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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

STATE OF HAWAI'I and ISMAIL ELSHIKH,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; ELAINE DUKE, in her official capacity as Acting Secretary of Homeland Security; U.S. DEPARTMENT OF STATE; REX TILLERSON, in his official capacity as Secretary of State; and the UNITED STATES OF AMERICA,

Defendants.

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

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

Judge: Hon. Derrick K. Watson

Related Documents:
Dkt. No. 368

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INTRODUCTION

Over the past several months, the Department of Homeland Security, in consultation with the Department of State and Director of National Intelligence, conducted a worldwide review of foreign governments' information-sharing practices and risk factors, evaluated each country according to a set of religion-neutral criteria, and identified countries with inadequate information-sharing practices. The Secretary of State then engaged countries diplomatically to encourage them to improve their performance. The Acting Secretary of Homeland Security reported the results of this review to the President, recommending that the President impose entry restrictions on nationals from eight countries whose information-sharing practices continued to be inadequate or that otherwise presented special risk factors. After reviewing the Acting Secretary's recommendations and consulting within the Executive Branch, the President crafted "country-specific restrictions" that, in his judgment, "would be most likely to encourage cooperation given each country's distinct circumstances, and that would, at the same time, protect the United States until such time as improvements occur." Pursuant to broad constitutional and statutory authority to suspend or restrict the entry of aliens abroad when he deems it in the Nation's interest, the President issued a Proclamation describing those restrictions and the particular country-conditions justifying them. *See* Proclamation No. 9645, *Enhancing*

Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats, 82 Fed. Reg. 45,161 (Sept. 27, 2017).

Plaintiffs have now shown that, no matter how thorough the Government's process, they will continue to allege that the President's actions are motivated by animus. Plaintiffs ask this Court to enjoin the Proclamation worldwide, nullifying a formal national-security and foreign-policy directive of the President based on extensive investigations and recommendations of several Cabinet Secretaries. Their request threatens the ability of this or any future President to take necessary steps to protect the Nation.

Irrespective of earlier findings by this Court and the Ninth Circuit that Executive Order No. 13,780 ("EO-2") was flawed in certain respects, those alleged flaws do not apply to the Proclamation here, which is amply justified by the President's constitutional powers and the authority conferred on him by 8 U.S.C. §§ 1182(f) and 1185(a)(1). The President determined that, for countries with inadequate information-sharing practices or other special circumstances, it would be detrimental to the Nation's interests to allow certain foreign nationals of those countries to enter the United States, because "the United States Government lacks sufficient information to assess the risks they pose to the United States," and because the entry restrictions "are also needed to elicit improved identity-

management and information-sharing protocols and practices from foreign governments[.]" Procl. § 1(h)(i). Nor does the President's determination run afoul of any other Congressional enactment, which determine the *minimum* requirements for an alien to obtain entry, but which do not impliedly repeal the President's authority to impose *additional* restrictions when he deems appropriate under §§ 1182(f) or 1185(a)(1). Even applying the Ninth Circuit's standards for those statutes, the Proclamation easily passes.

Plaintiffs' Establishment Clause claim is governed by, and fails, *Kleindienst v. Mandel*, 408 U.S. 753 (1972), which requires upholding the Executive's decision to exclude aliens abroad so long as that decision rests on a "facially legitimate and bona fide reason." *Id*. at 770. The Proclamation's entry restrictions rest squarely on national-security and foreign-policy determinations by the President that are legitimate on their face and supported by extensive findings. Plaintiffs' theory would require this Court to impugn the motives of the numerous Cabinet Secretaries and other government officials who participated in the world-wide review that culminated in the Acting Secretary's recommendations to the President. Even without regard to *Mandel*, moreover, the Proclamation has nothing to do with religion on its face or in its operation, and Plaintiffs have not demonstrated that the Proclamation—the product of a review by multiple agencies—was motivated by

religious animus. It was based on a thorough, worldwide review and engagement process that resulted in tailored, country-specific restrictions.

Before reaching the merits, though, Plaintiffs' claims are not justiciable at all. No visa applications of the aliens abroad identified by Plaintiffs have been refused based on the Proclamation. In any event, Plaintiffs' statutory challenges are foreclosed by the general rule that courts may not second-guess the political branches' decisions to exclude aliens abroad where Congress has not authorized review, which it has not done here. Plaintiffs' constitutional challenges fare no better, because they do not assert a cognizable violation of their *own* constitutional rights. Plaintiffs' motion for a temporary restraining order should therefore be denied.

BACKGROUND

I. LEGAL FRAMEWORK

"The exclusion of aliens is a fundamental act of sovereignty" that is both an aspect of the "legislative power" and "inherent in the executive power to control the foreign affairs of the nation." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950).

Under the Immigration and Nationality Act ("INA"), admission to the United States normally requires a valid visa or other valid travel document. 8 U.S.C. §§ 1181, 1182(a)(7)(A)(i) and (B)(i)(II), 1203. Applying for a visa typically

requires an in-person interview and results in a decision by a Department of State consular officer. *Id*. §§ 1201(a)(1), 1202(h), 1204; 22 C.F.R. §§ 41.102, 42.62. Although a visa generally is necessary for admission, it does not guarantee admission; the alien still must be found admissible upon arriving at a port of entry. 8 U.S.C. §§ 1201(h), 1225(a). Congress has enabled certain nationals of certain countries to seek temporary admission without a visa under the Visa Waiver Program. *Id*. §§ 1182, 1187.

Building upon the President's inherent authority to exclude aliens, *see Knauff*, 338 U.S. at 542, Congress has likewise accorded the President broad discretion to restrict the entry of aliens. Section 1182(f) of Title 8 authorizes the President to "suspend the entry of all aliens or any class of aliens" "for such period as he shall deem necessary" whenever he finds that such entry "would be detrimental to the interests of the United States." Section 1185(a)(1) further empowers the President to adopt "reasonable rules, regulations," "orders," and "limitations and exceptions" on the entry of aliens. Pursuant to these authorities, President Reagan suspended entry of all Cuban nationals in 1986, and President Carter denied and revoked visas to Iranian nationals in 1979.

II. EXECUTIVE ORDER NO. 13,780

On March 6, 2017, the President issued Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017). EO-2 directed the Secretary of Homeland Security to

conduct a global review to determine whether foreign governments provide adequate information about their nationals seeking U.S. visas, EO-2 § 2(a), and to report his findings to the President.

During that review, EO-2 imposed a 90-day entry suspension on certain foreign nationals from six countries—Iran, Libya, Somalia, Sudan, Syria, and Yemen—all of which had been identified by Congress or the Department of Homeland Security (DHS) as presenting heighted terrorism-related concerns. *Id*. § 2(c). That 90-day suspension was preliminarily enjoined by this Court and one other district court. *See Hawaii v. Trump*, 245 F. Supp. 3d 1227 (D. Haw. 2017); *IRAP v. Trump*, 241 F. Supp. 3d 539 (D. Md. 2017). Those injunctions were affirmed in relevant part. *See Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017) (per curiam); *IRAP v. Trump*, 857 F.3d 554 (4th Cir. 2017) (en banc).

The Supreme Court granted certiorari in both cases and partially stayed the injunctions pending its review. *Trump v. IRAP*, 137 S. Ct. 2080 (2017). After EO-2's entry suspension expired, the Supreme Court vacated the *IRAP* injunction as moot. *See Trump v. IRAP*, 2017 WL 4518553 (U.S. Oct. 10, 2017). The Ninth Circuit's decision also affirmed the injunction of Section 6(a) of EO-2, concerning refugees, which is set to expire on October 24, 2017.

III. THE PRESIDENT'S PROCLAMATION

On September 24, 2017, following completion of the Government's review and engagement processes, the President signed Proclamation No. 9645.

A. DHS'S WORLDWIDE REVIEW AND RECOMMENDATIONS

The Proclamation describes the extensive, worldwide review of the nation's vetting procedures that preceded it. First, DHS, in consultation with the Department of State and the Director of National Intelligence, established categories of information needed from foreign governments to enable the United States to assess its ability to make informed decisions about foreign nationals applying for visas. That information "baseline" has three components:

> (1) identity-management information, to assess "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";
>
> (2) national-security and public-safety information, to determine "whether the country makes available . . . 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"; and
>
> (3) a national-security and public-safety risk assessment, including such factors as "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 [the program's] requirements, and whether it regularly fails to receive its nationals subject to final orders of removal from the United States."

Procl. § 1(c).

DHS, in coordination with the Department of State, then collected data on, and evaluated, every foreign country according to these criteria. Out of nearly 200 countries evaluated, the Acting Secretary of DHS identified the information-sharing practices and risk factors of 16 countries as "inadequate." Procl. § 1(e). Another 31 countries were found "at risk" of becoming "inadequate." *Id.* These preliminary results were submitted to the President. *Id*. § 1(c). The Department of State then conducted a 50-day engagement period to encourage all foreign governments to improve their performance, which yielded significant gains—29 countries provided travel-document exemplars to combat fraud, and 11 countries agreed to share information on known or suspected terrorists. Procl. § 1(f).

The Acting Secretary of DHS then submitted a report to the President recommending tailored entry restrictions on certain nationals from seven countries (Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen) that continue to be "inadequate" with respect to information-sharing and risk factors. *Id*. § 1(h)(ii). The Acting Secretary also recommended entry restrictions on nationals of Somalia. Although Somalia generally satisfied the information-sharing criteria, the Acting Secretary found that the Somali government's inability to effectively and consistently cooperate, as well as the terrorist threat within its territory, present special circumstances warranting entry restrictions. *Id.* § 1(i). The Acting

Secretary determined that an eighth country (Iraq) did not meet information-sharing requirements, but in lieu of entry restrictions, recommended additional scrutiny of Iraqi nationals seeking entry because of the United States' close cooperative relationship with Iraq, the strong United States diplomatic presence in Iraq, the significant presence of United States forces in Iraq, and Iraq's commitment to combatting ISIS. *Id.* § 1(g).

B. THE PRESIDENT'S FINDINGS AND SUSPENSIONS OF ENTRY

After considering the Acting Secretary's recommendations and consulting with his Cabinet, the President issued the Proclamation pursuant to his inherent and statutory authorities, including 8 U.S.C. §§ 1182(f) and 1185(a)(1). The President considered "several factors, including each country's capacity, ability, and willingness to cooperate with our identity-management and information-sharing policies and each country's risk factors," as well as "foreign policy, national security, and counterterrorism goals." Procl. § 1(h)(i). The President sought to "craft[] those country-specific restrictions that would be most likely to encourage cooperation given each country's distinct circumstances, and that would, at the same time, protect the United States until such time as improvements occur." *Id.*

Accordingly, for countries that refuse to cooperate regularly with the United States (Iran, North Korea, and Syria), the Proclamation suspends entry of nationals seeking both immigrant and nonimmigrant visas; all classes of nonimmigrant visas

are suspended for North Korea and Syria, and all are suspended for Iran except student (F and M) and exchange visitor (J) visas. *Id*. §§ 2(b)(ii), (d)(ii), (e)(ii). For countries that are valuable counter-terrorism partners but nonetheless have information-sharing deficiencies (Chad, Libya, and Yemen), the Proclamation suspends entry only of persons seeking immigrant visas and business, tourist, and business/tourist nonimmigrant (B-1, B-2, B-1/B-2) visas. *Id.* §§ 2(a)(ii), (c)(ii), (g)(ii). For Somalia, the Proclamation suspends entry of persons seeking immigrant visas, and requires additional scrutiny of nationals seeking nonimmigrant visas. *Id.* § 2(h)(ii). And for Venezuela, the Proclamation suspends entry of "officials of government agencies of Venezuela involved in screening and vetting procedures" and "their immediate family members" on nonimmigrant business and tourist visas. *Id.* § 2(f)(ii). For each country, the Proclamation summarizes some of the country conditions and inadequacies warranting the restrictions. *Id.* § 2. The Proclamation also provides for case-by-case waivers. *Id.* § 3(c).

The restrictions on each country are "to encourage cooperation" and to "protect the United States until such time as improvements occur." *Id.* § 1(h)(i); *see also* Procl. pmbl. To that end, the Proclamation requires an ongoing review to determine whether the limitations imposed should be continued, terminated, modified, or supplemented. *Id.* § 4.

The entry suspensions were effective immediately for foreign nationals previously restricted under EO-2 and the Supreme Court's stay order, *id*. § 7(a), but for all other covered persons they will be effective at 12:01 a.m. EDT on October 18, 2017, *id.* § 7(b).

STANDARD OF REVIEW

Plaintiffs "must establish that [they are] likely to succeed on the merits, 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 relief] is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

ARGUMENT

Plaintiffs rely heavily on this Court's and the Ninth Circuit's decisions addressing EO-2. But the courts' conclusions regarding EO-2 in *Hawaii* do not apply to the Proclamation, an entirely different policy adopted following the extensive review process described above.

I. PLAINTIFFS' CHALLENGES TO THE PROCLAMATION ARE NOT JUSTICIABLE

A. PLAINTIFFS' STATUTORY CHALLENGES ARE NOT REVIEWABLE

1. The Supreme Court "ha[s] long recognized the power to . . . exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). "[I]t 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." *Knauff*, 338 U.S. at 543.

Courts have distilled from these longstanding principles that the denial or revocation of a visa for an alien abroad "is not subject to judicial review . . . unless Congress says otherwise." *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999). Courts refer to that rule as "the doctrine of consular nonreviewability," *id*., but the short-hand label merely reflects the context in which the principle most often arises—challenges to decisions by consular officers adjudicating visa applications. The principle underlying that doctrine applies regardless of the manner in which the Executive denies entry to an alien abroad. Indeed, it would make no sense to bar review of consular officers' case-specific determinations while permitting review of decisions by the President that are grounded in sensitive foreign-affairs and national-security determinations. *See id.* at 1159-60.

Congress has declined to provide for judicial review of decisions to exclude aliens abroad. It has not authorized any judicial review of visa denials—even by the alien affected, much less by third parties like Plaintiffs. *E.g.*, 6 U.S.C. § 236(f); *see id*. § 236(b)(1), (c)(1). Congress also has forbidden "judicial review" of visa revocations (subject to a narrow exception inapplicable to aliens abroad). 8 U.S.C. § 1201(i).

2. Plaintiffs erroneously assert that the Administrative Procedure Act (APA) authorizes judicial review of their statutory claims. *See* Hawaii Br. 11. The APA does not apply "to the extent that . . . statutes preclude judicial review." 5 U.S.C. § 701(a)(1). Here, the conclusion is "unmistakable" from history that "the immigration laws 'preclude judicial review' of []consular visa decisions." *Saavedra Bruno*, 197 F.3d at 1160. Moreover, APA § 702 itself contains a "qualifying clause" that preserves "other limitations on judicial review" that predated the APA. *Id.* at 1158. At a minimum, the general rule of "nonreviewability . . . represents one of the 'limitations on judicial review' unaffected by § 702's opening clause[.]" *Id*.

In 1961, Congress specifically abrogated a Supreme Court decision to establish that even aliens physically present in the United States cannot seek review of their exclusion orders under the APA. *See Saavedra Bruno*, 197 F.3d at 1157-62 (recounting history). It follows *a fortiori* that neither aliens abroad nor U.S.

citizens acting at their behest can invoke the APA to obtain review. And given that Congress generally foreclosed "judicial review" of visa revocations, 8 U.S.C. § 1201(i), it is implausible that Congress authorized review of visa denials in the first instance.[1]

3. Review is unavailable for three additional reasons. First, the APA provides for judicial review only of "final agency action." 5 U.S.C. § 704. The President's Proclamation is not "agency action" at all. *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992). And none of the aliens abroad identified by Plaintiffs has been refused a visa based on the Proclamation. *See* Hawaii Br. 8-9. If any of Plaintiffs' relatives is denied both a visa and a waiver, then the Court can consider their claims in the context of a live dispute. Similarly, Hawaii's anticipated difficulties in operating its universities are premature: Hawaii identifies no students, faculty, or speakers who have been admitted, offered employment, or invited, but who have applied for and been denied a visa, and a waiver, under the Proclamation. Hawaii Br. 6-8.

[1] Plaintiffs assert that *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), shows that their statutory claims are reviewable. *See* Hawaii Br. 12. But *Sale* did not address reviewability because it simply rejected the plaintiffs' claims on the merits, and the aliens in *Sale* alleged that the INA and a treaty gave them a judicially enforceable right. Here, Plaintiffs have no such colorable claim, as discussed below.

Second, Plaintiffs lack a statutory right to enforce. Nothing in the INA gives Plaintiffs a direct right to judicial review. *See, e.g.*, *Abourezk v. Reagan*, 785 F.2d 1043, 1050 (D.C. Cir. 1986); *Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498, 1505 (11th Cir. 1992). None of the statutes Plaintiffs invoke confers any rights on third parties like Plaintiffs.

Finally, the APA does not apply "to the extent that . . . agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Here, the relevant statutes commit these matters to the President's unreviewable discretion. *See* Part II.A.1, *infra*.[2]

B. PLAINTIFFS' CONSTITUTIONAL CLAIMS ARE NOT REVIEWABLE

In *Mandel*, the Court reviewed (and rejected on the merits) a claim that the denial of a waiver of visa-ineligibility to a Belgian national violated U.S. citizens' *own* First Amendment right to receive information. 408 U.S. at 756-59, 762-70 (explaining that the alien himself could not seek review because he "had no constitutional right of entry"). Similarly in *Kerry v. Din*, the Court considered but denied a claim by a U.S. citizen that the refusal of a visa to her husband violated

[2] Plaintiffs suggest that judicial review is available through equity. Hawaii Br. 11 (citing *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384-85 (2015)). But the "judge-made remedy" in *Armstrong* does not permit Plaintiffs to sidestep "express and implied statutory limitations" on judicial review, 135 S. Ct. at 1384-85, such as those under the APA.

her own due-process rights. 135 S. Ct. 2128, 2131 (2015) (opinion of Scalia, J.); *id*. at 2139 (Kennedy, J., concurring in the judgment).

Here, Hawaii cannot assert that the Order violates any constitutional rights of its own, and it cannot assert the constitutional rights of its residents as *parens patriae* in a suit against the federal government. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982). The individual Plaintiffs allege that the Proclamation will prevent or delay their family members' entry into the United States. *See* Hawaii Br. 8-9. But putting aside that no visa has yet been denied pursuant to the Proclamation and this claim is therefore not ripe, that claimed injury is not cognizable because it does not stem from an alleged infringement of Plaintiffs' *own* constitutional rights.

In *McGowan v. Maryland*, 366 U.S. 420 (1961), the Supreme Court held that individuals who are indirectly injured by alleged religious discrimination against others generally may not sue, because they have not suffered violations of their own. *Id*. at 429-30. Likewise here, Plaintiffs are not asserting violations of their own constitutional rights, but are instead asserting the interests of third-party family members abroad.[3]

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[3] *McGowan* held that the plaintiffs could assert an Establishment Clause challenge to the state law only because they suffered "direct . . . injury, allegedly due to the imposition on them of the tenets of the Christian religion": they were subjected to (indeed, prosecuted under) a Sunday-closing law, which regulated their own

Plaintiffs also claim the Proclamation sends a "message" that condemns their Islamic faith. *See* Hawaii Br. 9-10. This "message" injury is not cognizable because it likewise does not result from a violation of Plaintiffs' own constitutional rights. The Supreme Court has "ma[de] clear" that "stigmatizing injury . . . accords a basis for standing only to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct." *Allen v. Wright*, 468 U.S. 737, 755 (1984). The same rule applies to Establishment Clause claims. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 85-86 (1982).

A plaintiff may suffer a "spiritual" injury from the violation of his own Establishment Clause rights where he is "subjected to unwelcome religious exercises" or "forced to assume special burdens to avoid them." *Valley Forge*, 454 U.S. at 486-487 n.22. But neither is true here. The Proclamation does not expose Plaintiffs to a religious message: it says nothing about religion, and does not subject them to any religious exercise. A putative Establishment Clause plaintiff may not "re-characterize[]" an abstract injury flowing from "government *action*" directed against others as a personal injury from "a governmental *message*

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conduct. 366 U.S. at 422, 430-31. That contrasts with the indirect injury here from alleged discrimination against aliens abroad.

[concerning] religion" directed at the plaintiff. *In re Navy Chaplaincy*, 534 F.3d 756, 764 (2008) (Kavanaugh, J.), *cert. denied*, 556 U.S. 1167 (2009).

II. PLAINTIFFS' STATUTORY CLAIMS ARE NOT LIKELY TO SUCCEED ON THE MERITS

A. THE PROCLAMATION FITS WELL WITHIN THE PRESIDENT'S BROAD CONSTITUTIONAL AND STATUTORY AUTHORITY TO SUSPEND ENTRY OF ALIENS ABROAD

The Proclamation was issued pursuant to the President's Article II authority and the broad statutory authority vested in him by 8 U.S.C. §§ 1182(f) and 1185(a)(1). The text of those statutes confirms the expansive discretion afforded to the President, and historical practice likewise confirms that the President need not offer detailed justifications for entry suspensions. Although the government disagrees with the Ninth Circuit's attempts to narrow the scope of those statutes, the Proclamation satisfies the Ninth Circuit's standard as well.

1. The President Has Extremely Broad Discretion to Suspend Entry of Aliens Abroad

a. As relevant here, 8 U.S.C. § 1182(f) provides the following:

> 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). This provision grants the President broad authority and confirms his discretion at every turn. At least four courts of appeals have recognized that § 1182(f) provides the President with broad power to suspend the entry of aliens. *See Abourezk*, 785 F.2d at 1049 n.2; *Haitian Refugee Ctr., Inc.*, 953 F.2d at 1507 ; *Allende v. Shultz*, 845 F.2d 1111, 1117-18 (1st Cir. 1988); *Mow Sun Wong v. Campbell*, 626 F.2d 739, 744 n.9 (9th Cir. 1980). The Supreme Court itself has deemed it "perfectly clear that [Section] 1182(f) . . . grants the President ample power to establish a naval blockade that would simply deny illegal Haitian migrants the ability to disembark on our shores." *Sale*, 509 U.S. at 187.

In addition, 8 U.S.C. § 1185(a)(1) further provides:

> 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[.]

This statutory text likewise confirms the breadth of the President's authority. This section does not require any predicate findings whatsoever, but simply gives the President authority to restrict entry to the United States according to "such limitations and exceptions as the President may prescribe." *Id.*; *see also Haig v. Agee*, 453 U.S. 280, 297 (1981) (construing similar language in §1185(b) as "le[aving] the power to make exceptions exclusively in the hands of the Executive"); *Allende*, 845 F.2d at 1118 & n.13.

b. The plain text of these statutes provides no basis for judicial second-guessing of the President's determinations about what restrictions to "prescribe" or what restrictions are necessary to avoid "detriment[] to the interests of the United States." Congress specifically committed those matters to the President's judgment and discretion. Indeed, the statutes "fairly exude[] deference to the [President]" and "appear[] . . . to foreclose the application of any meaningful judicial standard of review," such that it would be inappropriate for this Court to second-guess the the President's restrictions or their basis. *Webster v. Doe*, 486 U.S. 592, 600 (1988); *see also Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999) [hereafter "*AAADC*"] ("The Executive should not have to disclose its 'real' reasons for deeming nationals of a particular country a special threat . . . and even if it did disclose them a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy."). Thus, the President's determinations are "not subject to review." *United States v. George S. Bush & Co.*, 310 U.S. 371, 380 (1940).

c. Historical practice confirms the breadth of and deference owed to the President's authority. For decades Presidents have restricted entry pursuant to §§ 1182(f) and 1185(a)(1) without detailed public justifications or findings; some have discussed the President's rationale in one or two sentences that broadly

declare the Nation's interests.[4] Executive Order No. 12,807—the Presidential action at issue in *Sale*—contained only a single sentence justifying its measures. *See* Exec. Order No. 12,807, pmbl. pt. 4 (May 24, 1992) ("There continues to be a serious problem of persons attempting to come to the United States by sea without necessary documentation and otherwise illegally."). But the Supreme Court expressed no concerns about the adequacy of that finding, instead stating that "[w]hether the President's chosen method" made sense from a policy perspective was "irrelevant to the scope of his authority" under the statute. *Sale*, 509 U.S. at 187-88.

Similarly, in 1979 when President Carter invoked § 1185(a)(1) to restrict Iranian nationals, the Executive Order contained no express findings and delegated the authority to prescribe restrictions to lower Executive Branch officials. *See* Exec. Order No. 12,172, § 1-101 (Nov. 26, 1979). Yet courts refused to invalidate those restrictions. *See Nademi v. INS*, 679 F.2d 811, 813-14 (10th Cir. 1982); *Yassini v. Crosland*, 618 F.2d 1356, 1362 (9th Cir. 1980).

[4] *E.g.*, Proclamation No. 8693 (July 27, 2011); Proclamation No. 8342 (Jan. 22, 2009); Proclamation No. 6958 (Nov. 26, 1996); Proclamation No. 5887 (Oct. 26, 1988); Proclamation No. 5829 (June 14, 1988).

2. Under Any Standard, the Proclamation is Adequately Justified By the President's National Security and Foreign Affairs Judgments

a. The President provided far more detail and explanation for his findings than exist in other Presidential suspensions under §§ 1182(f) or 1185(a). The President imposed the entry restrictions after reviewing the recommendations of the Acting Secretary of DHS, as explained in the Proclamation, and her recommendations were created following a worldwide review that evaluated every country according to neutral criteria.

The President's entry restrictions serve two purposes. First, the restrictions are "necessary to prevent the entry of those foreign nationals about whom the United States Government lacks sufficient information to assess the risks they pose to the United States." *Id.* § 1(h)(i); *id.* § 1(a)-(b) (discussing the importance of foreign countries' information-sharing to the overall security-vetting process). Plaintiffs have no basis to contest the Executive Branch's national-security judgments, and it would be inappropriate for this Court to second-guess them. *See Department of Navy v. Egan*, 484 U.S. 518, 530 (1988) ("courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs").

Second, the restrictions place pressure on foreign governments "to work with the United States to address those inadequacies and risks so that the restrictions and

limitations imposed . . . may be relaxed or removed as soon as possible." *Id.* § 1(h). The utility of entry restrictions as a foreign-policy tool is confirmed by the results of the diplomatic engagement period described in the Proclamation—the prospect of entry restrictions yielded significant improvements in foreign countries' information-sharing practices. *Id.* § 1(e)-(g). These foreign-relations efforts independently justify the Proclamation and yet they are almost wholly ignored by Plaintiffs. *See also Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 115-16 (2013) (noting "the danger of unwarranted judicial interference in the conduct of foreign policy").

b. Plaintiffs argue that the Proclamation fails for the same reasons EO-2 failed before the Ninth Circuit. *See* Hawaii Br. 18-22 (citing *Hawaii*, 859 F.3d at 770-74). But the Proclamation satisfies the standards the Ninth Circuit applied as well.

First, the Ninth Circuit held that EO-2 made "no finding that nationality alone renders entry of this broad class of individuals a heightened security risk to the United States." *Hawaii*, 859 F.3d at 772. But the Proclamation here explains that "[s]creening and vetting protocols" play "a critical role" in protecting United States citizens "from terrorist attacks and other public-safety threats," Procl. § 1(a); that "[i]nformation-sharing and identity-management protocols and practices of foreign governments are important for the effectiveness of th[os]e screening and

vetting protocols," *id.* § 1(b); that each of the eight countries was determined to have "inadequate" practices under DHS's baseline criteria or to present other special circumstances, *id.* § 1(g); and therefore the Proclamation's restrictions are "necessary to prevent the entry of those foreign nationals about whom the United States Government lacks sufficient information to assess the risks they pose to the United States," *id.* § 1(h)(i). These findings necessarily turn on nationality, because it is the inadequacy of the foreign governments' practices concerning their nationals that creates the risk inherent in those persons' entry. *Id.* § 1(b).[5]

Similarly, the Proclamation explains that the entry restrictions are intended to "elicit improved identity-management and information-sharing protocols and practices from foreign governments" going forward. Procl. § 1(h)(i); *see id.* § 1(b). The Ninth Circuit itself acknowledged the rationality of distinguishing among "classes of aliens on the basis of nationality" when necessary "as retaliatory diplomatic measures." *Hawaii*, 859 F.3d at 772 n.13.

Second, the Ninth Circuit faulted EO-2's use of nationality as over-inclusive because it suspended entry even for "nationals without significant ties to the six

[5] The Ninth Circuit also faulted EO-2 for not identifying a "link between an individual's nationality and their propensity to commit terrorism." *Hawaii*, 859 F.3d at 772. To the extent the Ninth Circuit implied that the President must make an individualized risk determination as to each particular national excluded, that would plainly conflict with the statutes here, which permit the President to make categorical determinations.

designated countries[.]" *Hawaii*, 859 F.3d at 773. As the Proclamation explains, however, the "practices of foreign governments are important for the effectiveness of the screening and vetting protocols and procedures of the United States," because these governments "manage the identity and travel documents of their nationals," and "also control the circumstances under which they provide information about their nationals to other governments." Procl. § 1(b). Such practices, however, would apply to all of a foreign government's nationals, regardless of the degree of a foreign national's connection to his or her country of citizenship.

Third, the Ninth Circuit noted that EO-2 did not "make[] any finding that the current screening processes are inadequate." *Hawaii*, 859 F.3d at 773. But the Proclamation expressly contains such a finding; the Acting Secretary conducted the worldwide review "to identify whether, and if so what, additional information will be needed from each foreign country to adjudicate an application by a national of that country . . . in order to determine that the individual is not a security or public-safety threat," Procl. § 1(c), and after being evaluated under that standard, the eight countries here were found to have *inadequate* information-sharing practices or to present other risks, *id.* § 1(g), (i). Furthermore, the President found that the status quo was inadequate to encourage greater cooperation from the eight nations. *See id.* § 1(h)(i) ("These restrictions and limitations are also *needed* to elicit improved

identity-management and information-sharing protocols and practices from foreign governments[.]" (emphasis added)).[6]

3. Plaintiffs' Asserted Limitations on the President's Statutory Authority are Incorrect

Plaintiffs suggest three limitations on the President's statutory authority. None is correct.

a. Plaintiffs first suggest that the President's authority under §§ 1182(f) and 1185(a) should be construed narrowly in light of the non-delegation doctrine. *See* Hawaii Br. 22-24. But this argument is squarely foreclosed by *Knauff*, which rejected a non-delegation challenge to the predecessor version of § 1185(a)(1) because the exclusion of aliens also "implement[s] an inherent executive power." 338 U.S. at 542.

b. Plaintiffs argue that §§ 1182(f) and 1185(a) may be used only to "exclude (1) aliens akin to subversives, war criminals, and the statutorily inadmissible, and (2) aliens who would undermine congressional policy during an exigency in which

[6] Plaintiffs suggest that the President's findings are irrational because, if risk of entry is tied to a particular government's practices, then the restrictions should exclude non-immigrants and immigrants alike. Hawaii Br. 20-21. But as the Proclamation explains, given that immigrants will generally remain in the country longer and are harder to remove, Procl, § 1(h)(ii), it is perfectly rational to determine that they pose greater risks and accordingly to impose further restrictions on their entry.

it is impracticable for Congress to act." Hawaii Br. 24. But these limitations find no basis in the statutes' text, history, or practice, and Plaintiffs' theory would require this Court to find that several prior presidential exercises of this authority were unlawful. President Reagan's suspension of Cuban immigrants in August 1986, which Plaintiffs cite approvingly, Hawaii Br. 27, was issued in response to an event fifteen months earlier, s*ee* Proclamation No. 5517, pmbl. (Aug. 26, 1986)—not an exigency to which Congress could not respond. President Carter's 1979 Executive Order responded to the Iranian hostage crisis, which lasted from November 1979 to January 1981, and was the subject of legislation, *see* Hostage Relief Act of 1980, Pub. L. No. 96-449, 94 Stat. 1967. But no court held that Congressional action eliminated the President's authority to impose restrictions on Iranian nationals. More recently, Presidents have continued to use § 1182(f) not solely to address exigencies, but rather as a tool to encourage foreign nations' cooperation with the United States' objectives. *See, e.g.*, Exec. Order No. 13,662 (Mar. 24, 2014); Proclamation No. 7524 (Feb. 26, 2002); Proclamation No. 6730 (Oct. 5, 1994).

c. Plaintiffs argue the President's authority under § 1182(f) is limited such that he may not "supplant Congress's scheme" under the INA. Hawaii Br. 28-29. But there is no conflict here between the Proclamation and the INA: Congress has set the *minimum* requirements for an alien to gain entry, and has also granted the

President authority to impose *additional* restrictions when he deems appropriate. *See Knauff*, 338 U.S. at 541-42, 545-47.

Plaintiffs' theory is particularly ill-suited to the arena of national security and foreign affairs, which involve delicate balancing in the face of ever-changing circumstances, such that the Executive must be permitted to act quickly and flexibly. *See Zemel v. Rusk*, 381 U.S. 1, 17 (1965); *see also Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 348 (2005). In this setting, courts typically apply the *opposite* presumption: courts will not assume Congress's intent to foreclose the President's authority over national security and foreign affairs unless Congress has specifically expressed that intent. *See, e.g.*, *Jama*, 543 U.S. at 348; *Egan*, 484 U.S. at 530.

Plaintiffs assert that the Government's interpretation of §§ 1182(f) and 1185(a)(1) would mean there is no limit to the President's authority to make immigration policy. Hawaii Br. 28. Whatever outer limits may exist on the President's authority under §§ 1182(f) and 1185(a), however, they are not implicated by the Proclamation here, which addresses core areas of national security and foreign relations, and which *furthers* the INA by ensuring that the Government has the information needed to determine whether aliens present national-security or safety risks.

B. THE PROCLAMATION DOES NOT VIOLATE SECTION 1152(a)(1)

1. There Is No Conflict Between the Non-Discrimination Provision and the President's Suspension Authorities

The non-discrimination provision does not conflict with the President's suspension authorities because the statutes operate in two different spheres. Sections 1182(f) and 1185(a)(1), along with other grounds in Section 1182(a), limit the universe of individuals eligible to receive visas, and then § 1152(a)(1)(A) prohibits discrimination on the basis of nationality *within* that universe of eligible individuals.

The legislative history shows that Congress understood the INA to operate in this manner. The 1965 amendments were designed to eliminate the country-quota system previously in effect, not to limit any of the pre-existing provisions like §§ 1182(f) or 1185(a)(1) addressing entry or protecting security. *See* H. Rep. No. 745, 89th Cong., 1st Sess., at 13 (1965); S. Rep. No. 89-748 at 11 (1965), *as reprinted in* 1965 U.S.C.C.A.N. 3328, 3329-30. The history expressly states that the new immigrant-selection system (now codified in §§ 1151-53) was intended to operate only as to those *otherwise eligible for visas*. *See* H. Rep. No. 745, 89th Cong., 1st Sess., at 12 (1965); S. Rep. No. 89-748, at 13.

Historical practice also confirms this interpretation. President Carter in 1979 directed the Secretary of State and the Attorney General to adopt "limitations and

exceptions" regarding "entry" of "Iranians holding nonimmigrant visas," Exec. Order No. 12,172 (Nov. 26, 1979); *see also Immigration Laws and Iranian Students*, 4A Op. O.L.C. 133, 140 (1979), and subsequently amended that directive to make it applicable to all Iranians. Exec. Order No. 12,206 (Apr. 7, 1980). Although President Carter's Order itself did not deny or revoke visas to Iranian nationals by its terms, he simultaneously explained how the new measures would operate: the State Department would "invalidate all visas issued to Iranian citizens for future entry into the United States, effective today," and "w[ould] not reissue visas, nor w[ould] [it] issue new visas, except for compelling and prove humanitarian reasons or where the national interest of our own country requires."[7] And that is how the State Department implemented it. *See* 45 Fed. Reg. 24,436 (Apr. 9, 1980). Similarly, President Reagan invoked § 1182(f) to suspend immigrant entry of "all Cuban nationals," subject to exceptions. Proclamation No. 5517. And the Supreme Court in *Sale* deemed it "perfectly clear" that § 1182(f) would authorize a "naval blockade" against illegal migrants from a particular country. 509 U.S. at 187.[8]

[7] The American Presidency Project, Jimmy Carter, *Sanctions Against Iran: Remarks Announcing U.S. Actions* (Apr. 7, 1980), https://goo.gl/4iX168.

[8] Even if Plaintiffs were correct that the Government violates § 1152(a)(1)(A) by denying immigrant visas on the basis of nationality, the remedy would be to enjoin the Government from refusing to issue visas on the basis of the Proclamation. In

2. In the Event of a Conflict, the President's Suspension Authorities Would Prevail

Interpreting § 1152(a)(1)(A) as limiting §§ 1182(f) or 1185(a)(1) would require concluding that § 1152(a)(1)(A) impliedly repealed those provisions. But implied repeals are disfavored, and in the event of a conflict between the statutes, the suspension authorities would prevail.

While § 1152(a)(1)(A) was later-enacted with respect to § 1182(f), that is not true for § 1185(a)(1), which was modified to its current form in 1978. *See* Foreign Relations Authorization Act, Fiscal Year 1979, Pub. L. No. 95-426, § 707(a), 92 Stat. 963, 992-93 (1978). Even under Plaintiffs' approach, then, § 1185(a)(1) would prevail over § 1152(a)(1)(A). Plaintiffs also assert that § 1152(a)(1)(A) is "more specific" on the issue of nationality-based discrimination. But there is no indication that Congress intended a rule governing non-discrimination in the issuance of visas by consular officers to supersede the *President's* authority to suspend entry. Section 1182(f) confers special power on the President to suspend entry of aliens, and that unique grant of authority to the President himself is more specific and supersedes § 1152(a)(1)(A)'s general rule governing visa issuance.

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no event would the remedy extend to an injunction compelling the Government to grant individuals *entry* into the United States.

* * * *

If this Court accepted Plaintiffs' interpretation of §§ 1182(f) and 1152(a)(1)(A) as constraints on the President's constitutional powers, even in response to an urgent crisis (*e.g.,* the brink of war with a particular country), then the statutes would raise grave constitutional questions. This Court should reject Plaintiffs' interpretation for that reason alone.

III. THE PROCLAMATION DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

A. THE PROCLAMATION IS CONSTITUTIONAL UNDER *MANDEL*

1. The Supreme Court in *Mandel* held that when the Executive gives "a facially legitimate and bona fide reason" for excluding an alien, "courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the" asserted constitutional rights of U.S. citizens. 408 U.S. at 770.[9] This rule reflects that the Constitution "exclusively" allocates power over the entry of aliens to the "political branches," *id.* at 765 (citation omitted), and that aliens abroad have no constitutional rights at all regarding entry into the country. *See Fiallo*, 430 U.S. at 792-96.

[9] Plaintiffs contend that the Ninth Circuit has rejected *Mandel*'s application to Establishment Clause claims. Hawaii Br. 30 n.10 (citing *Washington v. Trump*, 847 F.3d 1151, 1166 (9th Cir. 2017)). Not so. *See Washington*, 847 F.3d at 1168 (expressly "reserv[ing] consideration" of Plaintiffs' Establishment Clause challenge).

Mandel compels rejection of Plaintiffs' Establishment Clause claim. The Proclamation's entry restrictions rest on facially legitimate reasons: both protecting national security and enhancing the government's leverage in persuading foreign governments to share information needed to screen their nationals. Procl. § 1. The Proclamation also sets forth a bona fide basis for these reasons: after the worldwide review and diplomatic engagement required by EO-2, several nations continued to have inadequate information-sharing practices or otherwise heightened risk factors that warranted entry restrictions. It further explains that, based on the Acting Secretary's recommendations and after consulting with members of the Cabinet, the President "craft[ed] . . . country-specific restrictions that would be most likely to encourage cooperation given each country's distinct circumstances, and that would, at the same time, protect the United States until such time as improvements occur." *Id*. § 1(h)(i). The Proclamation's entry restrictions readily satisfy *Mandel*'s test.

The Supreme Court's decision in *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1693 (2017), describes *Mandel*'s standard as "minimal scrutiny (rational-basis review)." Rational-basis review is objective and does not permit probing government officials' subjective intent or second-guessing the Executive's national-security and foreign-policy determinations. *See W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 671-72 (1981) (rational-basis

standard does not ask "whether *in fact* [a] provision will accomplish its objectives," but whether the government "*rationally could have believed*" that it would do so). That objective rational-basis standard has particular force here, as courts are generally "ill equipped to determine the[] authenticity and utterly unable to assess the[] adequacy" of the Executive's "reasons for deeming nationals of a particular country a special threat." *AAADC*, 525 U.S. at 491.

2. In any event, Plaintiffs do not and cannot show that the Proclamation's stated national-security and foreign-policy rationales are a pretext for a purported ban of Muslims. Plaintiffs rely on this Court's prior conclusion that EO-2 was motivated by religious animus. *See* Hawaii Br. 31. But the allegations against EO-2 cannot justify a similar determination against the Proclamation.

Nearly all of the evidence on which this Court relied in examining EO-2 predates the Proclamation by more than a year and therefore fails to take into account the worldwide review and diplomatic engagement processes that took place after EO-2's issuance. These processes combined the efforts of multiple government agencies and resulted in recommendations from the Acting Secretary of DHS to the President as to necessary entry restrictions to address inadequate information-sharing practices and to encourage foreign governments to cooperate with the United States to address those inadequacies. The processes and the

resulting entry restrictions are more tailored and relate to a different set of countries than those in EO-2.

Plaintiffs cannot plausibly maintain that the numerous government officials involved in these processes were acting in bad faith or harbored anti-Muslim animus, or that the Government's substantial diplomatic efforts were a charade.

B. THE PROCLAMATION IS VALID UNDER DOMESTIC ESTABLISHMENT CLAUSE PRECEDENT

Even in the domestic context, a court deciding whether official action violates the Establishment Clause because of an improper religious purpose looks only to "the 'text, legislative history, and implementation of the statute,' or comparable official act." *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 862 (2005). The court is not to engage in "judicial psychoanalysis of a drafter's heart of hearts." *Id*. Rather, it is only an "official objective" of favoring or disfavoring religion that implicates the Establishment Clause. *Id*.

There is no basis for invalidating the Proclamation under that standard. The Proclamation's text does not refer to or draw any distinction based on religion. And the Proclamation's operation confirms that it is religion-neutral: it applies tailored restrictions to eight countries based on detailed findings regarding the national-security and foreign-policy interests of the United States, and the entry restrictions apply to certain nationals of those countries without regard to their religion.

Plaintiffs assert that an anti-Muslim purpose can be inferred from the Proclamation's restriction on entry of certain nationals from six majority Muslim countries. But the Proclamation omits from its entry restrictions the overwhelming number of majority-Muslim countries, including Sudan and Iraq, both of which were previously included. It is neither surprising nor pernicious that those six majority Muslim countries are included, as five of them were previously identified by Congress or DHS as countries presenting terrorism-related concerns. *See* 8 U.S.C. § 1187(a)(12). In addition, the Proclamation applies entry restrictions to two countries that do not have majority Muslim populations (North Korea and Venezuela), and a third country that has a substantial (approximately 48 percent) non-Muslim population (Chad). *See* CIA, The World Factbook: Africa: Chad.[10] Plaintiffs' assertion also ignores that the entry restrictions in the Proclamation are customized for each nation. Procl. § 1(h).

As this Court correctly recognized, "past conduct" cannot "forever taint" future government efforts. *Hawaii*, 245 F. Supp. 3d at 1236; *see also McCreary*, 545 U.S. at 874. And the specific sequence of events leading to the issuance of the Proclamation—especially the recommendations of the Acting Secretary of DHS after an extensive, multi-agency process—severs any connection between EO-2's

[10] https://www.cia.gov/library/publications/the-world-factbook/geos/cd.html.

supposed religious purpose and the Proclamation. *Cf. Felix v. City of Bloomfield*, 841 F.3d 848, 863 (10th Cir. 2016) (explaining that "curative efforts" can "neutralize" a previously religious message); *Books v. City of Elkhart*, 235 F.3d 292, 304 (7th Cir. 2000) (acknowledging that "subsequent history" can "transform[] [a] religious purpose").

Comparing the Proclamation to the third in a series of Ten Commandments displays at issue in *McCreary* only confirms that the Proclamation does not embody a religious purpose. *McCreary* involved displays with explicitly religious content, whereas the Proclamation has no reference to religion in its terms or its operation. The *McCreary* display contained "no context that might have indicated an object beyond the religious character of the text." 545 U.S. at 868. In contrast, the Proclamation explains its secular purposes, and the context in which it was issued highlights its national-security and foreign-policy objectives.

Lastly, the counties in *McCreary* never "repudiated" the resolutions authorizing the prior Ten Commandments displays, which contained "extraordinary" references to religion. 545 U.S. at 871. Here, in contrast, since EO-2's issuance, the President has, in an official address, praised Islam as "one of the world's great faiths," decried "the murder of innocent Muslims," and emphasized that the fight against terrorism "is not a battle between different faiths." Washington Post Staff, President Trump's full speech from Saudi Arabia on global

terrorism, Wash. Post, May 21, 2017, https://goo.gl/viJRg2. Thus, the Proclamation represents a "genuine change[] in constitutionally significant conditions," *McCreary*, 545 U.S. at 874.

This Court should reject Plaintiffs' suggestion that President Trump is forever disabled from regulating immigration from majority-Muslim countries.

IV. THE REMAINING PRELIMINARY INJUNCTION FACTORS WEIGH AGAINST RELIEF

Plaintiffs have not demonstrated that "irreparable injury is likely in the absence of an injunction." *Winter*, 555 U.S. at 22 (emphasis omitted). The closest Plaintiffs come to alleging concrete harm while the Court considers their claims is their assertion that the Proclamation will prevent or delay their foreign-national family members from entering the United States. But delay in entry alone does not amount to irreparable harm. Visa processing times vary widely, and until the aliens abroad meet the otherwise-applicable visa requirements and seek and are denied a waiver, they have not received final agency action; their claimed harms are too "remote" and "speculative" to merit injunctive relief. *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991).

On the other side of the scales, an injunction would cause direct, irreparable injury to the government and public interest. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers

a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). *A fortiori*, the same principle applies to a national-security and foreign-policy judgment of the President. *Agee*, 453 U.S. at 307; *Sale*, 509 U.S. at 188. The Court should not interfere with, or second-guess, such judgments.

V. A GLOBAL INJUNCTION WOULD BE INAPPROPRIATE

Constitutional and equitable principles require that any injunctive relief be limited to redressing a plaintiff's own cognizable injuries. Article III requires that "a plaintiff must demonstrate standing . . . for each form of relief that is sought." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017). "The remedy" sought therefore must "be limited to the inadequacy that produced the injury in fact." *Lewis v. Casey*, 518 U.S. 343, 357 (1996). Equitable principles independently require that injunctions "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994).

Any injunction the Court enters should be limited to relieving the specific injury of only those Plaintiffs whom the Court determines have a cognizable and meritorious claim and who will suffer irreparable harm in the absence of an injunction. For example, the injunction should not extend beyond the Plaintiffs' identified family members, or identified students or faculty. The claim of a

"message" injury from an asserted Establishment Clause violation is not cognizable at all as a basis for equitable relief, but even that argument provides no basis for relief for a statutory violation beyond the particular individuals affected. An injunction also should not extend beyond Section 2 of the Proclamation; nor should it cover any specific provisions of Section 2 that Plaintiffs do not challenge, such as the entry restrictions for North Korea and Venezuela. *See* Hawaii Br. 10 n.4. The Proclamation's severability clause compels the same approach. Procl. § 8(a).

CONCLUSION

The Court should deny Plaintiffs' motion.

DATED: October 14, 2017 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing memorandum complies with the word limitation specified in Local Rule 7.5(b). The memorandum is set in Times New Roman 14-point type and, according to the word-count facility of the word processing system used to produce the memorandum, contains 8,691 words.

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I hereby certify that, on this 14th day of October, 2017, by the methods 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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