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Technology Companies and Other Businesses

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

STATE OF HAWAI'I, *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, President of the United States, *et al.*,

Defendants.

Case No. 1:17-cv-00050-DKW-KSC

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* TECHNOLOGY COMPANIES AND OTHER BUSINESSES IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER [DKT. NO. 65]; EXHIBIT "1"; CERTIFICATE OF SERVICE

Hearing
Date: March 15, 2017
Time: 9:30 a.m.
Judge: Hon. Derrick K. Watson

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* TECHNOLOGY COMPANIES AND OTHER BUSINESSES IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER

This motion is brought pursuant to Federal Rule of Civil Procedure 7, Local Rules of Practice for the United States District Court for the District of Hawaii 7.1 and 7.2, and the *Brief of Amici Curiae Technology Companies and Other Businesses in Support of Plaintiffs' Motion for a Temporary Restraining Order*, attached as Exhibit "1," together with the papers and pleadings on file herein.

The undersigned represents that counsel for the *Amici* have received the consent of the Plaintiffs to file brief of *Amici Curiae*. Further, Defendants' counsel has represented that Defendants take no position on the *Amici's* motion for leave to file brief of *Amici Curiae*.

INTEREST OF *AMICI CURIAE*

Amici curiae are 58 leading businesses from the technology sector and other parts of the U.S. economy. A list of the *Amici* is set forth in Appendix A. These companies operate throughout the United States, including in Hawai'i, and collectively employ millions of Americans as well as hundreds of thousands of individuals from around the globe.

ARGUMENT IN SUPPORT OF LEAVE TO FILE

The role of *amici curiae* is to assist in a case of general public interest, to supplement the efforts of counsel, and to draw the court's attention to law that escaped consideration. *Miller-Wohl Co. v. Comm'r of Labor & Indus. State of Mont.*, 694 F.2d 203, 204 (9th Cir. 1982); citing *Alexander v. Hall,* 64 F.R.D. 152, 155 (D.S.C.1974); 3A C.J.S. *Amicus Curiae* § 6, at 427 (1973).

In this matter, *Amici* provide an important perspective because a ruling denying Plaintiffs' motion for a temporary restraining order would result in constitutional injuries to employees and customers of *Amici*. These injuries would inflict significant and irreparable harm on U.S. businesses and their employees, stifling the growth of the United States' most prominent industries.

As a result, *Amici* are uniquely suited to inform the Court of the consequences to the United States' burgeoning industries should the temporary restraining order be denied.

CONCLUSION

Amici respectfully request that this Court grant leave for the *Amici* to file their *Brief of Amici Curiae Technology Companies and*

Other Businesses in Support of Plaintiffs' Motion for a Temporary Restraining Order, attached as Exhibit "1".

DATED: Honolulu, Hawai'i, March 14, 2017.

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BRIEF OF *AMICI CURIAE* TECHNOLOGY COMPANIES AND OTHER BUSINESSES IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER; APPENDIX "A"; CERTIFICATE OF SERVICE

Exhibit "1"

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INTEREST OF *AMICI CURIAE*

Amici curiae are 58 leading businesses from the technology sector and other parts of the U.S. economy. A list of *amici* is set forth in Appendix A. These companies operate or have users throughout the U.S., including in Hawaii, and collectively employ millions of Americans as well as hundreds of thousands of individuals from around the globe.

Amici have a strong interest in this case because a ruling denying Plaintiffs' motion for a temporary restraining order would cause constitutional injuries to occur and would inflict significant and irreparable harm on U.S. businesses and their employees.

BACKGROUND

Since the dawn of the digital age and the proliferation of the Internet, the *amici* technology companies and thousands of other businesses throughout the American economy have prospered and grown through the hard work, innovation and genius of immigrants and refugees. The technological and scientific breakthroughs that fuel the economic engine of the country—search, cloud computing, social media, artificial intelligence, faster and faster microprocessors, the Internet of Everything, reusable spacecraft—were all made possible by the ingenuity, imagination and invention of newcomers to America, including Muslims from across the world. Never in modern American history has that infusion of

talent and passion and creativity been stanched, as it is vital to the lifeblood of our economy. Never, until now.

On January 27, 2017, one week after being sworn into office, President Donald Trump signed Executive Order No. 13,769, entitled "Protecting the Nation from Foreign Terrorist Entry into the United States." 82 Fed. Reg. 8977 (Feb. 1, 2017). The Order limited the ability of certain non-citizens to enter America, and suspended entry to the U.S. of all citizens of seven Muslim-majority countries for 90 days. *Id.* § 3. The Order also banned Syrian refugees outright, decreased the nationwide annual cap on refugee admissions by more than fifty percent, and created a review system that favored Christian refugees living in Muslim-majority countries. *Id.* § 5. In all, this travel ban was a fulfillment of a campaign promise Donald Trump had made throughout the fall—to institute a "Muslim ban."[1]

Plaintiffs across the nation quickly filed litigation to challenge the legality of the travel ban, seeking injunctions based on the ongoing and irreparable harm it caused. The judiciary responded. Among other federal district courts, the U.S. District Court for the Western District of Washington issued a nationwide

[1] *See* Donald J. Trump Statement on Preventing Muslim Immigration (Dec. 7, 2015), https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration; *Meet the Press* (NBC television broadcast July 24, 2016) (in response to being asked if a plan similar to the travel ban was a "rollback" from "[t]he Muslim Ban," then-candidate Trump stated: "I actually don't think it's a rollback. In fact, you could say it's an expansion. . . . I'm looking now at territory. People were so upset when I used the word Muslim. Oh, you can't use the word Muslim. Remember this. And I'm OK with that, because I'm talking territory instead of Muslim.").

injunction barring enforcement of the travel ban, holding it to be an improper exercise of executive power that caused substantial harm to individuals in the U.S. and abroad. *Washington* v. *Trump*, No. C17-0141-JLR, 2017 WL 462040, at *3 (W.D. Wash. Feb. 3, 2017). On appeal, a group of U.S. businesses, including many members of *amici* here, filed an *amici curiae* brief before the Ninth Circuit Court of Appeals to explain that President Trump's first travel ban was inflicting substantial harm on U.S. companies and their employees. *See* Brief of Technology Companies and Other Businesses as *Amicus Curiae* in Support of Appellees, *Washington* v. *Trump*, 847 F.3d 1151 (9th Cir. 2017) (No. 17-35105). On February 9, 2017, the Ninth Circuit Court of Appeals declined to stay the district court's nationwide injunction. *Washington*, 847 F.3d at 1151. The Ninth Circuit held that the travel ban caused substantial harm in part by preventing nationals of seven Muslim-majority countries from entering the U.S. for the purpose of accepting employment with U.S. entities. *See id.* at 1168–69.

In response to the Ninth Circuit's decision, President Trump issued a new "Muslim ban" on March 9, 2017 through Executive Order No. 13,780. 82 Fed. Reg. 13,209 (Mar. 9, 2017). This new version of the travel ban still bars entry to the U.S. by citizens of six Muslim-majority countries who are not current visa holders, and it suspends all decisions on applications for refugees for 120 days. *Id.* §§ 2(c), 6. Absent judicial intervention, this new travel ban will go into effect on March 16, 2017. *Id.* § 14.

ARGUMENT

Consider five scenarios:

- *A U.S. resident employed at a cutting-edge software company fears that he cannot leave the U.S. because he is a national of a Muslim-majority country targeted by President Trump's travel ban. If he attempts to travel outside the country, he could be detained and refused re-entry. After the travel ban went into effect, he canceled plans to bring his mother to the U.S. to visit him, out of concern that she might be detained or turned away. He has not been home for five years. The U.S. company he works for, which employs over 100 people and has raised hundreds of millions of dollars in capital, was founded by an immigrant.*

- *A high-tech, U.S.-based software company devoted significant resources to an event it scheduled in February 2017 where it planned to host owners of small businesses and tech start-ups based overseas. Before these entrepreneurs became business and start-up owners, they were Syrian refugees. After President Trump's travel ban went into effect on January 27, 2017, the event was abruptly postponed, because the guests were unable to travel to the U.S. on account of their status as Syrian refugees. The U.S.-based software company plans to reschedule the event at a location outside the U.S., so the Syrian refugees and entrepreneurs can safely attend.*

- *A U.S.-based mobile app and website development company with millions of users worldwide employs U.S. residents who are nationals of the Muslim-majority countries targeted by President Trump's travel ban. In late January and February 2017, some of these employees had planned to fly outside the U.S. for business or personal reasons. Since the travel ban was announced, these employees canceled their flights for fear they would be detained or not permitted to re-enter the U.S.*

- *A U.S.-based technology company courted promising job candidates overseas and was prepared to offer them employment when the prospects suddenly withdrew from consideration because*

they were worried about immigration issues in light of President Trump's travel ban.

- *After the implementation of President Trump's travel ban, foreign-born founders of a U.S.-based technology company began exploring the possibility of moving their company outside of the U.S.—and taking the company's jobs with them.*

These are not hypotheticals. They are just a handful of the myriad real-world examples of injury President Trump's first travel ban inflicted on *amici* and their business partners in the U.S. Each instance illustrates what federal courts across the country have recognized: the U.S. government's restrictions on travel through nationality- and religion-based discrimination causes substantial harm, including to U.S. businesses and their employees. *See Washington*, 2017 WL 462040, at *2; *Darweesh* v. *Trump*, No. 17 Civ. 480, 2017 WL 388504, at *1 (E.D.N.Y. Jan. 28, 2017); *Aziz* v. *Trump*, No. 1:17-cv-116 (LMB/TCB), 2017 WL 580855, at *10 (E.D. Va. Feb. 13, 2017).

A travel ban based on national origin or religion runs directly contrary to the principle of inclusion that is the bedrock of our country. "From its inception, the United States has always been a nation of immigrants; it is one of our greatest strengths." *In re Jean*, 23 I & N Dec 373, 383–84 (2002) (quoted in *Singh* v. *Riding*, No. CV-F-07-1198 OWW/SMS, 2008 WL 162603, at *2 (E.D. Cal. Jan. 17, 2008)). Our country's economy and businesses also have benefited from diversity, inclusiveness, and competition fueled by immigration—"America is a

nation of immigrants, and the American economy is an economy of immigrants."[2] U.S. companies thrive on the creativity, entrepreneurship, and determination that immigrants bring with them to this country. For these very reasons, our country has for decades maintained a system of openness to immigrants and refugees, balanced by well-calibrated controls such as background checks and border security measures designed to protect the nation from legitimate threats.

President Trump's first unconstitutional "Muslim ban" sent this system into upheaval. The travel ban closed our nation's borders to immigrants and refugees based solely on their national origin or religion. It inflicted arbitrary and irreparable harm on U.S. businesses and their employees. In the brief time the first travel ban was fully operational, scores of employees of U.S. businesses were detained at airports and separated from their families; numerous business events, conferences, and meetings in the U.S. and abroad were canceled; and countless business trips into or out of the U.S. were delayed or disrupted. On top of the injuries suffered by employees of U.S. companies and their families, one study estimated that the first travel ban cost U.S. businesses $185 million *in business travel bookings alone*.[3] *Amici*, such as ride-share and travel businesses, are among

[2] P'ship for a New Am. Econ., *The "New American" Fortune 500*, at 5 (2011), http://goo.gl/yc0h7u.

[3] *See The Ruling on the Travel Ban: A Lose-Lose Scenario for Business Travel and the Economy*, Bus. Travel (Feb. 9, 2017), http://blog.gbta.org/2017/02/09/the-ruling-on-the-travel-ban-a-lose-lose-scenario-for-business-travel-and-the-economy/.

those damaged; several *amici* already lost bookings from the first travel ban due to travel from the banned countries being enjoined, and they are certain to lose more if the proposed new ban takes effect.

And that is apart from the unquantifiable losses the U.S. economy suffered because the travel ban blocked entry to the next groundbreaking entrepreneur, innovator, inventor, founder, or artist—and solely on account of her national origin and religion. Those incalculable losses are all the more acute for *amici*, technology companies who depend significantly on immigrant talent. If this Court permits President Trump's new travel ban to be implemented, the losses will not abate any time soon. By some reports, U.S. businesses are expected to lose $66 billion annually as a result of the travel ban, along with as many as 132,000 jobs.[4]

President Trump's first travel ban was challenged in court as a deprivation of individuals' constitutional rights and as impermissible discrimination on the basis of religion or nationality. Federal courts enjoined enforcement of the travel ban in light of the substantial and irreparable harm it was likely to cause, including to U.S. businesses and their employees. *See Washington*, 2017 WL 462040, at *2; *Darweesh*, 2017 WL 388504, at *1; *Aziz*, 2017 WL 580855, at *10.

President Trump's new travel ban is no different. It will inflict the same substantial and irreparable harm upon U.S. companies and their employees. And

[4] *See* Robert Kahn, Opinion, *The Muslim Travel Ban Could Cost America $66 Billion a Year*, Newsweek (Feb. 2, 2017, 7:10 AM), http://www.newsweek.com/muslim-ban-could-cost-america-66-billion-year-551264.

in implementing the promise of a "Muslim ban," the new travel ban suffers from many of the same defects as the first travel ban. It violates the prohibition against nationality-based discrimination that Congress established through the Immigration and Nationality Act. It exceeds the authority granted to the Executive. It is arbitrary and overbroad in scope. And it impermissibly discriminates on the basis of religion and deprives individuals of Due Process rights, thus violating the U.S. Constitution. In sum, President Trump's new travel ban has not overcome the constitutional and legal deficiencies that led courts to enjoin his first travel ban. Accordingly, the new travel ban should meet the same fate as the first travel ban—it should be enjoined nationwide.

I. LIKE THE FIRST TRAVEL BAN, THE NEW TRAVEL BAN WILL CAUSE IRREPARABLE HARM TO U.S. BUSINESSES AND THEIR EMPLOYEES.

Cutting off *amici* and other U.S. companies from broad swaths of foreign-born talent will have profound and irreparable consequences.

Many of America's leading entrepreneurs, including at *amici*, are immigrants. "The American economy stands apart because, more than any other place on earth, talented people from around the globe want to come here to start their businesses."[5] Indeed, forty percent of Fortune 500 companies were founded

[5] Partnership for a New American Economy, *The "New American" Fortune 500*, at 5 (2011), http://goo.gl/yc0h7u.

by immigrants or by their children.[6] These companies together account for over $4.25 trillion in annual revenues and collectively employ more than 10 million people.[7] This trend shows no sign of slowing.

Critically for these *amici*, who require a workforce skilled in technology, a recent report from the National Foundation for American Policy found that 83% of the top performing students in the renowned Intel science competition for U.S. high schools were the children of immigrants.[8] Immigrants also play an outsize role in starting new businesses in the U.S. economy: "While accounting for 16 percent of the labor force nationally and 18 percent of business owners, immigrants make up 28 percent of Main Street business owners."[9]

The potential injury that *amici* face from the implementation of the new travel ban is far from speculative or theoretical. *Amici* and their employees already suffered irreparable harm as a result of the first travel ban's suspension of refugee applications and restriction on travel to the U.S. by nationals of certain Muslim-majority countries, as discussed *supra* p. 4. These are elements of the program that

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[6] *Id.* at 2, 6.

[7] *Id.* at 2, 6, 22, 27.

[8] Stuart Anderson, Nat'l Found. for Am. Policy, *The Contributions of the Children of Immigrants to Science in America* at 1–3, 5, 12 (2017), http://nfap.com/wp-content/uploads/2017/03/Children-of-Immigrants-in-Science.NFAP-Policy-Brief.March-2017.pdf.

[9] Americas Soc'y & Council of The Americas, *Bringing Vitality To Main Street* at 2 (2015), https://goo.gl/i9NWc9; *see also* Partnership for a New American Economy, *Open For Business: How Immigrants Are Driving Small Business Creation in the United States* 3, Aug. 2012, https://goo.gl/zqwpVQ.

the Trump administration has retained in its new travel ban, and they are certain to cause the same harm if they go into effect.

Beginning March 16, 2017, absent injunctive relief from the Court, *amici* and the rest of the U.S. business community will see potential interviewees, new employees, and employees stationed outside the U.S. cancel flights into the U.S. for fear of being detained or otherwise not permitted to enter the U.S.; employees who are current U.S. residents and intend to travel outside the country for work or personal reasons cancel trips for fear they will be detained or not permitted to return to the U.S.; and family members of current U.S. residents cancel visits to the country for fear they will be detained or otherwise not permitted to enter the U.S. Under these conditions, many of the most talented employees from around the world would be unwilling or unable to come to the U.S. to accept employment by U.S. companies. Workers come to the U.S., often on H1-B visas, which are non-immigrant visas, with the hopes of obtaining legal permanent resident status. The weakening of interest on the part of workers abroad to come to the U.S. is a significant, unquantifiable and irreparable harm to *amici* and other U.S. companies.

This puts U.S. companies at a distinct disadvantage relative to their global competitors. *Amici* and other U.S. companies must be able to successfully recruit top talent from around the world in order to compete in the global marketplace. And *amici* and other U.S. companies require the ability to retain immigrant employees who are U.S. residents and need to travel outside the U.S. for business

or personal reasons. The new travel ban thus presents a direct threat to *amici* and other U.S. companies.

U.S. companies in related industries face similar harms in light of the impending travel ban. Chief executives from more than 160 biotech companies signed an open letter stating that the travel ban puts America "at risk of losing its leadership position in one of its most important sectors, one that will shape the world in the twenty-first century."[10] The biotech companies' letter also noted that more than half of the 69,000 biomedical researchers working in the U.S. were born outside the country.[11] And U.S. companies as disparate as Ford, Bank of America, Coca-Cola, and the *New York Times* have all spoken out against the travel ban as an impediment to their business and a violation of their core principles.[12]

The new travel ban would place U.S. companies, including *amici*, at a severe disadvantage compared to companies outside the U.S. that are free to hire

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[10] *US immigration order strikes against biotech*, Trade Secrets: a blog from Nature Biotechnology (Feb. 7, 2017), http://blogs.nature.com/tradesecrets/2017/02/07/us-immigration-order-strikes-against-biotech.

[11] *Id.*

[12] *See* Samantha Masunaga, *CEOs speak out about Trump's travel ban*, Los Angeles Times (Jan. 31, 2017), http://www.latimes.com/business/la-fi-ceo-tweets-trump-20170130-story.html; Jackie Wattles, Aaron Smith and Shannon Gupta, *Trump's travel ban: Companies and executives speak out*, CNN Money (January 31, 2017), http://money.cnn.com/2017/01/30/news/companies/travel-ban-executives-business-reactions/.

individuals from all countries, and free to let their employees travel internationally without fear of detention or retribution—except, perhaps, to the U.S.

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.

A. The New Travel Ban Violates the Immigration And Nationality Act.

1. The Order Violates the Prohibition of Nationality-Based Discrimination

Section 202(a)(1)(A) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1152(a)(1)(A), prescribes clearly that "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." By halting the issuance of visas to nationals of six specific countries—Iran, Libya, Somalia, Sudan, Syria, and Yemen—the Order violates the INA by classifying by nationality, and only nationality. The Order expressly acknowledges, repeatedly, that it regulates "the visa-issuance process," New Order §§ 1(a) and 3(c), which directly contravenes Section 202(a)(1)(A)'s prohibition on "discriminat[ion] . . . in the issuance of an immigrant visa because of . . . nationality." And courts have interpreted Section 202(a)(1)(A) broadly. *See, e.g.*, *Legal Assistance for Vietnamese Asylum Seekers* v. *Dep't of State*, 45 F.3d 469, 473 (D.C. Cir. 1995) (striking down a "nationality-based regulation" because "Congress has unambiguously directed that no nationality-based discrimination

shall occur" under Section 202, and "Congress could hardly have chosen more explicit language,") (vacated on other grounds).

The new travel ban relies on the purported authority of Section 212(f) of the INA, which permits the President, in certain circumstances, to suspend "entry" into the U.S. 8 U.S.C. § 1182(f). While that is the authority the new order cites, that is not in fact what it does. Rather, nationals of the six countries who possess valid visas can enter the U.S. even while the new travel ban is in effect. New Order § 3(a). Thus, the new travel ban's only effect is to discriminate in the *issuance* of visas against certain individuals based solely on their nationality—precisely what Section 202 prohibits.

2. The Order Exceeds the Authority Vested in the President and is Arbitrary

The President justifies the Order on his statutory authority to exclude noncitizens. Under the most basic principles of statutory interpretation, that general authority, vested in Section 212(f), cannot override Section 202's specific nondiscrimination requirement. Section 202 was enacted thirteen years after Section 212(f) and can only logically be read as limiting the authority granted by it. Allowing the President to disregard the requirements of Section 202 would imply that, under the authority of Section 212(f), the President could override *any* of the INA's visa criteria or admissibility grounds. Section 212(f) does not allow this. *Cf. Abourezk* v. *Reagan*, 785 F.2d 1043, 1057 (D.C. Cir. 1986) (holding that the

Executive may not "nullif[y]" the contours of existing inadmissibility grounds or "evade the limitations Congress" has imposed); *Clinton* v. *City of New York*, 524 U.S. 417, 443 (1998) (holding that Congress may not give the President "the power to cancel portions of a duly enacted statute").

The new travel ban also invokes Section 212(f) in an "arbitrary and discriminatory" manner, conduct that is prohibited by the Due Process Clause. *See Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). Put simply, the new travel ban exercises discretion afforded under Section 212(f) to impose an overbroad ban on immigration from six countries, applying to many millions of individuals who could not plausibly be foreign terrorists—including many hundreds of thousands of students, employees, and family members of citizens who have already been admitted to the U.S. The result is therefore arbitrary. In every prior Executive Order utilizing Section 212(f), Presidents issued targeted restrictions, typically limited to dozens or hundreds of individuals and based on the explicit determination that each of these individuals had engaged in culpable conduct, such as illegal entry or human trafficking. *See* Cong. Research Serv., *Executive Authority to Exclude Aliens: In Brief* at 6–10 (Jan. 23, 2017), https://goo.gl/D0bRkS (listing each of the previous orders). This new Order is unprecedented in scope and arbitrariness, but for the original Order.

B. The New Travel Ban Deprives Individuals of Their Constitutional Rights.

Like the first travel ban, the new travel ban imperils individuals' constitutional rights to due process, freedom from religious discrimination, and equal protection under the law. This is apparent from the text of the new Order and from the overwhelming evidence that it is primarily motived by improper discriminatory purpose. That evidence belies the Government's characterization of the Order as a neutral security measure. To the contrary, the new Order is simply another attempt to effectuate President Trump's campaign promise to restrict the entry of Muslims into the U.S. The U.S. Constitution cannot countenance such a policy.

1. Procedural Due Process

The Fifth Amendment provides that "no person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. "An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 542 (1985) (citation omitted). The Ninth Circuit held in *Washington* that Due Process requires "the opportunity to present reasons not to proceed with the deprivation and have them considered." 847 F.3d at 1164.

If it is not enjoined, the new Order will prejudice the liberty interest of thousands of individuals—including U.S. citizens and their relatives, as well as visa-holders within the U.S.—without affording the process required by the Fifth Amendment. Section 2(c) of the Order would prevent American citizens like Plaintiff Elshikh from sponsoring or receiving visits from loved ones from the six Muslim-majority countries. The new Order will also effectively prevent certain visa-holders—including individuals with single entry visas—from traveling outside the U.S. to attend academic conferences or work meetings, engage in religious pilgrimage, visit ailing relatives or attend funerals, as such individuals would not be guaranteed re-entry to the U.S. *See* Compl. 83–84.[13]

The Government claims that the new Order "applies only to aliens who have no due-process rights in connection with their entry into this country, and it specifically excludes all categories of aliens about whom the Ninth Circuit had expressed concern." Defs' Mem. & Opp'n to Pls.' Mot. for TRO 36. Not so. Individuals who will be affected by the new Order have Due Process rights, for the reason the Ninth Circuit already recognized: even "aliens who are in the United States unlawfully . . . have due process rights[,]" as do "citizens who have an

[13] It is well established that the right to travel is an important liberty interest protected by the Fifth Amendment. *See Abdelfattah* v. *U.S. Dep't of Homeland Sec*., 787 F.3d 524, 539 (D.C. Cir. 2015) ("The Due Process Clause of the Fifth Amendment protects a liberty interest in international travel.").

interest in specific non-citizens' ability to travel to the United States." *Washington*, 847 F.3d at 1166.

The new Order provides insufficient process to accompany the deprivation of these individuals' important liberty interests—a vague possibility of a waiver from enforcement of the Order under §3(c) is no replacement for meaningful process. *See Grayned*, 408 U.S. at 108 ("[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them."). If the new Order is not enjoined, thousands of individuals will be deprived of their liberty and denied a meaningful opportunity to challenge this deprivation. Such an outcome offends the Due Process clause and should not be permitted to occur.

2. Religious Discrimination

By targeting those born in six Muslim-majority countries for wholesale exclusion from the U.S., the new Order violates the Establishment Clause of the First Amendment. There is abundant evidence that the new Order is designed to deliver on President Trump's campaign promise to effectuate a "Muslim ban."

The First Amendment bars any "law respecting an establishment of religion." U.S. Const. amend. I. This clause is violated by laws that evidence an official preference for one religion over another. *See Larson* v. *Valente*, 456 U.S. 228, 244 (1982); *see also McCreary Cty.* v. *Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 875 (2005) (observing the central Establishment Clause principle that

"the government may not favor one religion over another"). The Establishment Clause also cautions that the"[Government] may not be hostile to any religion" or "adopt programs or practices . . . which . . . oppose any religion." *Epperson* v. *State*, 393 U.S. 97, 104, 106 (1968).

Under the *Lemon* v. *Kurtzman* standard, government action: "(1) must have a secular legislative purpose, (2) may not have the principal or primary effect of advancing or inhibiting religion, and (3) must not foster excessive government entanglement with religion." 403 U.S. 602, 612–13 (1971). Under a related standard, laws that discriminate among religious denominations are subject to strict scrutiny. *Larson*, 456 U.S. at 246.

The discriminatory purpose of the new Order is evident from its text. Section 2(c) applies exclusively to foreign nationals from Muslim-majority nations. Moreover, the text references stereotypes about Islam completely unrelated to terrorism, mandating that the Attorney General collect information regarding "honor killings." Order §11(iii).

That the new Order omits the original Order's explicit preference for religious minorities does not remedy its constitutional deficiencies. As President Trump's senior associates have touted, this revised Order merely employs minor, "technical" revisions in an attempt to skirt the federal court's injunction and

achieve "the same basic policy outcome"[14]—that is, limiting the entry of Muslims into the U.S.

President Trump's explicit pledge to ban Muslims from the U.S. provides clear evidence of the discriminatory intent behind this new Order. Then-candidate Trump called for "a total and complete shutdown of Muslims entering the country"[15]—a shutdown that President Trump and his advisors have sought to "do [] legally" by scrubbing the more overt discriminatory language from the new Order's text.[16] Discriminatory purpose is further evidenced by the disconnect between the Order's stated purpose—preventing terrorism—and what it actually accomplishes. The Order is both over- and under-inclusive: it bars foreign nationals who are extremely unlikely to present a threat (including the elderly and young children) while failing to address the terrorism risk presented by native-born

[14] Matthew Nussbaum, Josh Gerstein and Cristiano Lima, *White House creates confusion about future of Trump's travel ban*, Politico, Feb. 21, 2017, http://www.politico.com/story/2017/02/trump-travel-ban-confusion-235241.

[15] Statement by Donald J. Trump on Preventing Muslim Immigration (Dec. 7, 2015). As of March 14, 2017, this statement remains available on President Trump's campaign website: https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigrationwww.donald.trump.com..

[16] *See* Amy B. Wang, *Trump asked for a 'Muslim ban,' Guiliani says – and ordered a commission to do it "legally*", Washington Post (Jan. 29, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally/?utm_term=.a466e1636ffb.

U.S. citizens.[17] As over one hundred foreign policy and national security officials point out, far from enhancing national security, the new Order is "damaging to the strategic and national security interest of the United States."[18]

3. Equal Protection

For the same reasons, the new Order violates the Equal Protection Clause of the Fifth Amendment, which bars discrimination by the federal government against individuals on the basis of religion or ancestry. *See De La Cruz* v. *Tormey*, 582 F.2d 45, 49 (9th Cir. 1978).

In conducting an equal protection analysis, a court must first determine whether a challenged classification burdens a suspect or quasi-suspect class. *Ball* v. *Massanari*, 254 F.3d 817, 823 (9th Cir. 2001). As discussed above, the new Order discriminates on the basis of both nationality and religion, and thus warrants strict scrutiny. *See City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976) (per curiam) (describing religion and alienage as an "inherently suspect distinctions"); *Benson* v. *Arizona State Bd. of Dental Examiners*, 673 F.2d 272, 277 n. 15 (9th Cir. 1982) (describing nationality as a suspect classification). The new Order cannot survive such scrutiny, because it does not serve a compelling government

[17] Indeed, while the Order cites terrorist acts committed by two Iraqi nationals in the United States as a justification for the travel ban, *see* Order §1(h), Iraqi nationals are *not included* in this ban. Order §1(c).

[18] *See* Lara Jakes, *Trump's Revised Travel Ban Is Denounced by 134 Foreign Policy Experts*, N.Y. Times (Mar. 11, 2017), https://www.nytimes.com /2017/03/11/us/politics/trump-travel-ban-denounced-foreign-policy-experts.html.

interest, but instead serves an unconstitutional one: limiting the entry of Muslims and those from Muslim-majority nations into the U.S. Moreover, rather than being narrowly tailored to its stated aim of preventing terrorism, it is both overbroad and under-inclusive, barring millions from entering the U.S. who cannot credibly be deemed security risks while ignoring entirely risks presented by U.S. citizens or those from other nations not included in the Order. *See supra* p. 19.

Even under the rational basis standard, the new Order cannot survive. Courts apply a more searching rational basis review where the challenged action "has the peculiar property of imposing a broad and undifferentiated disability on a single named group." *Romer* v. *Evans*, 517 U.S. 620, 632 (1996). That is the case here, where the evidence shows that the new Order is motivated not primarily by security concerns, but by the "bare desire to harm a politically unpopular group." *United States* v. *Windsor*, 133 S. Ct. 2675, 2693 (2013) (citation omitted).

III. THE BALANCE OF THE EQUITIES AND THE INTEREST OF THE PUBLIC FAVOR NATIONWIDE INJUNCTIVE RELIEF BARRING ENFORCEMENT OF THE NEW TRAVEL BAN.

The balance of the equities and the public interest weigh heavily in favor of enjoining enforcement of the new travel ban. As described *supra* pp. 8–12, U.S. businesses and their employees will be irreparably harmed as soon as the new travel ban goes into effect.

In addition, the public interest in the free movement of persons is manifest. In enjoining the first travel ban, the Ninth Circuit held that "the public . . . has an

interest in free flow of travel, in avoiding separation of families, and in freedom from discrimination." *Washington*, 847 F.3d at 1169. The same is true with respect to the new travel ban, which will interrupt travel and separate families through a system of nationality- and religion-based discrimination.

As with the first travel ban, the government attempts to manufacture false urgency in arguing that the public interest weighs against a temporary restraining order. *See* Defs' Mem. in Opp'n to Pls.' Motion for TRO 49–52, ECF No. 145 (Mar. 13, 2017). But the record does not support any urgent need for implementation of the new Order.

The Ninth Circuit concluded that the Government had not provided any meaningful evidence of the purported "urgent need for the [original] Executive Order to be placed immediately into effect." *Washington*, 847 F.3d at 1168. The Government failed to show that the injunction barring enforcement of the travel ban did anything more than revert the federal immigration system to the status quo that existed during the Obama administration. *See id.* It is no different with the new version of the ban. Yet again, the Government does not offer evidence to support its claims of urgency—because no such evidence exists.

If anything, the Government has even *less* of an argument that the new travel ban must be implemented on the proposed effective date than it did when it launched the first travel ban. In the face of criticism that the rollout of the first travel ban was "chaotic" and that, outside of the White House, "nobody knew

anything" about the administration's plans before the original Order was signed, the administration defended its decision not to circulate its plans by appealing to the element of surprise.[19] President Trump stated that the rushed rollout was a strategic decision, and that any advance notice of the administration's plans would have undermined the purpose of the travel ban.[20] With its new travel ban, however, the Government imposed on itself two delays to implementation. First, the Government withheld the new Order from publication in order to keep attention on the positive news coverage of the President's first address to Congress on February 28, 2017.[21] Second, the administration delayed the effective date of the new travel ban until March 16, 2017—seven days after the signing of the new Order on March 9, 2016. The Government therefore has effectively conceded that a delay in the implementation of the new travel ban will not adversely affect the administration's goals with respect to the travel ban. Accordingly, the administration will not be harmed if the new travel ban is enjoined.

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[19] *See* Ted Hesson & Jennifer Scholtes, *Confusion over Trump's Travel Ban Deepens*, Politico (Jan. 30, 2017, 8:50 PM), http://www.politico.com/story/2017/01/trump-immigration-travel-ban-chaos-234410.

[20] *Id.*; *see also* Donald J. Trump (@realDonaldTrump), Twitter (January 30, 2017, 5:31 AM) https://twitter.com/realdonaldtrump/status/826060143825666051) ("If the ban were announced with a one week notice, the 'bad' would rush into our country during that week.").

[21] *See* Laura Jarrett, et al., "*Trump Delays New Travel Ban after Well-Reviewed Speech*," CNN (Mar. 1, 2017, 6:01 AM), http://www.cnn.com/2017/02/28/politics/trump-travel-ban-visa-holders/.

The purported urgency of implementing the new travel ban is entirely unsupported by facts, data, or logical explanations that would justify such a dramatic reversal of American tradition. *See id.* at 1168 n.7. This Court has consistently refused to credit "conclusory allegations unsupported by any factual assertions" in considering requests for equitable relief. *See, e.g.*, *Mama Loa Foundation* v. *Hawaii*, No. 12–00088 DAE–KSC, 2012 WL 518562, at *3 (D. Haw. Feb. 15, 2012); *Young* v. *Lau*, No. 11–00110 LEK–KSC, 2011 WL 744928, at *5 (D. Haw. Feb. 22, 2011). *Amici* respectfully request that this Court follow the precedent set by the Ninth Circuit in *Washington*, hold that the Government has failed to demonstrate any urgent need to implement the new travel ban, and grant the State's motion for a temporary restraining order.

CONCLUSION

Amici respectfully request that the Court grant Plaintiffs' motion for a temporary restraining order.

DATED: Honolulu, Hawai'i, March 14, 2017.

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**Pro hac vice* application pending

APPENDIX A

LIST OF *AMICI CURIAE*

1. Airbnb, Inc.
2. AltSchool, PBC
3. Ampush LLC
4. Appboy
5. Appnexus, Inc.
6. Azavea
7. CareZone, Inc.
8. Chegg, Inc.
9. Cloudera
10. Color Genomics, Inc.
11. Copia Institute
12. DoorDash
13. Dropbox, Inc.
14. Electronic Arts Inc.
15. EquityZen Inc.
16. Evernote Corporation
17. Flipboard

18. General Assembly Space, Inc.

19. Glassdoor, Inc.

20. Greenhouse Software, Inc.

21. IDEO

22. Imgur, Inc.

23. Indiegogo, Inc.

24. Kargo Global, Inc.

25. Kickstarter, PBC

26. Light

27. Linden Research, Inc. d/b/a Linden Lab

28. Lithium Technologies, Inc.

29. Lyft

30. Lytro, Inc.

31. Mapbox, Inc.

32. Marin Software Incorporated

33. Meetup, Inc.

34. Memebox Corporation

35. MongoDB, Inc.

36. NetApp, Inc.

37. Patreon, Inc.

38. Pinterest, Inc.

39. Postmates Inc.

40. Quora, Inc.

41. RealNetworks, Inc.

42. RetailMeNot, Inc.

43. Rocket Lawyer Incorporated

44. Shutterstock, Inc.

45. Square, Inc.

46. Strava, Inc.

47. SugarCRM

48. Sunrun, Inc.

49. TripAdvisor LLC

50. Turo, Inc.

51. Twilio Inc.

52. Udacity, Inc.

53. Upwork

54. Warby Parker

55. Wikimedia Foundation, Inc.

56. Work & Co

57. Y Combinator Management, LLC

58. Zendesk, Inc.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

STATE OF HAWAI'I, *et al.*, Plaintiffs, v. DONALD J. TRUMP, President of the United States, *et al.*, Defendants.	Case No. 1:17-cv-00050-DKW-KSC CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that, on the date and by the method of service noted below, a true and correct copy of the foregoing was served on the following at their last known addresses:

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**Pro hac vice* application pending

Motions

1:17-cv-00050-DKW-KSC State of Hawaii v. Trump

U.S. District Court

District of Hawaii

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Case Number: 1:17-cv-00050-DKW-KSC
Filer: Technology Companies and Other Businesses
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Docket Text:
MOTION for Leave to File *Brief of Amici Curiae in Support of [65] Plaintiff's Motion for a Temporary Restraining Order]* Margery S. Bronster appearing for Amicus Technology Companies and Other Businesses (Attachments: # (1) Exhibit 1_proposed Amici Curiae Brief, # (2) Certificate of Service)(Bronster, Margery)

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