on extra-statutory discretionary-relief programs to shield certain removable aliens from deportation. Far from cabining this authority, Congress has amended the INA in ways that expressly acknowledge the Executive Branch's power to decline to initiate removal proceedings against certain removable aliens. It thus cannot be the case that, by recognizing that certain removable aliens represented lower enforcement priorities than others, the DACA program violates the Constitution.

Nor is DACA unconstitutional because it identified a certain category of removable aliens—individuals who were brought to the United States as children, lacked meaningful criminal histories, and had met educational or military-service requirements—as eligible for favorable treatment. The court is aware of no principled reason why the Executive Branch may grant deferred action to particular immigrants but may not create a program by which individual immigrants who meet certain prescribed criteria are eligible to request deferred action. It is surely within DHS's discretion to determine that certain categories of removable alien—felons and gang members, for example—are better uses of the agency's limited enforcement resources than law-abiding individuals who entered the United States as children. Indeed, unless deferred-action decisions are to be entirely random, they necessarily must be based at least in part on "categorical" or "class-based" distinctions. See Arpaio v. Obama, 27 F.Supp.3d 185, 210 (D.D.C. 2014) (DACA "helps to ensure that the exercise of deferred action is not arbitrary and capricious, as might be the case if the executive branch offered no guidance to ***423** enforcement officials. It would make little sense for a Court to strike down as arbitrary and capricious guidelines that help ensure that the Nation's immigration enforcement is not arbitrary but rather reflective of congressionally-directed priorities."). The court cannot see how the use of such distinctions to define eligibility for a deferred-action program transforms such a program from discretionary agency action into substantive lawmaking and (somehow) an encroachment on the separation of powers.

Lastly, DACA is not unconstitutional because, as the Attorney General put it, that program was implemented "after Congress' repeated rejection of proposed legislation that would have accomplished a similar result." (Sessions Ltr.) The "proposed legislation" to which the Attorney General referred would not have "accomplished a similar result" to DACA. The DREAM Act, in its many variations, would have offered its beneficiaries a formal immigration status and a pathway to lawful permanent residency. See, e.g., Development, Relief, and Education for Alien Minors Act of 2011, S. 952 (112th Cong.); Regents, 279 F.Supp.3d at 1040 n.15, 2018 WL 339144, at *20 n.15 (collecting proposed legislation). DACA, on the other hand, offers only forbearance from deportation, along with work authorization, and does not provide an immigration status or a pathway to citizenship. (2012 DACA Memo at 4.)

Even if the DREAM Act had offered benefits similar to those conveyed by DACA, it does not follow that Congress's failure to enact a DREAM Act precluded the Executive Branch from enacting the DACA program. The court does not see how executive action, taken either "pursuant to an express or implied authorization of Congress" or "in the absence of either a congressional grant or denial of authority," becomes unconstitutional simply because Congress has considered and failed to enact legislation that would accomplish similar ends. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–37, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (Jackson, J., concurring). Fruitless congressional consideration of legislation is not itself law, see U.S. Const. art. I, § 7, cl. 2, and is an unconvincing basis for ascertaining the "implied will of Congress" to oust the President from acting in the space contemplated by the proposed but un-enacted legislation, see Youngstown Sheet & Tube, 343 U.S. at 637, 72 S.Ct. 863 (Jackson, J., concurring). It strikes the court as improbable that, if the President has some authority, any Member of Congress can divest the President of that authority by introducing unsuccessful legislation on the same subject.

To the extent the decision to end the DACA program was based on the Attorney General's determination that the program is unconstitutional, that determination was legally erroneous, and the decision was therefore arbitrary and capricious. The court does not address whether the DACA program might be unconstitutional on grounds other than those identified by the Attorney General, as any such grounds are not fairly before the court.

ii. The Attorney General Erred in Concluding that DACA Has the "Same Legal and Constitutional Defects that the Courts Recognized as to DAPA"

[17] Nor can the Attorney General's determination that DACA is unlawful rest on the ground that "the DACA policy has the same legal and constitutional defects that the courts recognized as to DAPA." (Sessions Ltr.) That rationale is arbitrary and capricious not only because it is premised on an obvious factual mistake that courts had recognized "constitutional defects" in DAPA, as the court explains in ***424** the next subsection, but also because it is legally erroneous. The Southern District of Texas enjoined the implementation of the DAPA program on the grounds that DAPA was not promulgated through notice-and-comment rulemaking, and the Fifth Circuit affirmed, adding the additional ground for affirmance that DAPA was substantively arbitrary and capricious because it conflicted with the INA. The court is unpersuaded that either ground applies to DACA.

(I) DACA Was Not a Legislative Rule.

DACA does not appear to have been a "legislative" rule that was subject to notice-and-comment rulemaking. The APA generally requires agencies to make "rules" through notice-and-comment procedures, but provides an exception for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553. The line between legislative rules (which are subject to notice and comment) and non-legislative rules (which are not) is not always clear. See Chrysler Corp. v. Brown, 441 U.S. 281, 301–03, 99 S.Ct. 1705, 60 L.Ed.2d 208 (1979); Noel v. Chapman, 508 F.2d 1023, 1029–30 (2d Cir. 1975) (characterizing this distinction as "enshrouded in considerable smog"). In general, however, "legislative rules are those that 'create new law, rights, or duties, in what amounts to a legislative act.' " Sweet v. Sheahan, 235 F.3d 80, 91 (2d Cir. 2000) (quoting White v. Shalala, 7 F.3d 296, 303 (2d Cir. 1993)). A rule is legislative if it creates a "binding norm." Bellarno Int'l Ltd. v. FDA, 678 F.Supp. 410, 412 (E.D.N.Y. 1988) (quoting Am. Bus Ass'n v. United States, 627 F.2d 525, 529 (D.C. Cir. 1980)). General statements of policy, on the other hand, do not "change 'existing rights and obligations' " of those regulated, but instead state the agency's "general policy" or "are rules directed primarily at the staff of an agency describing how it will conduct agency discretionary functions." Noel, 508 F.2d at 1030 (quoting Lewis–Mota v. Sec'y of Labor, 469 F.2d 478, 482 (2d Cir. 1972)) (internal quotation marks and additional citation omitted); see also Chrysler, 441 U.S. at 302 n.31, 99 S.Ct. 1705 ("General statements of policy are statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." (internal quotation marks and citation omitted)).

On its face, the 2012 DACA Memo is plainly a "general statement of policy," not a substantive rule. That memo described how, as a matter of agency policy, DHS would exercise its prosecutorial discretion with respect to a discrete class of individuals without lawful immigration status, and directed DHS staff to implement procedures to facilitate that exercise of discretion. Most importantly, the memo stated that it created no substantive right, that all DACA applications would be adjudicated on an individualized basis, and that the agency retained discretion to deny or revoke deferred action or work authorization. Based on the text of the 2012 DACA Memo, the court cannot say that the creation of the DACA program either "imposed any rights and obligations" on DHS or the public, or did not "genuinely [leave] the agency and its decisionmakers free to exercise discretion." Clarian Health W., LLC v. Hargan, 878 F.3d 346, 357 (D.C. Cir. 2017) (internal quotation marks and citation omitted).

To determine whether a rule is properly classed as "legislative" or as a "general statement of policy," some courts have also considered whether the agency has characterized or treated the rule as binding. Id. In determining that the DAPA program constituted a legislative rule, the Southern District of Texas focused on the purportedly ***425** binding effect that DAPA would have on the agency. Texas, 86 F.Supp.3d at 668–72. Judge Hanen reached that conclusion by determining that DACA had been implemented in such a way as to deprive agency employees of true discretion to evaluate DACA applications on a case-by-case basis, including that (1) the "operating procedures" for implementing DACA were quite long; (2) DACA applications were adjudicated by service-center staff, not field-office employees, using a check-the-box form; (3) certain DACA denials were subject to review by a supervisor; (4) "there is no option for granting DAPA to an individual who does not meet

each criterion"; and (5) nearly all DACA applications were granted, and those that were denied were uniformly denied for mechanical reasons or fraud. Id. at 669 & nn.98–101.

The court respectfully finds the Southern District of Texas's analysis unpersuasive. First, that court appears to have conflated the discretion of the agency with that of individual USCIS employees. (See Br. for the United States at 68–71, Texas v. United States, 136 S.Ct. 2271 (2016) (No. 15–674).) The 2012 DACA Memo indicated how DHS would exercise its discretion by treating certain individuals as lower priorities for removal. Because the 2012 DACA Memo created no substantive rights, it in no way constrained the agency's discretion in the enforcement of immigration laws, even if it might have affected how rank-and-file USCIS employees reviewed specific requests for deferred action. (See id.) Second, even accepting that the relevant focus of this inquiry is the discretion of rank-and-file employees, the court views the first four factors on which the Southern District of Texas relied as insufficient to support an inference that DHS did not exercise discretion in adjudicating DACA applications. As for the fifth factor—that DHS supposedly granted too many DACA applications—the court finds persuasive the observation by the dissenting judge in the Fifth Circuit that the district court appears to have erroneously conflated rejections of DACA applications, which were made on intake for mechanical reasons, and denials, which were made "when a USCIS adjudicator, on a case-by-case basis, determines that the requestor has not demonstrated that they satisfy the guidelines for DACA or when an adjudicator determines that deferred action should be denied even though the threshold guidelines are met." Texas, 809 F.3d at 210 (King, J., dissenting). To the contrary, as of December 2014, DHS had denied nearly 40,000 DACA applications out of the more than 700.0 applications accepted for processing at USCIS service centers, and rejected more than 40.0 applications for administrative reasons. Id. at 210 n.44. This rejection rate hardly "suggests an agency on autopilot" and is "unsurprising given the self-selecting nature of the program." Id. at 210 & n.44; see also Arpaio, 27 F.Supp.3d at 209 n.13 (noting that similar statistics "reflect that ... case-by-case review is in operation"). To the extent Defendants rely on Texas for the proposition that the DACA program (which was not challenged in that litigation) was illegal because it was not made through notice-and-comment rulemaking, such reliance is arbitrary and capricious.

(II) DACA Does Not Conflict with the INA

Nor may Defendants rely on Texas for the proposition that the DACA program conflicts with the INA. As noted above, the Fifth Circuit held that the DAPA program was not only procedurally invalid, but also substantively arbitrary and capricious because it conflicted with the INA. Texas, 809 F.3d at 178–86. That is because, in the view of the Fifth Circuit, the INA prescribes the exclusive means by which aliens may obtain "lawful immigration classification ***426** from their children's immigration status," and because Congress could not have intended to delegate to DHS the authority to designate approximately four million undocumented immigrants as lawfully present and able to work in this country. See id. To the extent Defendants relied, without additional explanation, on this decision as grounds for ending the DACA program, they acted arbitrarily and capriciously, for two reasons.

First, not all the grounds on which the Fifth Circuit decided that DAPA was substantively arbitrary and capricious apply to the DACA program. For example, the Fifth Circuit inferred that by creating procedures by which alien parents of U.S. citizens may obtain lawful status, Congress implicitly prohibited the Executive Branch from granting deferred action and work authorization to such individuals based on more permissive criteria. Even if the court were to accept that dubious logic, it would not apply to DACA, because there is no analogous procedure by which aliens brought to the United States as children may seek to obtain lawful status on that basis. (BV Pls. Mot. at 25; Br. of Amicus Curiae Legal Services Organizations (Dkt. 193) at 6.) The Fifth Circuit also relied extensively on the magnitude of the DAPA program, reasoning that Congress could not have intended the Executive Branch to decide whether more than four million undocumented immigrants could obtain deferred action and work authorization. Texas, 809 F.3d at 179, 181–82, 184 & n.197. Again, even accepting that proposition, it is not clear why it would apply to the DACA program, which is open to far fewer individuals than DAPA would have been, and which is roughly the same scale as the Family Fairness program enacted by the

Reagan and George H.W. Bush Administrations in the 1980s.

Second, to the extent that the Fifth Circuit's rationale applies to the DACA program, the court finds it unpersuasive. It does not follow that by prescribing procedures by which some aliens may obtain lawful status, Congress implicitly barred the Executive Branch from granting those or other aliens deferred action and work authorization, a relatively meager and unstable set of benefits (if, indeed, they can even be described as such). Nor is the court convinced that by expressly recognizing that certain discrete populations of aliens are eligible for deferred action, Congress implicitly precluded the Executive Branch from according deferred action to other aliens; to the contrary, the court views these enactments as ratifying the Executive Branch's longstanding historical practice, rooted in the INA, of forbearing from pursuing deportation proceedings against particular aliens and categories of alien. The court respectfully finds the Fifth Circuit's attempts to distinguish DAPA from prior discretionary-relief programs unpersuasive, as this court does not see what in the INA permits immigration officials to accord discretionary relief "on a country-specific basis," as a "bridge[ ] from one legal status to another," or as an adjunct to "a statutory legalization scheme," id. at 184, but not to generally law-abiding parents of U.S. citizens or lawful permanent residents—or, for that matter, individuals who were brought to the United States as children.

For these reasons, and for the reasons stated by the Office of Legal Counsel, the dissent in Texas, and by the Office of the Solicitor General in its brief to the U.S. Supreme Court in Texas, the court concludes that DACA is lawful and not arbitrary, capricious, or contrary to the INA. See Texas, 809 F.3d at 214–18 (King, J., dissenting); OLC Op.; ***427** Br. for the United States at 61–65, Texas v. United States, —— U.S. ——, 136 S.Ct. 2271, 195 L.Ed.2d 638 (2016) (No. 15–674). Defendants acted arbitrarily and capriciously by ending the DACA program based on the erroneous legal conclusion that DACA is either unconstitutional or "has the same legal and constitutional defects that the courts recognized as to DAPA."

b. The Decision Relies on a Factually Erroneous Premise that Courts Have Determined that DACA Is Unconstitutional

This conclusion was also arbitrary and capricious because it is based on an obvious factual mistake. In concluding that the Southern District of Texas and Fifth Circuit would enjoin the continued operation of the DACA program, Defendants appear to have relied on the premise that those courts have recognized "constitutional defects ... as to DAPA." (Sessions Ltr.; DACA Rescission Memo at 3.) This premise is flatly incorrect. The Southern District of Texas enjoined the implementation of DAPA, and the Fifth Circuit affirmed that injunction, on the grounds that DAPA violated the APA. 809 F.3d at 170–86; 86 F.Supp.3d at 665–72. Both courts expressly declined to reach the plaintiffs' constitutional claim that DAPA violated the Take Care Clause of the U.S. Constitution, see U.S. Const. art. II, § 3, or the separation of powers. 809 F.3d at 154; 86 F.Supp.3d at 677. Defendants do not attempt to defend this factual premise as correct. (Cf. Defs. Opp'n at 26–27.)

[18] This error alone is grounds for setting aside Defendants' decision. "[A]n agency decision is arbitrary and must be set aside when it rests on a crucial factual premise shown by the agency's records to be indisputably incorrect." Mizerak v. Adams, 682 F.2d 374, 376 (2d Cir. 1982); see also State Farm, 463 U.S. at 43, 103 S.Ct. 2856 (agency acts arbitrarily and capriciously by "offer[ing] an explanation for its decision that runs counter to the evidence before the agency"); City of Kansas City, Mo. v. Dep't of Hous. & Urban Dev., 923 F.2d 188, 194 (D.C. Cir. 1991) ("Agency action based on a factual premise that is flatly contradicted by the agency's own record does not constitute reasoned administrative decisionmaking, and cannot survive review under the arbitrary and capricious standard."). Because neither the Southern District of Texas nor the Fifth Circuit "recognized" any "constitutional defects" in the DAPA policy, Defendants' reliance on this erroneous factual premise was arbitrary and capricious.

[19] Nor was this error harmless. Although judicial review under the APA takes "due account ... of the rule of prejudicial error," 5 U.S.C. § 706, "the standard for demonstrating lack of prejudicial error is strict. 'Agency mistakes constitute harmless error [under APA § 706] only

where they clearly had no bearing on the procedure used or the substance of decision reached.' " N.Y. Pub. Interest Research Grp. v. Whitman, 321 F.3d 316, 334 n.13 (2d Cir. 2003) (alteration in original) (quoting Sierra Club v. U.S. Fish & Wildlife Serv., 245 F.3d 434, 444 (5th Cir. 2001)). That cannot be said here, as the Attorney General's opinion that DACA was unlawful appears to have been based in significant part on his judgment that the program was unconstitutional and on the Texas courts' decision to enjoin implementation of DAPA. The current record furnishes no basis for this court to conclude that the Attorney General would have reached the same conclusion had he correctly understood the holdings of the Texas courts.

c. The Decision's Rationale Is Internally Contradictory

[20] Finally, Defendants' decision to rescind the DACA program was arbitrary and capricious because it appears to be ***428** internally inconsistent. See, e.g., Nat'l Res. Def. Council v. U.S. Nuclear Regulatory Comm'n, 879 F.3d 1202, 1214 (D.C. Cir. 2018) ("Of course, it would be arbitrary and capricious for the agency's decision making to be 'internally inconsistent.' " (citation omitted)); Gen. Chem. Corp. v. United States, 817 F.2d 844, 846 (D.C. Cir. 1987) (per curiam) (vacating decision based on "internally inconsistent and inadequately explained" analysis). Defendants clearly ended the DACA program at least partly because the Attorney General viewed the program as unconstitutional.[10] (Sessions Ltr.; DACA Rescission Memo at 3.)[11] Rather than terminating the program forthwith, however, Acting Secretary Duke directed her subordinates to begin a phased "wind-down of the program," under which DHS would continue to renew DACA applications that were set to expire in the next six months and would honor existing DACA benefits until they expired. The means by which Defendants ended the DACA program thus appear to conflict with their stated rationale for doing so. If the DACA program was, in fact, unconstitutional, the court does not understand (nor have Defendants explained) why Defendants would have the authority to continue to violate the Constitution, albeit at a reduced scale and only for a limited time.

10 It is not clear that the Attorney General's views are those of the Administration he serves. On September 5, 2017, President Trump tweeted that "Congress now has 6 months to legalize DACA (something the Obama Administration was unable to do). If they can't, I will revisit this issue!" (Donald J. Trump, @realdonaldtrump, Twitter.com (Sept. 5, 2017, 7:38 PM), https://twitter.com/realdonaldtrump/status/905228667336499200.) It is not clear how the President would "revisit" the decision to rescind the DACA program if the DACA program were, as the Attorney General has stated, "an unconstitutional exercise of authority by the Executive Branch." (Sessions Ltr.) See Josh Blackman, Trump's DACA Decision Defies All Norms: The President's Incompetence Continues to Temper His Malevolence, Foreign Policy (Sept. 7, 2017, 1:26 PM), http://foreignpolicy.com/2017/09/07/trumpsdaca-decision-defies-all-norms/. Defendants' contention that the President simply "emphasized the need for legislative action and expressed [his] intention to revisit Administration policies on childhood arrivals—not the legality and defensibility of the DACA program—if Congress did not timely act" (Defs. Opp'n at 33) is unsupported by the text of the President's tweet.

11 Defendants' arguments that "Plaintiffs identify nothing contradictory about the Acting Secretary's stated justification for the [decision to rescind the DACA program]" (cf. Defs. Opp'n at 29–30) are thus once again belied by the record.

It is true but immaterial that the DACA Rescission memo provided that DHS would adjudicate all remaining DACA applications and renewal requests "on an individual, case-by-case basis." (DACA Rescission Memo at 4.) The 2012 DACA Memo also stated that all DACA applications and renewal requests would be considered on an individual, case-by-case basis (2012 DACA Memo at 1–3), but, in Defendants' view, that was insufficient to render the program lawful. More importantly, if DHS could render the DACA program constitutional by adjudicating the remaining DACA applications and renewal requests on an "individual, case-by-case" basis, then there was nothing inherently unconstitutional about the DACA program—only how rank-and-file USCIS employees were implementing that program—and a key reason for ending that program would disappear.

Defendants attempt to sidestep this problem by arguing that there was nothing inherently contradictory about Acting Secretary Duke's decision to allow the DACA program "to gradually sunset" despite having "concern[s] about [the program]'s legality." (Defs. Opp'n at 30.) The record ***429** makes clear, however, that

Defendants ended the program because they believed it to be unconstitutional and unlawful, not because they had "concern[s]" about its legality. (Sessions Ltr.; DACA Rescission Memo at 3–4.) Defendants' post hoc rationalization is thus unavailing. At the very least, Defendants' failure to acknowledge and explain the apparent conflict between their determination that the DACA program was unconstitutional and their plan to continue adjudicating a subset of DACA renewal requests renders their decision arbitrary and capricious.

2. Defendants' Alternative Grounds for Upholding the DACA Rescission Are Unpersuasive

Defendants offer two reasons why the court should uphold the decision to end the DACA program. First, they argue, that decision was reasonable in light of the risk that the plaintiffs in the Texas litigation would amend their complaint to challenge the DACA program and that the Southern District of Texas would strike down the DACA program. (E.g., Defs. Opp'n at 11.) Second, they argue that the court should construe the Attorney General's legal judgment that the DACA program was unlawful as an "independent policy judgment ... that immigration decisions of this magnitude should be left to Congress." (Defs. Opp'n at 25.) Neither argument is persuasive.

a. The DACA Rescission Cannot Be Sustained on the Basis of Defendants'"Litigation Risk" Argument

Defendants frame the decision to end the DACA program as motivated primarily by "litigation risk." (Id. at 1, 10–13, 15–24.) In their view, Acting Secretary Duke considered the Government's losses in the Texas v. United States litigation and the threat by some of the plaintiffs in that litigation to challenge the DACA program and ultimately "concluded that maintaining the DACA [program] would, in all likelihood, result in another nationwide injunction plunging the policy, and its nearly 800,000 recipients, into immediate uncertainty." (Id. at 11.) That decision, they argue, was reasonable, not arbitrary or capricious, "particularly in view of the near-certain litigation loss in the pending Texas lawsuit." (Id.)

The record does not support Defendants' contention that they based their decision on a reasonable assessment of litigation risk. As the court has previously noted, the record, fairly read, indicates that Defendants ended the DACA program because they believed it to be illegal. The only basis for Defendants' "litigation risk" argument is the Attorney General's statement that, because DACA shared the flaws of the DAPA program, "it is likely that potentially imminent litigation would yield similar results with respect to DACA." (Sessions Ltr.) This is too thin a reed to bear the weight of Defendants' "litigation risk" argument. While the court must uphold an agency decision "of less than ideal clarity ... if the agency's path may reasonably be discerned," Bowman Transp., Inc. v. Ark.–Best Freight Sys., Inc., 419 U.S. 281, 286, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974), the court cannot discern a reasoned assessment of "litigation risk" in this conclusory statement. See also Chenery II, 332 U.S. at 196–97, 67 S.Ct. 1760 (stating that the grounds on which an agency reaches its decision "must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive."). The Administrative Record does not indicate, for example, that the Attorney General made any reasoned assessment of the ***430** likelihood that DACA would be struck down in light of its similarities to, or differences from DAPA; that he considered any potential defenses to the "potentially imminent litigation"; that he acknowledged contrary rulings by other courts; or that he assessed whether Department of Justice resources would be better spent elsewhere. The court thus cannot conclude that the Attorney General actually considered "litigation risk" in any meaningful sense. Absent Defendants' post hoc explanations, the court would not have guessed that Defendants made their decision for this reason.

The court views this "litigation risk" rationale as a mere post hoc rationalization, which is insufficient to withstand arbitrary-and-capricious review. State Farm, 463 U.S. at 50, 103 S.Ct. 2856; Burlington Truck Lines, 371 U.S. at 168–69, 83 S.Ct. 239. Indeed, it is telling that, to substantiate their argument that the DACA rescission was motivated by concern for DACA recipients and a desire to avoid a disorderly shut-down of the program, Defendants resort to a press release, issued by Acting Secretary Duke, that fleshes out her reasons for ending the DACA program. (Defs. Opp'n at 12 (quoting Press Release, DHS, Statement from Acting Secretary Duke on the Rescission of DACA (Sept. 5,

2017), https://www.dhs.gov/news/2017/09/05/statement-acting-secretary-dukerescission-deferred-action-childhood-arrivals-daca).) That press release is not in the record, however, so the court may not consider it. See Overton Park, 401 U.S. at 419–20, 91 S.Ct. 814. While Defendants assert that this rationale is reasonably discernible because Plaintiffs addressed it in their briefs (Defs. Opp'n at 12), Plaintiffs cannot be faulted for responding to an argument that Defendants have made throughout this litigation. [12]

12 Judge Alsup found in Regents that "[n]owhere in the administrative record did the Attorney General or [DHS] consider whether defending the program in court would (or would not) be worth the litigation risk." Regents, 279 F.Supp.3d at 1043, 2018 WL 339144, at *23. As such, "[t]he new spin by government counsel is a classic post hoc rationalization," which "alone is dispositive of the new 'litigation risk' rationale." Id.

[21] Even if the record indicated that Defendants made their decision based on "litigation risk," they acted arbitrarily and capriciously in doing so. The Attorney General's conclusory statement that it was "likely that potentially imminent litigation would yield similar results with respect to DACA" falls well short of the APA's "requirement that an agency provide reasoned explanation for its action." Fox Television Stations, 556 U.S. at 516, 129 S.Ct. 1800. For example, the record before the court offers no indication that Defendants considered why the Southern District of Texas would strike down the DACA program (which was not initially challenged in Texas and which lacked certain attributes of the DAPA program that were critical to the Fifth Circuit's decision that that program was contrary to the INA). Nor does the record indicate that Defendants considered —independent of their opinion that DACA was illegal —why litigating the rescission of DACA was preferable to litigating the decision to maintain the program. See Organized Vill. of Kake v. U.S. Dep't of Agric., 795 F.3d 956, 970 (9th Cir. 2015) (en banc) (litigation-risk rationale was arbitrary and capricious where agency's decision "predictably led to ... lawsuit" and "[a]t most ... deliberately traded one lawsuit for another"). To the extent that Defendants now argue that their decision was based on a desire to avoid the harms that could result to DACA beneficiaries from a disorderly end to the program, the record offers absolutely no indication that Defendants considered ***431** these impacts. While Defendants ask the court to infer a persuasive rationale from their conclusory statements and from the Southern District of Texas's and Fifth Circuit's opinions in Texas, it is not the court's job to "supply a reasoned basis for the agency's action that the agency itself has not given." State Farm, 463 U.S. at 43, 103 S.Ct. 2856. Even accepting for the sake of argument that the record provides some support for Defendants' "litigation risk" rationale, that rationale is so inscrutable and unexplained that reliance upon it was arbitrary and capricious.

[22] Even accepting for the sake of argument that "litigation risk" furnished a discernible, reasoned basis for Defendants' decision to end the DACA program, Defendants nevertheless acted arbitrarily and capriciously by ending that program without taking any account of reliance interests that program has engendered. To withstand review under the APA's arbitrary-and-capricious standard, an agency that is changing its policy need not explain why the reasons for the new policy are better than the reasons for the old policy. Fox Television Stations, 556 U.S. at 514–15, 129 S.Ct. 1800. The agency must nevertheless engage in reasoned decisionmaking, which, among other things, means that the agency must consider "serious reliance interests" engendered by the previous policy. Id. at 515, 129 S.Ct. 1800; see also Encino Motorcars, LLC v. Navarro, —— U.S. ——, 136 S.Ct. 2117, 2125–27, 195 L.Ed.2d 382 (2016).

Plaintiffs identify a number of reliance interests engendered by the DACA program, including that, in reliance on the continued existence of the program, DACA recipients have "raised families, invested in their education, purchased homes and cars, and started careers" (BV Pls. Mot. at 16; State Pls. Mot. at 9–10); employers have hired, trained, and invested time in their DACA-recipient employees (BV Pls. Mot. at 17; State Pls. Mot. at 10); educational institutions have enrolled DACA recipients who, if they lose their DACA benefits, may be forced to leave the United States or may see little need to continue pursuing educational opportunities (BV Pls. Mot. at 17; State Pls. Mot. at 10); and states have expended resources modifying their motor-vehicle and occupational licensing regimes to accommodate DACA recipients (State Pls. Mot. at 10 & n.18). The record does not indicate that Defendants acknowledged, let alone considered, these or any other reliance interests engendered by the DACA program. That alone is

sufficient to render their supposedly discretionary decision to end the DACA program arbitrary and capricious.

Defendants' arguments to the contrary are unpersuasive. First, Defendants appear to argue that they did not need to discuss reliance interests because "controlling legal precedent" had changed. (Defs. Opp'n at 15.) That argument confuses the requirement that the agency show "that there are good reasons for the new policy" with the requirement that it not ignore "serious reliance interests that must be taken into account" when amending or rescinding an existing policy. Fox Television Stations, 556 U.S. at 515, 129 S.Ct. 1800. In any event, it is hard to reconcile this argument—in effect, that Defendants were compelled to terminate the DACA program—with their insistence elsewhere that the decision to end the DACA program was discretionary and the product of reasoned deliberation.

Next, Defendants appear to contend that they did not need to consider reliance interests engendered by the DACA policy because those interests were not "longstanding" or serious, to the extent they existed. (Defs. Opp'n at 16–17.) It is true that DACA recipients received deferred ***432** action and work authorization for only two years at a time, that DHS retained discretion to revoke those benefits at any time, and that the 2012 DACA Memo "confer[red] no substantive right." (2012 DACA Memo at 3; Defs. Opp'n at 17.) As a practical matter, however, it is obvious that hundreds of thousands of DACA recipients and those close to them planned their lives around the program. It is unrealistic to suggest that these reliance interests were not "serious" or "substantial" simply because DHS retained the ability to terminate DACA recipients' deferred action at its discretion.

Moreover, the court does not see why the contingent, discretionary nature of DACA benefits means that, as Defendants argue, DACA recipients had no "legally cognizable reliance interests—and certainly not beyond the stated duration" in the continued existence of the DACA program. (Defs. Opp'n at 17.) In so contending, Defendants cross-reference their argument, made in their October 27 Motion to Dismiss, that DACA beneficiaries had no " 'protected entitlement' for due process purposes" because " 'government officials may grant or deny [DACA benefits] in their discretion.' " (Defs. Oct. 27, 2017, Mot. to Dismiss (Dkt. 95) ("Defs. Oct. 27 MTD") at 35 (quoting Town of Castle Rock v. Gonzales, 545 U.S. 748, 756, 125 S.Ct. 2796, 162 L.Ed.2d 658 (2005)) (emphasis added).) Even accepting for the sake of argument that DACA recipients had no constitutionally protected liberty or property interests in the continued existence of the DACA program and the renewal of their particular DACA applications, it does not follow that they had no reliance interests therein, such that Defendants were free to end the DACA program without considering such interests. Encino Motorcars is instructive: A car dealer may have not have a Fifth Amendment entitlement to the Department of Labor's hewing to a particular interpretation of the Fair Labor Standards Act, but that does not mean that the Department is free to disregard reliance interests engendered by the longstanding interpretation of the Act when it alters its regulations. See 136 S.Ct. at 2124–26.

Finally, Defendants argue that Acting Secretary Duke effectively considered the relevant reliance interests by adopting a policy that resulted in an orderly wind-down, rather than an immediate shut-down of the DACA program. (Defs. Opp'n at 17–18.) This is sleight-of-hand and further post hoc rationalization. The record does not indicate that the Acting Secretary actually considered how the end of the DACA program would affect DACA recipients. That her chosen policy may, in practice, ameliorate the impact of the DACA rescission on DACA recipients, as compared to an immediate and disorderly shut-down of the program following a hypothetical injunction in the Texas litigation, does not mean that she actually considered this possibility. While the Acting Secretary stated that she "[r]ecogniz[ed] the complexities associated with winding down the program," the Sessions Letter makes clear that these complexities referred to the burdens on DHS of winding down the DACA program. (Compare DACA Rescission Memo at 4, with Sessions Ltr. ("In light of the costs and burdens that will be imposed on DHS associated with rescinding this policy, DHS should consider an orderly and efficient wind-down process." (emphasis added)).)

Accordingly, even if the record were to support Defendants' "litigation risk" rationale, that rationale would be arbitrary and capricious. Finally, even if this rationale were not arbitrary and capricious, the court would nevertheless likely vacate Defendants' decision because it is tainted by the errors discussed in Section III.A.1 ***433** above. "When an agency relies on multiple grounds for its decision, some of which are invalid, we

may nonetheless sustain the decision as long as one is valid and 'the agency would clearly have acted on that ground even if the other were unavailable.' " Mail Order Ass'n of Am. v. U.S. Postal Serv., 2 F.3d 408, 434 (D.C. Cir. 1993) (quoting Syracuse Peace Council v. FCC, 867 F.2d 654, 657 (D.C. Cir. 1989)). To the extent that Defendants' "litigation risk" rationale can be discerned from the Administrative Record and the parties' submissions in these cases, that rationale appears to be intertwined with Defendants' erroneous legal conclusion that the DACA program was unlawful. Because the court cannot say that Defendants clearly would have made the same decision even had they correctly understood the law and the holdings of the Texas courts, that decision is nevertheless likely arbitrary and capricious. See also N.Y. Pub. Interest Research Grp., 321 F.3d at 334 n.13.

b. The Court Cannot Construe This Decision as an "Independent Policy Judgment"

[23] Defendants also contend that, even if the court disagrees with the Attorney General's conclusion that DACA is unconstitutional, the court may nevertheless uphold the decision to end the DACA program because the same facts that led the Attorney General to conclude that the DACA program is unconstitutional "equally support a policy judgment by the Acting Secretary that deferred action should be applied only on an individualized case-by-case basis rather than used as a tool to confer certain benefits that Congress had not otherwise acted to provide by law." (Defs. Opp'n at 25 (internal quotation marks and citation omitted).) The record, however, offers no support for the notion that Defendants based their decision on any "policy judgment that immigration decisions of this magnitude should be left to Congress." (Id.) Defendants' argument therefore conflicts with fundamental principles of judicial review of agency action—namely that the court reviews the agency's stated reasons for its decision and "may not supply a reasoned basis for the agency's action that the agency itself has not given." State Farm, 463 U.S. at 43, 103 S.Ct. 2856: see also Chenery II, 332 U.S. at 196, 67 S.Ct. 1760; Chenery I, 318 U.S. at 87, 63 S.Ct. 454.

Defendants' only authority for this novel argument, Syracuse Peace Council, 867 F.2d at 654, is inapposite. In that case, the D.C. Circuit held that when an agency bases its decision on both a judgment about constitutionality and policy reasons, the reviewing court may uphold the decision if the agency clearly would have reached the same decision for policy reasons alone, even if the agency stated that its constitutional and policy rationales were "intertwined." Id. at 655–57. Syracuse Peace Council does not stand for the proposition that, when an agency bases its decision on constitutional grounds, a reviewing court may, in the first instance, construe that decision as having been based on a "policy judgment" found nowhere in the administrative record.

* * *

For the reasons stated above, the court concludes that Plaintiffs are substantially likely to prevail on the merits of their claim that the decision to rescind the DACA program was arbitrary, capricious, and an abuse of discretion.

B. Irreparable Harm

[24] Plaintiffs have also demonstrated that they are likely to suffer irreparable harm if the court does not enjoin Defendants from fully implementing the DACA rescission.

***434** **[25]** **[26]** "To satisfy the irreparable harm requirement, Plaintiffs must demonstrate that absent a preliminary injunction they will suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm." Grand River Enter. Six Nations, Ltd. v. Pryor, 481 F.3d 60, 66 (2d Cir. 2007) (quoting Freedom Holdings, Inc. v. Spitzer, 408 F.3d 112, 114 (2d Cir. 2005)). Irreparable harm "cannot be remedied by an award of monetary damages." State of New York ex rel. Schneiderman, 787 F.3d at 660.

Plaintiffs have extensively documented the irreparable harms they will suffer if the DACA program ends. Each day, approximately 122 DACA recipients who failed (or were unable) to renew their DACA status before October 5, 2017, lose their deferred action and work authorization. (BV Pls. Mot at 1–2, 35; State Pls. Mot. at 28.) If the implementation of the DACA Rescission Memo is not enjoined, approximately 1,400 DACA recipients will lose deferred action each work day, beginning on March 5, 2018. (State Pls. Mot. at 28.) As a result, these individuals will face the possibility of deportation from the country.

While this possibility of deportation is clearly extremely worrisome to DACA recipients, the court declines to grant a preliminary injunction on this basis. See Winter, 555 U.S. at 21–22, 129 S.Ct. 365; see also Carlsson v. U.S. Citizenship & Immigration Servs., No. 12-CV-7893 (CAS), 2012 WL 4758118, at *9 (C.D. Cal. Oct. 3, 2012) (risk of deportation speculative, not imminent, when there were no pending removal proceedings against the plaintiffs).[13] Nor may the court grant a preliminary injunction on the grounds that DACA recipients may, for fear of deportation, suffer from anxiety or depression, lose the "abilit[y] to plan for the future and make commitments, whether familial, career-based, academic, or otherwise" (BV Pls. Mot. at 37–38), or be required to turn their U.S. citizen children over to the care of the State Plaintiffs' child welfare systems, or that public safety will be harmed because former DACA recipients will be less likely to report crimes and other harms to the community (State Pls. Mot. at 28). Because deportation is, at this point, not sufficiently "likely" for purposes of establishing irreparable harm, harms accruing from the fear of deportation are also too speculative to support the grant of a preliminary injunction.

13 The court notes that Secretary Nielsen recently stated that, even if the DACA program ended, DHS would not prioritize the removal of DACA recipients who had not committed crimes. See Louis Nelson, DHS Chief: Deporting Dreamers Won't Be a Priority for ICE If Talks Fail, Politico (Jan. 16, 2018, 8:30 AM), https://www.politico.com/story/2018/01/16/dhs-dreamers-deportation-not-priority-340681.

Concomitant with the loss of deferred action, however, DACA recipients will also lose their work authorization. As a result, they will be legally unemployable in this country. Some DACA recipients will lose their employer-sponsored healthcare coverage, which will endanger DACA recipients and their families (BV Pls. Mot. at 36–37) and impose tremendous burdens on the State Plaintiffs' public health systems (State Pls. Mot. at 31–32). Other DACA recipients, due to the imminent loss of their employment, may lose their homes or need to drop out of school. (BV Pls. Mot. at 37.) Employers will suffer due to the inability to hire or retain erstwhile DACA recipients, affecting their operations on an ongoing basis and causing them to incur unrecoverable economic losses. (Id. at 38; State Pls. Mot. at 29–30.) Finally, the DACA rescission will result in "staggering" adverse economic impacts, including, ***435** by the State Plaintiffs' best lights, $215 billion in lost GDP over the next decade, and $797 million in lost state and local tax revenue. (State Pls. Mot. at 33 & nn.77–78.) Thus, while it may be true that "[l]oss of employment does not in and of itself constitute irreparable injury," Savage v. Gorski, 850 F.2d 64, 67 (2d Cir. 1988), these cases present a "genuinely extraordinary situation" warranting injunctive relief, Sampson v. Murray, 415 U.S. 61, 92 n.68, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974).

While the above is sufficient to demonstrate irreparable harm, the court also notes the obvious fact that the decision to rescind DACA, if carried into effect, will have profound and irreversible economic and social implications. That decision "will profoundly disrupt the lives of hundreds of thousands of people." In re United States, 875 F.3d 1200, 1210 (9th Cir. 2017) (Watford, J., dissenting). It may force one out of every four hundred U.S. workers out of the lawful workforce. See Jie Zong et al., "A Profile of Current DACA Recipients by Education, Industry, and Occupation," Migration Policy Institute (Nov. 2017), https://www.migrationpolicy.org/research/profile-current-daca-recipients-education-industry-and-occupation. Former DACA recipients will be separated from their families and communities. It is impossible to understand the full consequences of a decision of this magnitude. If the decision is allowed to go into effect prior to a full adjudication on the merits, there is no way the court can "unscramble the egg" and undo the damage caused by what, on the record before it, appears to have been a patently arbitrary and capricious decision.

Moreover, it is also impossible for the court to adjudicate this dispute on the merits before March 5, 2018, when these harms will begin to materialize in earnest. Defendants set an aggressive timetable for ending the DACA program and have pursued various dilatory tactics throughout this litigation. Notably, they have yet to produce a plausible administrative record in these cases, without which the court cannot render a merits decision. Overton Park, 401 U.S. at 420, 91 S.Ct. 814. For these reasons, it is clear that Plaintiffs will suffer substantial and imminent irreparable harm if the court does not preliminarily enjoin the DACA rescission.

Defendants argue that Plaintiffs have not shown that irreparable harm is "imminent, or even likely, given the preliminary injunction recently issued" in Regents. (Defs. Opp'n at 48.) Defendants are, however, vigorously

contesting that injunction before both the U.S. Court of Appeals for the Ninth Circuit and the U.S. Supreme Court. If Judge Alsup or the Ninth Circuit were to lift the injunction in Regents, then Plaintiffs would no doubt suffer irreparable harm. Defendants cite no authority for the proposition that Plaintiffs cannot establish irreparable harm simply because another court has already enjoined the same challenged action.

C. Balancing the Equities and the Public Interest

[27] **[28]** Finally, the court must consider whether "the balance of equities tips in [Plaintiffs'] favor" and if "an injunction is in the public interest." Winter, 555 U.S. at 20, 129 S.Ct. 365. To make this decision, the court "balance[s] the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief," as well as "the public consequences of employing the extraordinary remedy of injunction." Id. at 24, 129 S.Ct. 365 (internal quotation marks and citation omitted). "These factors merge when the Government is the opposing party." Nken, 556 U.S. at 435, 129 S.Ct. 1749. The court concludes that these factors weigh firmly in Plaintiffs' favor.

***436** **[29]** The court need not restate at length the consequences of the DACA rescission for Plaintiffs, other DACA recipients, those close to them, and the public at large. Allowing the DACA rescission to take immediate effect would quickly cost many DACA recipients the opportunity to work legally in this country, and hence to support themselves and their families. Enjoining the implementation of the DACA Rescission Memo would also preserve the status quo, enabling a full resolution of this matter on the merits, rather than allowing severe social dislocations to unfold based on an agency decision that, as noted above, strongly appears to have been arbitrary and capricious. The public interest is not served by allowing Defendants to proceed with arbitrary and capricious action.

Against these considerations, the court weighs the effect on Defendants of initiating a wind-down of the DACA program on their predetermined timetable. The court does not step in this area lightly. Defendants have broad discretion to set immigration-enforcement priorities. Arizona, 567 U.S. at 394, 132 S.Ct. 2492. Moreover, the DACA program was originally created by the Executive Branch, and the Trump Administration should be able to alter the policies and priorities set by its predecessor. There are, however, several factors that lead the court to conclude that the balance of the equities favors granting an injunction. Defendants do not appear to have rescinded the DACA program as an exercise of their discretion, or because of a reasoned policy judgment, but instead, at least in significant part, because they erroneously concluded that the program was unconstitutional and unlawful. Enjoining Defendants from rescinding the DACA program on erroneous legal grounds therefore does not intrude on their discretion or well-established authority to set immigration-enforcement policies. Moreover, although the Government generally has a substantial interest in the speedy deportation of removable aliens because their presence here "permit[s] and prolong[s] a continuing violation of United States law," Nken, 556 U.S. at 436, 129 S.Ct. 1749 (quoting AAADC, 525 U.S. at 490, 119 S.Ct. 936), the court finds that the Government's interest in ending the DACA program is not so compelling. For one thing, the President has stated his support for keeping DACA recipients in the country (albeit preferably pursuant to legislation rather than executive action). Donald J. Trump, @realdonaldtrump, Twitter.com (Sept. 14, 2017 3:28 AM), https://twitter.com/realdonaldtrump/status/908276308265795585 ("Does anybody really want to throw out good, educated and accomplished young people who have jobs, some serving in the military? Really!....."). The current DHS Secretary has also stated that the erstwhile DACA recipients would not be a priority for immigration enforcement. Louis Nelson, DHS Chief: Deporting Dreamers Won't Be a Priority for ICE If Talks Fail, Politico (Jan. 16, 2018), https://www.politico.com/story/2018/01/16/dhs-dreamers-deportation-not-priority-340681. Even if deporting DACA recipients were a priority of the Administration, an injunction against the end of the DACA program would not impede this policy, as, under the 2012 DACA Memo, DHS retains discretion to revoke specific DACA recipients' deferred action and work authorization. [14]

14 The court expresses no view as to whether the revocation of existing DACA benefits would be consistent with the Due Process Clause or other potentially applicable protections.

Accordingly, the court finds that the balance of the equities tip decidedly in Plaintiffs' ***437** favor, and that the public interest would be well-served by an injunction.

D. Scope of Relief

[30] For the foregoing reasons, the court finds that Plaintiffs have demonstrated that they are entitled to a preliminary injunction. Defendants are therefore ORDERED to maintain the DACA program on the same terms and conditions that existed prior to the promulgation of the DACA Rescission Memo, subject to the following limitations. Defendants need not consider new applications by individuals who have never before obtained DACA benefits; need not continue granting "advanced parole" to DACA beneficiaries; and, of course, may adjudicate DACA renewal requests on a case-by-case, individualized basis. See Regents, 279 F.Supp.3d at 1048–49, 2018 WL 339144, at *28.

Plaintiffs contend that the court should require Defendants to restore the DACA program as it existed on September 4, 2017, in particular by requiring Defendants to adjudicate initial DACA applications submitted by individuals who only became eligible for DACA after that date. (Jan. 30, 2018, Hr'g Tr. (Dkt. Number Pending) 8:24–25.) As in Regents, however, the court finds that the irreparable harms identified by Plaintiffs largely result from Defendants' expected failure to renew existing grants of deferred action and especially work authorization, not from Defendants' refusal to adjudicate new initial DACA applications. While the court is sympathetic to the plight of individuals who were unable to apply for DACA before September 5, 2017, it cannot say that Plaintiffs have demonstrated either that these individuals would be irreparably harmed without injunctive relief or that the balance of equities favors these individuals to the same extent it favors existing DACA beneficiaries.

[31] The court enjoins rescission of the DACA program on a universal or "nationwide" basis. Again, it does not do so lightly. As Defendants correctly note, equitable principles provide that the court should not enter an injunction that is broader than "necessary to provide complete relief to the plaintiffs." (Defs. Opp'n at 50 (quoting Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994)).) See also Church & Dwight Co. v. SPD Swiss Precision Diagnostics, GmBH, 843 F.3d 48, 72 (2d Cir. 2016) ("[I]njunctive relief should be no broader than necessary to cure the effects of the harm caused by the violation...." (internal quotation marks and citations omitted)). Moreover, several academic commentators have insightfully observed various problems with the practice of granting nationwide injunctions against the Government, including that such injunctions thwart the development of law in different courts, encourage forum-shopping, and create the possibility that different courts will issue conflicting nationwide injunctions. See Samuel L. Bray, Multiple Chancellors: Reforming the National Injunction, 131 Harv. L. Rev. 417 (2017); Michael T. Morley, Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts, 97 B.U. L. Rev. 611 (2017); Zayn Siddique, Nationwide Injunctions, 117 Colum. L. Rev. 2095 (2017); Getzel Berger, Note, Nationwide Injunctions Against the Federal Government: A Structural Approach, 92 N.Y.U. L. Rev. 1068 (2017).

Nevertheless, the court finds that a nationwide injunction is warranted in these cases. First, it is hard to conceive of how the court would craft a narrower injunction that would adequately protect Plaintiffs' interests. Plaintiffs include not only several individuals and a nonprofit organization, but also sixteen states and the District ***438** of Columbia. To protect the State Plaintiffs' interests, the court would presumably need to enjoin Defendants from rescinding the DACA program with respect to the State Plaintiffs' residents and employees, including the employees of any instrumentalities of the state, such as public hospitals, schools, and universities. Such an injunction would be unworkable, partly in light of the simple fact that people move from state to state and job to job, and would likely create administrative problems for Defendants. Furthermore, there is a strong federal interest in the uniformity of federal immigration law. See U.S. Const. art. I, § 8, cl. 4 (empowering Congress to "establish a uniform Rule of Naturalization"); Texas, 809 F.3d at 187–88. Because the decision to rescind the DACA program had a "systemwide impact," the court will preliminarily impose a "systemwide remedy." Lewis v. Casey, 518 U.S. 343, 359, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996) (quoting Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 420, 97 S.Ct. 2766, 53 L.Ed.2d 851 (1977)).

IV. CONCLUSION

Plaintiffs' motions for a preliminary injunction (Dkt. 123 in No. 16–CV–4756; Dkt. 96 in No. 17–CV–5228) are GRANTED. The Batalla Vidal Plaintiffs' motion for class certification (Dkt. 124) is DENIED as moot.

SO ORDERED.

All Citations

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