Intl. Refugee Assistance v. Donald J. Trump Doc. 44

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, et al.,

Plaintiffs-Cross-Appellants,

v.

DONALD TRUMP, et al.,

Defendants-Appellants.

IRANIAN ALLIANCES ACROSS BORDERS, et al.,

Plaintiffs-Appellees,

v.

DONALD TRUMP, et al.,

Defendants-Appellants.

EBLAL ZAKZOK, et al.,

Plaintiffs-Appellees,

v.

DONALD TRUMP, et al.,

Defendants-Appellants.

Nos. 17-2231 (L), 17-2240, 17-2232, 17-2233

***IRAP* PLAINTIFFS-CROSS-APPELLANTS' OPPOSITION TO MOTION FOR AN EMERGENCY STAY PENDING APPEAL**

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INTRODUCTION

In the government's prior appeal in this case, the en banc court concluded that "the Government's asserted national security interest" was "a post hoc, secondary justification for an executive action rooted in religious animus and intended to bar Muslims from this country." *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 603 (4th Cir. 2017) (en banc), *as amended* (May 31, 2017), *as amended* (June 15, 2017), *vacated as moot*, 2017 WL 4518553 (U.S. Oct. 10, 2017). That executive action—Executive Order 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017) ("EO–2")—"injure[d] Plaintiffs and in the process permeate[d] and ripple[d] across entire religious groups, communities, and society at large." *Id.* at 604.

The district court has now found the ban provision of Presidential Proclamation 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017) ("EO-3") likewise unconstitutional. It issued a preliminary injunction preventing the government from applying EO-3's ban to persons with bona fide relationships with individuals or entities in the United States.[1] Op. 88-89. The government's motion asks this Court to stay the preliminary injunction so that the government can ban persons *with* meaningful ties to persons and institutions in the United States—even though the government has lost on

[1] The district court did not enjoin the ban as applied to North Koreans and the set of Venezuelan nationals barred by EO-3. Op. 89.

the merits as to EO-3 in the district courts in Maryland and Hawai‘i and even though it has been continually prohibited from applying *any* iteration of its ban to such persons.

The government's motion recycles the same argument that it has made time and again without success: that its abstract interests warrant a stay, regardless of the harms its ban would impose on the plaintiffs and many others. Once again, the government asks for an emergency stay without demonstrating any actual urgency, and despite acting in ways that demonstrate the opposite. Once again, the government asks the Court to allow it to enforce an order that would rewrite the Immigration and Nationality Act and implement the President's promise to ban Muslims. And once again, the government trivializes the concrete irreparable harms that the ban would cause the plaintiffs.

A stay is even less appropriate now than it was at previous points in this litigation, when this Court and the Supreme Court denied similar requests. The severity of the new ban is greater; EO-3 would indefinitely separate the plaintiffs' families and harm the organizational plaintiffs. And this time, a vacated but highly persuasive en banc decision of this Court strongly supports the district court's judgment.

It is the government's burden to justify the extraordinary remedy of a stay pending appeal. The government cannot meet that heavy burden, and the Court should deny the motion.

ARGUMENT

The government "bears the burden of showing that the circumstances justify" a stay pending appeal. *Nken v. Holder*, 556 U.S. 418, 434 (2009). The Court considers the traditional factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* at 426 (internal quotation marks omitted). A stay is warranted "only in those extraordinary cases where the applicant is able to rebut the presumption that the decisions below—both on the merits and on the proper interim disposition of the case—are correct." *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers).

I. The Government Identifies No Harm Warranting a Stay.

The government has presented no evidence to justify a stay; instead, as before, it has presented only abstract interests and conclusory assertions. The government has not acted with the level of urgency claimed in its papers.

And EO-3's own waiver provisions confirm that individualized visa vetting procedures are sufficient to protect national security.

1. The government's interest in immediately enforcing the ban does not justify a stay while the appeal is expeditiously litigated on the merits. Since EO-1 was issued, nearly nine months have elapsed without any ban being enforced against the individuals who are protected by the preliminary injunction. In significant part, that is because the Supreme Court refused to stay the EO-2 injunction with respect to individuals with credible claims of bona fide relationships with U.S. persons or entities. *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (per curiam); *see* App. Stay, No. 16A1190 at 1, 3-4, 33-37 (U.S. filed June 1, 2017); *see also* Mot. Stay, No. 17-1351, Doc. 35 at 2-10 (4th Cir filed Mar. 24, 2017); *IRAP*, 857 F.3d at 606 (denying stay). That is the same class of persons protected by the injunction at issue here. The government has pointed to no new harms that would now justify the extraordinary remedy of a stay.

2. The government primarily argues that the preliminary injunction "undermines" the President's authority and "intrudes" on his "prerogatives." Stay Mot. 8. But the en banc Court previously rejected "the notion that the President, because he or she represents the entire nation, suffers irreparable harm whenever an executive action is enjoined." *IRAP*, 857 F.3d at 603.

Nor was EO-3 issued "at the height of the President's authority." Stay Mot. 8. As explained below, the President's power in this case is at its "lowest ebb," because it both exceeds his statutory authority and conflicts with Congress's non-discrimination mandate. *Youngstown Sheet & Tube Co.*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

3. The government's stay application fails to identify any *concrete* injury to the government that would occur in the absence of a stay. But in seeking a stay, the government cannot simply offer *ipse dixit*. *See, e.g.*, *IRAP*, 137 S. Ct. at 2088 (recognizing that harms to plaintiffs and those like them were "sufficiently weighty and immediate to outweigh the Government's interest in enforcing" the prior ban); *IRAP*, 857 F.3d at 603 ("We are . . . unmoved by the Government's rote invocation of harm to 'national security interests' as the silver bullet that defeats all other asserted injuries").[2]

And the record evidence indicates that no such harm exists. A bipartisan group of forty-nine former national security officials concluded that "[i]ssuing a new preliminary injunction against Travel Ban 3.0 would

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[2] The government relied in the district court on a new foreign relations rationale for the ban as an "independent" reason that it would be harmed by an injunction. Response Br. 23, D. Ct. Doc. No. 212; *see also id.* at 44. But the stay motion (correctly) does not assert that the government is irreparably harmed on that basis. Mot. 8-9.

not jeopardize national security." Joint Declaration of Former National Security Officials ¶ 14, D. Ct. J.R. 774, Doc. No. 205-1. Similarly, a DHS report concluded that "country of citizenship is unlikely to be a reliable indicator of potential terrorist activity." *Id.* ¶ 10, D. Ct. J.R. 771, Doc. No. 205-1 (citation and internal quotation marks omitted).

In fact, the evidence that does exist indicates that EO-3 "would undermine the national security of the United States" by disrupting national security partnerships with other nations, endangering intelligence sources, causing humanitarian harm, and supporting the recruitment narrative of terrorist organizations. *Id.* ¶¶ 13-15, D. Ct. J.R. 773-74, Doc. No. 205-1.

And EO-3 itself demonstrates that allowing individuals from the banned countries to enter the United States on visas does not pose an unacceptable security risk. Under EO-3's own terms, many such persons would be allowed to enter. *See* EO-3 § 3(a)(ii) (holders of visas issued before effective date); *id.* § 3(b)(iv) (dual nationals). The Order's waiver provision likewise confirms that the government is *already* capable of determining whether an individual's "entry would [] pose a threat to national security." *Id.* § 3(c)(i)(B); *see also* Op. 54, 86.

4. The government also has not acted with the kind of urgency typical of a party that claims to be suffering irreparable harm. *See Quince Orchard*

Valley Citizens Ass'n, Inc. v. Hodel, 872 F.2d 75, 80 (4th Cir. 1989) (movant's delay negates irreparable harm). EO-3 itself delayed implementation of the ban for 24 days with respect to persons covered by the preliminary injunction, from its issuance on September 24 to October 18. 82 Fed. Reg. 45161. Moreover, according to the schedule set forth in EO-2, the government could have issued EO-3 as early as August 28, *see Hawai'i v. Trump*, Order Granting Consent Motion to Issue Mandate, No. 17-15589, Doc. No. 316 (9th Cir. Filed June 19, 2017); EO-2 § 2(b) (20 days allowed for first report), 2(d) (50 days allowed for second report), but instead waited until the very last day of the 90-day EO-2 ban period to do so. And in the litigation over EO-2, the government proposed a briefing schedule to the Supreme Court that would leave the merits of the case unresolved for at least four months, knowing that the injunction of the prior ban might remain in place during that time. App. Stay, No. 16A1190 at 40 (U.S. filed June 1, 2017). This lack of dispatch undercuts the government's claim that it needs a stay while this case is expeditiously briefed.

II. The Government Is Unlikely to Prevail on the Merits.

A. EO-3 Violates the Establishment Clause.

This Court, sitting en banc, concluded that EO-2 spoke "with vague words of national security, but *in context* drip[ped] with religious intolerance,

animus, and discrimination." *IRAP*, 857 F.3d at 572 (emphasis added). The relevant context—including the President's and his advisors' statements before and after his election calling for a Muslim ban in the guise of nationality restrictions, the ban's disproportionate impact on Muslims, the explicit religious discrimination in the first version of the ban, and the weak, historically anomalous, and post hoc justifications offered for it—demonstrated that the primary purpose of the ban was to make good on the President's promise to ban Muslims from the United States. *Id.* at 591-92, 594.

The district court applied this same analysis and concluded that the newest iteration was "the inextricable re-animation of the twice-enjoined Muslim ban." Op. 83. The government has failed to meet its heavy burden of showing a likelihood of success on the merits of this appeal.

The government's principal contention is that "the process by which the Proclamation was issued"—namely a review yielding a report and recommendation from DHS—"foreclose[s] any suggestion that it was the product of bad faith or religious animus." Mot. 20. But the Supreme Court has repeatedly rejected that kind of reasoning. "[T]he world is not," after all, "made brand new every morning." *McCreary County v. ACLU of Kentucky*, 545 U.S. 844, 866 (2005) (citing *Santa Fe Independent School District v.*

Doe, 530 U.S. 290, 308 (2000)). So, as the district court observed, "[w]hen faced with allegations of a successive Establishment Clause violation, a court must . . . not lapse into the role of 'an absentminded objective observer,' but must instead remain 'familiar with the history of the government's action and competent to learn what history has to show.'" Op. 71-72 (quoting *McCreary*, 545 U.S. at 866).

The district court's injunction rests on a careful assessment of that history. As the court found, the "underlying architecture of the prior Executive Orders and the Proclamation is fundamentally the same." Op. 75. Far from abandoning the promise of a ban on entry from Muslim-majority countries, EO-3 "doubles down on it" by making the ban potentially permanent. Op. 76. And, as the court observed, many of the "specific findings about banned countries" from EO-2 are recycled as support for EO-3. Op. 77. As with EO-2, "[n]umerous distinguished former national security officials have attested to the unique nature of this travel ban and the lack of a discernible national security rationale for it . . . ." Op. 77-79. Ultimately, "where EO-1 and EO-2 were each likely to violate the Establishment Clause, and the third iteration, the Proclamation, was issued close on their heels—within nine and six months, respectively—it is 'common sense' that the Proclamation stands in their shadow." Op. 72

(citing *McCreary*, 545 U.S. at 855, 869-72, 874); *see also McCreary*, 545 U.S. at 866 (warning against looking only to "the latest news about the last in a series of governmental actions").

Given this history and context, the district court correctly found that the fact that a DHS report apparently recommended some travel restrictions on the countries banned in EO-3 cannot "foreclose" the courts from finding a constitutional violation, especially when EO-2 *required* DHS to recommend a country-based ban. *See* Op. 76 ("the outcome of the DHS Review was at least partially pre-ordained"); EO-2 § 2(e) (ordering that the Secretary "*shall* 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") (emphases added). And if that were not clear enough, the President again and again underlined what he expected, calling for further bans before EO-2's review process was even underway. Op. 82.[3]

[3] There are also troubling indications that White House pressure may have warped the agency recommendations. Reports indicate that the parallel process for reaching a recommendation regarding the new annual cap on refugees—which both EO-1 and EO-2 addressed—was "purely political" and "corrupt." Jonathan Blitzer, *How Stephen Miller Single-Handedly Got the U.S. to Accept Fewer Refugees*, The New Yorker (Oct. 13, 2017), https://www.newyorker.com/news/news-desk/how-stephen-miller-single-handedly -got-the-us-to-accept-fewer-refugees; *see also* D. Ct. J.R. 123-25, Doc. No. 95-10; *id.* at 607, 615, Doc. No. 205-1.

Moreover, even by the government's account, it was the *President*—who this Court held acted in bad faith with regard to EO-2—who "crafted" EO-3's ban provisions "in his judgment." Response Br., D. Ct. Doc. No. 212 at 1, 8. The ban does not even say *what* DHS recommended or how it chose and applied its criteria, and the government has refused to disclose publicly any part of the report or recommendations. All a reasonable observer knows is that some type of "restrictions and limitations" on the banned countries (and perhaps others) were recommended. EO-3 § 1(g). And, whatever the recommendations were, EO-3 admits a disconnect between the agency findings and EO-3 itself: Even though Somalia (which is more than 99 percent Muslim) satisfies the government's baseline criteria, for example, it was banned anyway; even though Venezuela (whose population is less than half a percent Muslim) fails to meet the baseline, it was effectively exempted. EO-3 §§ 2(f), 2(h); Op. 77-79.

The government's other objections to the district court's conclusions are similarly baseless. It argues that the ban operates in a facially neutral way, Mot. 20, but this Court previously concluded that facial neutrality is "not dispositive," *IRAP*, 857 F.3d at 595. The inclusion of two non-Muslim countries this time around is little more than a "litigating position," *McCreary*, 545 U.S. at 871: The narrow ban on Venezuela, and the near-

total lack of visa applicants from North Korea,[4] mean those bans will have "little practical consequence," Op. 74. And the fact that the ban operates differently as to different banned countries does not demonstrate that the ban's primary purpose is secular. Mot. 21-22. Notably, individuals with immigrant visas—who on entry become lawful permanent residents—are banned from *all* the Muslim-majority countries (but not from Venezuela).

Ultimately, the government resorts—as in the prior appeal—to alarm about other actions and other Presidents. Mot. 4, 24. But the Establishment Clause requires just the kind of common sense the district court applied. This President repeatedly promised a Muslim ban using nationality as a proxy, never repudiated that promise, and has signed three historically unprecedented orders banning hundreds of millions of people, overwhelmingly Muslim, based on nationality *this year*. *Cf. McGowan v. Maryland*, 366 U.S. 420, 444-45 (1961) (holding that religious purpose from "centuries ago" had abated). The district court was right to look at the context of the President's action, and to conclude that the third ban shares the purpose of the two earlier bans to which it is explicitly and inextricably connected. *See* Op. 80.

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[4] *See* Op. at 74 (noting that "the ban on North Korea will, according to Department of State statistics, affect fewer than 100 people").

B. EO-3 Violates the Immigration and Nationality Act.

EO-3 also violates the Immigration and Nationality Act, both for the specific reason found by the district court—that it violates the INA's prohibition on nationality discrimination in 8 U.S.C. § 1152(a)(1)(A)—and because it exceeds the President's authority under 8 U.S.C. §§ 1182(f) and 1185(a).

1. The district court correctly held that EO-3 violates the INA's core anti-discrimination mandate. That mandate, enacted in the original Immigration and Nationality Act of 1965, ended the national-origins quota system, which had been designed to favor some ethnic groups and disfavor others. President Johnson, in his signing statement, declared that "for over four decades the immigration policy of the United States has been twisted and has been distorted by the harsh injustice of the national origins quota system." Lyndon B. Johnson, Remarks at the Signing of the Immigration Bill (Oct. 3, 1965). The INA therefore provides that "no person shall . . . be discriminated in the issuance of an immigrant visa because of the person's . . . nationality." 8 U.S.C. § 1152(a)(1)(A).

EO-3 resurrects the discriminatory national-origins quota system that Congress abolished in 1965. It provides that nationals of Chad, Iran, Libya, Syria, Yemen, and Somalia may not come to the United States "as

immigrants"—i.e., future lawful permanent residents and U.S. citizens—indefinitely, solely because of their nationality. EO-3 § 2(a)-(h); *see id.* § 1(h)(ii) (explaining that the Order "distinguish[es] between the entry of immigrants and nonimmigrants" and bars the use of immigrant visas). The breadth of this nationality-based ban has no post-1965 parallel. It squarely violates § 1152(a)(1)(A). *See IRAP*, 857 F.3d at 635-38 (Thacker, J., concurring); *Hawai'i v. Trump*, 859 F.3d 741, 776-79 (2017).

As the district court correctly held, it is irrelevant that EO-3 claims to bar only "entry" using immigrant visas, not the issuance of those visas. Op. 44-45. First, the claim is wrong: The government has repeatedly admitted that it will implement EO-3 "by denying visas." Br. for the Petitioners, *IRAP v. Trump*, Nos. 16-1436 & 16-1540, at 51-52.[5] Second, banning entry to immigrant visa holders achieves the same effect as banning issuance of the visas themselves, because a visa is effectively nullified if its holder is categorically barred from entering the country. An indefinite immigrant-visa entry ban therefore achieves the precise result that § 1152(a) forbids. The government's response is a substanceless assertion that § 1182(f) allows the President to "limit the universe of individuals eligible to receive [immigrant] visas" on the basis of nationality, which is somehow distinct

[5] The State Department itself describes EO-3 as a "Presidential Proclamation on Visas." D. Ct. J.R. 506, Doc. No. 205-1.

from discriminating in visa issuance on the basis of nationality. Stay Mot. 17. The INA's hard-won non-discrimination principle is not so easily evaded.

There is no conflict between § 1152(a) and § 1182(f); as explained below, the latter does not empower the President to override Congress's enacted policy judgments. But if there were, § 1152(a) would control. It is later-enacted and more specific, in that it specifically addresses nationality discrimination in the issuance of visas, while § 1182(f) is silent as to visa issuance in general and discrimination in particular. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 & n.7 (1976).

2. More generally, EO-3 exceeds the President's suspension authority under 8 U.S.C. § 1182(f). Although the district court declined to enjoin EO-3 on this ground, it is nonetheless an alternative basis for this Court to affirm the injunction, which plaintiffs will brief more fully at the merits stage.

The government claims that § 1182(f) allows the President to override Congress's own enacted policy judgments—indeed, to rewrite any part of the INA with the mere recitation of the statutory words themselves. But that is contrary to our constitutional structure: The President may not "enact, to amend, or to repeal statutes," *Clinton v. City of New York*, 524 U.S. 417, 438 (1998), nor has Congress permitted him to do so. *See Carlson v. Landon*,

342 U.S. 524, 544 (1952) (holding that a delegation of immigration authority was only permissible where "the executive judgment is limited by adequate standards"); *Kent v. Dulles*, 357 U.S. 116, 129 (1958). The President must therefore exercise his delegated authority *consistent* with the "declared policy of Congress." *Mahler v. Eby*, 264 U.S. 32, 40 (1924).

EO-3 upends numerous congressional policy choices. As discussed above, it violates Congress's prohibition against nationality-based visa discrimination. It also formally rejects (while implicitly acknowledging the efficacy of) the individualized visa vetting process Congress has designed. EO-3 claims that its unprecedented bans are necessary to deny visas to foreigners about whom the government "lacks sufficient information to assess the risks they pose to the United States," EO-3 § 1(h)(i), but does not even acknowledge that existing law—the system Congress designed—*already* requires consular officers to deny visas whenever they lack sufficient information to negate any of the terrorism or public-safety grounds of inadmissibility. 8 U.S.C. § 1361 (individual applicant's burden to negate inadmissibility); *id.* § 1182(a)(2) (criminal bars), (a)(3)(A)-(C), (F) (terrorism bars); 22 C.F.R. § 40.6(a) (applicant's burden). EO-3's waiver provisions only underscore the value of that system. *See* EO-3 § 3(c). Those provisions employ consular officials to make individual decisions, as

Congress did in the INA; they just replace the substantive standards that Congress prescribed with those of the President's choosing.

Relatedly, EO-3 rejects Congress's method for encouraging countries to share information, issue secure passports, and engage in other practices. Since the 1980s, Congress has used the Visa Waiver Program—under which certain foreign nationals can travel to the United States for certain short-term nonimmigrant visits without applying for a visa—to spur other countries to meet a list of conditions for participation in the program. *See* 8 U.S.C. § 1187. EO-3 imposes a fundamentally different sanction: If a country fails to meet virtually the exact same criteria, *see* EO-3 § 1(c)(i)-(iii), its nationals are *banned* from receiving most visas, including (for the Muslim-majority countries) immigrant visas.

Finally, EO-3 overrides Congress's conclusions about how to address safety concerns relating to the very countries it bans. Congress considered that issue in 2015 and decided that the appropriate response to those concerns was to bar from the Visa Waiver Program individuals who had visited or were dual nationals of the countries in question. *See* Pub. L. 114-113, div. O, tit. II, § 203, 129 Stat. 2242 (codified at 8 U.S.C. § 1187(a)(12)); *see also* 4 Cong. Rec. H9051 (Dec. 8, 2015) (Rep. Miller) (explaining that Congress would now require the individuals in question "to

apply for a visa and go through the formal visa screening process" in "an abundance of caution"). Notably, Congress *rejected* a proposal to ban individuals from these countries. *E.g.*, S. 2302, 114th Cong., *introduced* Nov. 18, 2015. EO-3's basic premise is that Congress got this wrong. Based on the same security concerns for the same countries, it imposes the far more drastic remedy that Congress expressly rejected.

No other President has used § 1182(f) to override Congress's enacted policy judgments, or suggested that it authorized such action. Rather, past Presidents have invoked the statute to address detriments to the national interest that Congress had not itself already addressed. For example, President Reagan's 1986 suspension covering certain Cuban nationals responded to a fast-developing diplomatic event that Congress had not passed any statute to resolve. Proclamation No. 5,517, 51 Fed. Reg. 30,470 (Aug. 22, 1986). President Bush's 1992 suspension of unauthorized entry by sea likewise responded to an influx of unauthorized migrants for which Congress had not provided a statutory solution. Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (May 24, 1992). Other § 1182(f) suspensions have been far narrower, reaching only a handful of individuals who had contributed to specific and recent harmful situations abroad, none of which Congress had

addressed. *See generally* Kate M. Manuel, Executive Authority to Exclude Aliens, 6-10, Cong. Res. Serv., Jan. 23, 2017 (listing § 1182(f) suspensions).

3. Finally, the government is wrong that its entry ban is immune from statutory review. Stay Mot. 10-12. Both this Court and the Ninth Circuit have already rejected the government's troubling claim of unreviewable authority. *Hawai'i*, 859 F.3d at 768-69; *IRAP*, 857 F.3d at 587-88. The Supreme Court itself reviewed a statutory claim against a § 1182(f) suspension on the merits in *Sale v. Haitian Centers Council*, 509 U.S. 155, 163-66 (1993), despite the government's lengthy argument—just like in this case—that § 1182(f) suspensions were unreviewable, and that therefore the Court was barred from even considering the merits. *See* U.S. Br. 13-18 & n.9, 55-57, 1992 WL 541276, Reply Br. 1-4, 1993 WL 290141, *Sale v. Haitian Ctrs. Council, Inc.* (No. 92-344).

The government invokes the doctrine of consular non-reviewability, Stay Mot. 11-12, but as multiple Circuits have held, that doctrine applies only to "a particular determination in a particular case," not a "general" policy. *Int'l Union of Bricklayers & Allied Craftsmen v. Meese*, 761 F.2d 798, 801 (D.C. Cir. 1985); *see Patel v. Reno*, 134 F.3d 929, 931-32 (9th Cir. 1997) (same); *Mulligan v. Schultz*, 848 F.2d 655, 657 (5th Cir. 1988) (same); *accord Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999)

(describing doctrine as applying to "*a consular official's* decision to issue or withhold *a* visa" (emphases added)); *id.* at 1160, 1162.

Those cases, along with *Sale*, belie the government's invocation of a broader "principle" of non-reviewability. Stay Mot. 11-12. The government does not cite a *single* case recognizing any such principle, only a series of cases reviewing admissions policies deferentially *on the merits*. *See Fiallo v. Bell*, 430 U.S. 787, 792-99 (1977); *Harisiades v. Shaughnessy*, 342 U.S. 580, 583 & n.4 (1952); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544-47 (1950) (reviewing two statutory claims against regulations promulgated under a presidential proclamation). As the en banc Court explained, the notion that "this Court lacks the authority to review high-level government policy of the sort here" is "a dangerous idea," and the Supreme Court "has not countenanced judicial abdication, especially where constitutional rights, values, and principles are at stake." *IRAP*, 857 F.3d at 587.

III. The Plaintiffs and the Public Interest Would Be Harmed by a Stay.

A stay would cause immediate irreparable harm to both the organizational and individual plaintiffs. *See* Op. 84-85. As the district court correctly found, EO-3 would harm the plaintiffs by separating them from family members and denigrating their religion. The district court's findings

of harm and tailoring of relief are entitled to significant deference. *See Aberdeen & Rockfish R. Co. v. Students Challenging Reg. Agency Procedures*, 409 U.S. 1207, 1218 (1972). In any event, both this Court and the Supreme Court have rejected the government's argument that the plaintiffs are somehow not irreparably harmed by a ban that condemns their religion and prolongs the separation from their families. *See IRAP*, 857 F.3d at 602; *id.* at 611-12 (Keenan, J., concurring); *IRAP*, 137 S. Ct. at 2087-88.

1. Each day, each hour the ban is in effect, plaintiffs are told by the highest levels of their government that they are less than full members of our national community, and that they, their family members, and their colleagues and friends are suspect because of their religion. Such a "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 191 (4th Cir. 2013) (quotation marks omitted); *see also IRAP*, 857 F.3d at 602.

2. Likewise, the indefinite separation of the individual plaintiffs and the organizational plaintiffs' clients and members from their loved ones would inflict grave irreparable harm. There is no damages remedy that can compensate for one's separation from a loved one being unlawfully prolonged. The government's blithe assertion, without citation, that delay in

reunification "does not amount to irreparable harm," Mot. 9, is self-evidently wrong.

The impacts on plaintiffs here are severe. For example, Ms. Khazaeli's husband has terminal cancer, and her sister will likely never see him again if EO-3 takes effect. Khazaeli Decl. ¶ 12, D. Ct. J.R. 465, Doc. No. 205-1. AAANY has clients whose parents are stranded in dangerous circumstances in Yemen and Syria, Issa-Ibrahim Decl. ¶ 21-22, D. Ct. J.R. 442, Doc. No. 205-1, and a client whose husband has not yet seen his newborn son, *id.* ¶ 19, D. Ct. J.R. 441, Doc. No. 205-1. John Doe #4 finds life without his wife "excruciatingly difficult," and is unable to start a family while they are separated. Doe #4 Decl. ¶¶ 6-7, D. Ct. J.R. 461, Doc. No. 205-1. John Doe #5's mother fled Yemen and is stranded in Jordan, where she cares for her mother, who has Alzheimer's disease; the ban will prevent her from obtaining medical care in the United States. Doe #5 Decl. ¶ 4, D. Ct. J.R. 446-47, Doc. No. 205-1.

3. Finally, the Court should reject the government's request to partially stay the preliminary injunction by limiting it to the plaintiffs. While the government expresses alarm at a "worldwide" or "global" injunction, Mot. 3, 25, the Supreme Court approved of an injunction with the same scope as the one at issue here. *IRAP*, 137 S. Ct. at 2088. This Court

likewise rejected the contention that the previous preliminary injunction should be limited in this way. *IRAP*, 857 F.3d at 602.

"[T]he scope of . . . relief rests within [the district court's] sound discretion." *Dixon v. Edwards*, 290 F.3d 699, 710 (4th Cir. 2002). The district court's decision to enjoin EO-3 nationwide was correct. As this Court previously held, the nature of EO-3's constitutional violations means that "enjoining it only as to Plaintiffs would not cure the constitutional deficiency," *IRAP*, 857 F.3d at 605, because the unmistakable message of governmental condemnation would remain. Moreover, the organizational plaintiffs have employees, clients, and members located across the country, making more limited relief impractical. *Id.* And because EO-3 exceeds the President's statutory authority, its bans "are invalid" as a categorical matter. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2449 (2014); *see also Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989) (explaining that when courts hold government action unlawful, "the ordinary result" under the APA "is that the rules are vacated—not that their application to the individual petitioners is proscribed").

CONCLUSION

The Court should deny the motion for a stay pending appeal.

Dated: October 27, 2017 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of October, 2017, I caused a PDF version of the foregoing document to be electronically transmitted to the Clerk of the Court, using the CM/ECF System for filing and for transmittal of a Notice of Electronic Filing to all CM/ECF registrants.

Dated: October 27, 2017

Respectfully submitted,

/s/ Omar Jadwat
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CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(g)(1), I hereby certify that the foregoing motion complies with the type-volume limitation in FRAP 27(d)(2)(A). According to Microsoft Word, the motion contains 5,110 words and has been prepared in a proportionally spaced typeface using Times New Roman in 14 point size.

Dated: October 27, 2017

Respectfully submitted,

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