UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, et al.,	)	
Plaintiffs,	)	CIVIL NO. 8:17-cv-00361-TDC
v.	)	
DONALD J. TRUMP, et al.,	)	
Defendants.	)	

AMICUS CURIAE BRIEF OF THE IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF DEFENDANTS AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION AND/OR TEMPORARY RESTRAINING ORDER

CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Immigration Reform Law Institute (IRLI) is a 501(c)(3) not for profit charitable organization incorporated in the District of Columbia. IRLI has no parent corporation. It does not issue stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF *AMICUS CURIAE*

The Immigration Reform Law Institute ("IRLI") is a non-profit 501(c)(3) public interest law firm dedicated to litigating immigration-related cases on behalf of, and in the interests of, United States citizens and legal permanent residents, and also to assisting courts in understanding and accurately applying federal immigration law. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of cases, including *Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, No. 16-5287 (D.C. Cir. filed Sept. 28, 2016); *Matter of Silva-Trevino*, 26 I. & N. Dec. 99 (B.I.A. 2016); *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010); and *In re Q- T- -- M- T-*, 21 I. & N. Dec. 639 (B.I.A. 1996).

IRLI submits this *amicus curiae* brief to assist this Court in understanding the comprehensive statutory scheme that undergirds the President's instant exercise of authority, and to show, against this backdrop, that Plaintiffs are exceedingly unlikely to succeed in their lawsuit.

STATEMENT OF *AMICUS CURIAE*

All of the parties in this case have communicated to *amicus curiae*, in writing, that they do not oppose the filing of this brief. No counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*

curiae, its members, or its counsel, has contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION

To prevail in their motion for a temporary restraining order ("TRO"), Plaintiffs must show that they are likely to succeed on the merits of their claims. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). They have utterly failed to make that showing.

Aside from their constitutional claims, Plaintiffs argue that President Trump's March 6 Executive Order ("March 6 EO") "shares the same core constitutional problems as its predecessor issued five weeks earlier." Plaintiffs' [Amended] Motion for a Preliminary Injunction And/Or Temporary Restraining Order Of The Executive Order & Memorandum of Law In Support Thereof, Doc. No. 95, ("Amended Mtn. for TRO") at 1. Both of these statutory arguments betray a fundamental misunderstanding of the comprehensive statutory scheme Congress has enacted in the Immigration and Nationality Act ("INA"). The INA, moreover, contains numerous sources of authority for the March 6 EO that Plaintiffs fail to discuss at all, or even acknowledge. These glaring defects make Plaintiffs highly unlikely to succeed on the merits of their statutory claims. In addition, because Plaintiffs' constitutional arguments, if successful, would invalidate wide swaths of a comprehensive statutory scheme Congress has enacted pursuant to its plenary

authority over immigration, Plaintiffs also are highly unlikely to succeed on the merits of their constitutional claims.

BACKGROUND

During his campaign, President Donald Trump promised that he would focus on the country's national security and securing the safety of the American people. On January 27, 2017, President Trump kept that promise by signing Executive Order 13769 ("January 27 EO"). The January 27 EO's purpose was clear: the United States government would focus on "detecting individuals with terrorist ties and stopping them from entering the United States." The January 27 EO sought to ensure that those entering the United States did not "engage in acts of bigotry or hatred … or oppress Americans of any race, gender, or sexual orientation."

On January 30, 2017, the state of Washington filed suit in the Western District of Washington. Plaintiffs then brought the present action on February 7, 2017, for Declaratory and Injunctive Relief against the January 27 EO. Prior to the adjudication of the present case, the Western District of Washington granted the state of Washington's temporary restraining order. The Government then requested a stay of the Western District of Washington's order in the Ninth Circuit, but the stay was denied on February 9, 2017.

On March 6, 2016, President Trump signed a new executive order entitled "Protecting the Nation from Foreign Terrorist Entry into the United States." The

March 6 EO revoked the January 27 EO in order to clarify and narrow the categories of aliens affected. The March 6 EO prioritized the safety of Americans by allowing the opportunity to improve the screening and vetting protocols and procedures associated with the visa-issuance process and USRAP (the United States Refugee Admission Program).

The March 6 EO identified characteristics of six countries that demonstrate that their nationals, if admitted to the United States, pose an enhanced risk to our nation's security, including being designated a state sponsor of terrorism; containing active combat zones that make it impossible to provide security against extremist groups; providing terrorists a safe haven; and (combined with conditions such as the foregoing) having such a chaotic governmental structure that background checks on would-be entrants to the United States are extremely difficult or impossible to conduct. President Trump directed a review of what additional information would be needed to adjudicate applications by nationals from these countries to ensure "that the individual is not a security or public-safety threat."

The March 6 EO also recognized that terrorists have used the refugee programs of other nations to commit acts of terror. To better prevent and deter opportunities for terrorists to commit such heinous acts on U.S. soil, the March 6 EO directed the review of USRAP to ensure that those who seek admission to our

country as refugees do not pose a threat to the security and well-being of our citizens. The March 6 EO becomes effective at 12:01 am, eastern daylight time on March 16, 2017.

In response to the March 6 EO, the Plaintiffs filed a First Amended Complaint ("FAC") on March 10, 2017, Doc. No. 93, and filed the Amended Motion for TRO on March 11, 2017, Doc. No. 95.

ARGUMENT

I. THE MARCH 6 EXECUTIVE ORDER DOES NOT CONFLICT WITH EITHER THE IMMIGRATION AND NATIONALITY ACT OR THE ADMINISTRATIVE PROCEDURE ACT.

Plaintiffs allege—as associations, individuals and three purported classes of aliens[1]—that the March 6 EO "purports to deny or delay applications [for immigrant visas] because [sic] Plaintiffs' family members nationality, place of birth and/or place of residence" and thus "on its face mandates discrimination against those who apply for and/or hold immigrant visas on the basis of their nationality, place of birth, and/or place of residence, in violation of 8 U.S.C. § 1152(a)(1)(A), INA § 202(a)(1), which "prohibits discrimination in the issuance of

[1] The FAC fails to allege that any of the three alien Individual Plaintiffs or three citizen Individual Plaintiffs are members or clients of the three named Institutional Plaintiffs—IRAP, HIAS and MESA. The lengthy invocation of alleged harms to the three Institutional Plaintiffs, see FAC ¶¶ 144-181, moreover, never actually identifies by name any "member" who will suffer irreparable harm. The fundamental pleading defects in the FAC raise a serious question of whether the three Institutional Plaintiffs have associational standing to pursue this litigation.

immigrant visas on the basis of race, nationality, place of birth, or place of residence." See FAC Doc. No. 93, Third Claim for Relief, ¶¶ 226-230; *see also* Plaintiffs' Motion for TRO, Doc. No. 95, 23-28 ("[S]uspending visas issuances to nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen … contravenes the INA's prohibition on nationality discrimination and therefore exceeds the President's statutory authority to exclude noncitizens.")

As a general matter, Plaintiffs' sweeping contention that Congress has enacted an absolute ban on the President's using nationality in classifications relating to the issuance of an immigrant visa, a ban covering even a situation such as this – where nationals of certain countries, taken at random, have an enhanced likelihood of being terrorists dedicated to the indiscriminate killing of Americans, and where conditions in those countries make background checks on applicants for entry extremely difficult or impossible – is extremely implausible. Indeed, it was to meet just such then-unforeseen situations as the present one that Congress gave the President such textually-unrestricted power to exclude classes of aliens in the national interest.

8 U.S.C. § 1152(a)(1)(A) only applies to "persons … in the issuance of an immigrant visas" under INA § 204. By its plain terms, § 1152(a)(1)(A) exempts multiple large and varied classes of aliens from its statutory anti-discrimination protections. These exempted alien classifications include, *inter alia*, legal

permanent residents ("LPRs") who are designated special immigrants ("section[] 101(a)(27)"[2]), immediate relatives ("section … 201(b)(2)(A)(i)), family and employment-based allocation preferences and diversity visa beneficiaries ("section … 203"), and aliens barred by restrictions based on per country quotas ("paragraph 2").

None of the three citizen Individual Plaintiffs is protected by INA § 202 (a)(1)(A). Plaintiff Mohomed is applying for immediate relative visas, FAC ¶¶ 206-210, and is not protected by § 1152(a)(1)(A). Plaintiff Harrison is applying for a same-sex fiancé visa for his Iranian spouse. FAC ¶¶ 210-205. Same-sex fiancés are issued non-immigrant conditional visas under INA § 101(a)(15)(K)(1), are not covered by INA § 204, and thus not protected by INA § 202 (a)(1)(A). U.S. citizen Jane Doe #2 is apparently acting as a "sponsor" for her Syrian national sister and derivative family members who are seeking a refugee visa per INA § 207 in an alleged P-2 administrative priority status. FAC ¶¶ 188-194. These refugee visas are not issued pursuant to INA § 204 petitions and thus not covered by INA § 202 (a)(1)(A) antidiscrimination provisions.

The claims of discrimination based on delays in visa processing alleged by the three alien Individual Plaintiffs are also invalid because such delays are

[2] INA § 101(a)(27)(A) ("Definitions"), codified at 8 U.S.C. § 1101(a)(27)(A), designates "an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad" as a "special immigrant."

expressly exempted from the subject anti-discrimination protections by the following clause (B). Clause (B) states,

> Nothing in this paragraph shall be construed to limit the authority of the Secretary of State to determine the procedures for the processing of immigrant visa applications or the locations where such applications will be processed.

8 U.S.C. § 1152(a)(1)(B), INA § 202(a)(1)(B). Plaintiff LPR John Doe #1 alleges (incorrectly) that his "wife will not be interviewed or granted a visa." FAC ¶ 182. In fact, the March 6 EO only delays such visa processing in order to implement added anti-terrorist vetting procedures which clearly are included in the limiting language of § 1152(a)(1)(B). Plaintiff LPR Meteab's relatives (as an LPR he cannot "sponsor" refugees) are applying for refugee visas pursuant to INA § 207, not INA § 204, and thus not covered by INA § 202 (a)(1)(A) anti-discrimination provisions. Plaintiff LPR John Doe #3 does not even allege a delay in processing his wife's immigrant visa as a harm, only that he fears being denied admission as a returning LPR if he makes a short-term visit to Iran. FAC ¶¶ 185-187. John Doe #3's admissibility as a returning LPR is determined under 8 U.S.C. § 1101(a)(13(C), describing a returning LPR as an individual who "shall not be regarded as seeking and admission to the United States for purposes of the immigration laws unless …" the LPR is classified in one of six exceptions, none of which has been pled or even implied in the FAC. John Doe #3 and his Iranian

wife, like all the other Individual Plaintiffs, are not subject to INA § 204 petition procedures and thus are not covered by INA § 202 (a)(1)(A) anti-discrimination provisions.

Disparities in immigrant visa issuance based on religion that might constitute a "disparate impact" if applied to citizens in the domestic context are also exempted by the omission of the word "religion" from the anti-discrimination rule. Since passage of the Chinese Exclusion Act of 1882, 22 Stat. 58, Congress has adopted several dozen immigration statutes that restrict the availability of immigration benefits on the basis of nationality, religion or association. Amicus IRLI is aware of at least two statutes directly granting preferences or priorities to nationals of several of the six designated states that are expressly restricted on the basis of religion. Of particular relevance to aliens such as the Plaintiffs, for whom issuance of an immigrant or nonimmigrant visa might be delayed or subjected to additional vetting under the March 6 EO, is the Syrian Adjustment Act, P.L. 106-378 (2000). The Act granted preferential privileged entry and adjustment of status to LPR classification only to "Jewish nationals of Syria," excluding persecuted Syrian nationals of other faiths. This discriminatory exercise of the plenary power was made by Congress, as opposed to the President, but no objections on First Amendment grounds or of conflict with § 1152(a)(1) were ever raised. Second, the 2008 National Defense Appropriations Act designates Iraqi members of a religious

or minority community that has been identified by the Secretary of State as a persecuted group and whose members have immediate relatives or family-preference relatives in the United States as refugees eligible for priority (P-2) visa processing. *See* P.L. 110-181, title XII, subtitle C, §1243 (2009).

Third, the special aliens registration provisions ("NSEERS"), which was evoked after the 9/11 attacks, and which imposed exceptional appearance requirements only on aliens from Muslim-majority nations, experienced federal litigation similar to the present action. National Security Entry-Exit Registration System, 8 C.F.R. § 264.1. None of the claims that NSEERS was discriminatory in any way other than on the basis of immigration status was accepted by any federal court. *See, e.g.*, *Rajah v. Mukasey*, 544 F.3d 427 (2d Cir. 2008); *Iqbal Ali v. Gonzales*, 502 F.3d 659, 665 (7th Cir. 2007); *Kandamar v. Gonzales*, 464 F.3d 65, 70-74 (1st Cir. 2006).

It is a *reductio ad absurdum* of Plaintiffs' theory that, under it, these three statutory preferences would constitute prohibited religious discrimination under § 1152(a)(1).

More generally, Plaintiffs have chosen to allege their statutory-conflict claims as violations of the substantive and procedural provisions of the Administrative Procedure Act ("APA"). *See* FAC Third, Fifth, and Sixth Claim for Relief, ¶¶ 226-231, 235-244. These APA claims are non-justiciable. The APA

does not provide a cause of action "to the extent that there is involved a … foreign affairs function of the United States, or where agency action is committed to agency discretion by law." 5 U.S.C. §§ 553(a)(1), 701(a)(2).

Moreover, § 701(a)(2) of the Administrative Procedure Act precludes judicial review where agency action is committed to agency discretion by law. The strong presumption of reviewability under the APA notwithstanding, *see Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967), agency action is committed to the agency's discretion and unreviewable when "statutes are drawn in such broad terms that in a given case there is no law to apply," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410, (1971), or there is "no meaningful standard against which to judge the agency's exercise of discretion." *Id.*

Neither 8 U.S.C. § 1152(a)(1)(A) nor any of the statutes governing the suspension of entry or the revocation of visas summarized *infra* imposes any such limitations on the discretion offered the President, including discretion exercised by his Secretaries of Homeland Security or State. *See, e.g.*, 8 U.S.C. §§ 1182(f), 1185(a), 1201(i). Rather, they explicitly confer the widest discretion.

Similarly, while the APA generally requires notice and comment before implementation of a federal action, 5 U.S.C. § 553, in this case the proclamation clearly falls under not one but two statutory exemptions to the notice and comment rule: the "good cause" and "foreign affairs function" exceptions to these APA

requirements. *See* 5 U.S.C. §§ 553(a)(1), 553(b)(3)(B). The exemptions reflect the maxim of international law that the "power to exclude aliens is inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers – a power to be exercised exclusively by the political branches of government." *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972) (quoting *The Chinese Exclusion Case*, 130 U.S. 581, 609 (1889)). Plaintiffs are thus unlikely to succeed on their procedural claim that "actions of Defendants that are required or permitted by Executive Order … were without observance of procedure required by law…." FAC, ¶ 244.

II. A COMPREHENSIVE STATUTORY SCHEME CONFERS BROAD POWER ON THE PRESIDENT TO PROMULGATE THE MARCH 6 EXECUTIVE ORDER.

The INA is "the comprehensive federal statutory scheme for regulation of immigration and nationality." *De Canas v. Bica*, 424 U.S. 351, 353 (1976). These immigration provisions constitute an integral statutory scheme. *See K-Mart Corporation v. Cartier*, 486 U.S. 281 (1988) (the language of a statute should be construed with regard to the wording and design of the statute as a whole); *United States v. Hockings*, 129 F.3d 1069, 1071 (9th Cir. 1997) (same). In the INA, Congress has exercised its plenary authority to delegate enforcement of this comprehensive system of federal immigration laws.

A. General INA provisions authorize presidential action by proclamation to suspend and restrict the entry of any alien under the dual visa and admission stages of lawful entry.

The general rules setting forth executive authority delegated by Congress to the President to restrict the entry or reentry of any alien are found in six interrelated general provisions of the INA:

(1) INA § 215 (a)(1) ("Travel Control of Citizens and Aliens"/ "Restrictions and Prohibitions");

(2) INA § 212(f) ("Excludable Aliens"/"Suspension of entry or imposition of restrictions by President");

(3) INA § 235(a)(1) ("Inspection by Immigration Officers"/"Aliens treated as applicant for admission");

(4) INA § 212(a)(7) ("Excludable Aliens"/"Documentation Requirements");

(5) INA § 221(h) ("Issuance of Visas"/"Nonadmission upon arrival"); and

(6) INA § 221(i) ("Issuance of Visas"/"Revocation of visas or documents").

The first general rule undergirding the EO is INA § 215 (a)(1), a sweeping general exercise of congressional plenary power. 8 U.S.C. § 1185(a)(1). In relevant part, INA § 215 (a)(1) makes it "unlawful for any alien … to enter or attempt … to enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations as the President may prescribe." Both the rescinded and current EOs are clearly "order[s]" from the President that include multiple "limitations" on the legal capacity of certain aliens

"to enter the United States." Since the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. 104-208, 110 Stat. 3009-546 (1996), however, the term "entry" has been replaced with the term "admission." 8 U.S.C. § 1101(a)(13). IIRIRA made millions of aliens unlawfully present in the United States excludable: "An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible." INA § 212(a)(6)(A)(i).

There is a long modern history of presidential use of § 215(a)(1). For example, in 1979 President Jimmy Carter issued an executive order applying entry restrictions only on "Iranians." EO 12172, Delegation of Authority With Respect to Entry of Certain Aliens Into the United States.[3] EO 12172, along with a subsequent April 1980 EO that expanded the presidential exclusion action by

[3] "By virtue of the authority vested in me as President by the Constitution and laws of the United States, including the Immigration and Nationality Act, as amended, 8 U.S.C. § 1185 and 3 U.S.C. § 301, it is hereby ordered as follows: SECTION 1-101. Delegation of Authority. The Secretary of State and the Attorney General are hereby designated and empowered to exercise in respect of Iranians holding nonimmigrant visas, the authority conferred upon the President by *section 215(a)(1) of the Act of June 27, 1952 (8 U.S.C. § 1185)*, to prescribe limitations and exceptions on the rules and regulations governing the entry of aliens into the United States. SEC. 1—102. Effective Date. This order is effective immediately. JIMMY CARTER, The White House, November 26, 1979." (emphasis added).

removing a limitation that the original EO applied only to "Iranians *holding nonimmigrant visas*"; both were expressly implemented pursuant INA § 215.[4]

The second general rule, INA § 212(f), is a sweeping plenary act by Congress delegating to the President the authority to "suspend the entry of any aliens or any class of aliens" by "proclamation." 8 U.S.C. § 1182(f), *Mow Sun Wong v. Campbell*, 626 F.2d 739, 743 (9th Cir. 1980). Suspension of entry may occur "whenever the President finds that [such] entry would be detrimental to the interests of the United States" and continue "for such period as he may deem necessary." Section 212(f) was enacted as part of the 1952 Immigration and Nationality Act ("INA").

The legislative history supports a finding that its scope was intentionally broad. *See* H.R. Rpt. 1365, 82d Cong., 2d Sess., at 53 (Feb. 14, 1952) ("The bill vests in the President the authority to suspend the entry of all aliens if he finds that their entry would be detrimental to the interests of the United States, for such period as he shall deem necessary."). As with § 215, since 1996 the meaning of "entry" in § 212(f) has also been changed by the repeal of the entry definition and its replacement with "admission."

[4] EO 12206, Amendment of Delegation of Authority With Respect to Entry of Certain Aliens Into the United States (Apr. 7, 1980).

While the suspension of entry authority applies to entry "as immigrants or nonimmigrants," § 212(f) further authorizes the President to "impose on the entry of aliens any restrictions he may deem to be appropriate." 8 U.S.C. § 1182(f). So long as those "restrictions" do not constitute a suspension of *all* admissions for the affected class, this restriction authority thus applies on its face to *any* entry, and to all classes of aliens.

To date, no court has identified any limits on Presidential § 212(f) proclamation authority. In none of the approximately 43 uses of § 212(f) proclamation authority between the Reagan and Obama administrations documented by the Congressional Research Service has any court ever questioned the discretion of the president to make the prerequisite finding for a § 212(f) proclamation – that the entry of the disfavored aliens would be "detrimental to the interests of the United States." 8 U.S.C. § 1182(f); Manuel, K.M., *Executive Authority to Exclude Aliens: In Brief*, Table 1, CRS (Jan. 23, 2017).

The only Supreme Court case to address the scope of the § 212(f) proclamation power held that Executive Order 12807 (effective June 1, 1992) (suspending the entry of aliens coming to the United States by sea without required documentation) was authorized pursuant to § 212(f) and did not conflict with U.S. obligations towards refugees under either the INA or the United Nations Convention Relating to the Status of Refugees. *Sale v. Haitian Centers Council*

Inc., 509 U.S. 155, 172 (1993) ("The 1981 and 1992 Executive Orders expressly relied on statutory provisions [§212(f)] that confer authority on the President to suspend the entry of 'any class of aliens' or to 'impose on the entry of aliens any restrictions he may deem to be appropriate.'") That Order had "suspend[ed] the entry" of aliens fleeing Haiti, and ordered interdiction at sea and direct repatriation only for Haitian nationals, without affording them an opportunity to raise claims for asylum or withholding of removal.

As noted in the *Sale* decision, the Eleventh Circuit previously had upheld the President's exercise of §212(f) authority under a 1981 executive order suspending entry through interdiction. *Haitian Refugee Center Inc. v. Baker,* 953 F.2d 1498 (11th Cir 1992). Section 212(f) "clearly grants the President broad discretionary authority to control the entry of aliens into the United States." *Id.* at 1507.

In the Ninth Circuit, the U.S. District Court for the Northern District of California similarly emphasized the breadth of the executive's power over entry under § 212(f) in a post-IIRIRA 1996 decision, stating,

> The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation. When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power.

Encuentro del Canto Popular v. Christopher, 930 F. Supp. 1360, 1365 (N.D. Cal. 1996) (citing *Knauff v. Shaughnessy,* 338 U.S. 537 (1949)).

At the agency level, the Department of State has construed the application of § 212(f) proclamations over departmental functions to be very broad. The State Department's Foreign Affairs Manual considers § 212(f) proclamations as giving the Secretary "authority to identify individuals covered by the presidential proclamation and waive its application for foreign policy or other interests." 9 FAM 302.11-3(B)(1).

Although the § 212(f) proclamation power expressly applies to "any class of aliens as immigrants or nonimmigrants," there may be an effective limitation on its application to lawful permanent resident aliens. When IIRIRA enacted the admission definition at INA § 101(a)(13), it also carved out a set of exceptions to the requirement for mandatory inspection (as "applicants for admission" under INA § 235(a)) applicable to most LPRs returning from a visit abroad of less than 180 days. *See* 8 U.S.C. § 1101(a)(13)(C). The exceptions are relatively narrow, however, as aliens with immigrant visas who apply for admission for the first time are not yet LPRs, and thus remain subject to the presidential proclamation powers in both INA § 212(f) and INA § 215.

In any case, Section 3 of the March 6 EO, unlike rescinded EO 13769, expressly excludes "any" LPR from its coverage.

Next, Congress has mandated not one but two overlapping statutory processes for the regulation of entry. Issuance of a visa only enables an alien to

appear at a port of entry for inspection, and to prove his right to admission, if any. *U.S. ex rel. Strachey v. Reimer*, 101 F.2d 267, 269 (2d. Cir. 1939). This dual character of the entry process is implemented by a third general provision, INA § 235(a)(1). Section § 235(a)(1) mandates that every alien "who arrives in the United States … shall be deemed for purposes of this Act an applicant for admission." 8 U.S.C. § 1225(a)(1). Closely related is INA § 212(a)(7), a fourth general rule that any applicant for admission who is not in possession of a "valid" visa, or has not been granted a waiver from these documentation requirements, is inadmissible. 8 U.S.C. § 1182(a)(7).[5]

These provisions confirm the two-stage nature of alien entry: travel to a port of entry under a visa issued by the Department of State, followed by inspection and admission by the Department of Homeland Security. *See, e.g.*, *Knoetze v. U.S. Dep't of State*, 634 F.2d 207, 212 (5th Cir. 1981) (holding visa revocation and removal are distinct statutory functions of separate departments). In that regard, this Court's attention is invited to INA § 221(h), a fifth general provision establishing that no alien who has been issued an immigrant or nonimmigrant *visa* is thereby entitled to admission, if found inadmissible upon arrival at a port of entry under "any provision of law." 8 U.S.C. § 1201(h).

[5] Related INA § 235(b)(7) further mandates that arriving aliens are "to be removed from the United States without further hearing" if they are inadmissible for failure to comply with the documentation requirements in INA § 212(a)(7) – for example, possession of a valid passport and visa.

Most significant for the exercise of presidential exclusionary power by proclamation is a sixth general statute, INA § 221(i). Section 221(i) is a plenary delegation power by Congress to the Secretary of State of general authority to revoke "at any time, in his discretion" a visa or other entry documentation issued to an alien. 8 U.S.C. § 1201(i). Notice of revocation must be "communicated" to the Secretary of Homeland Security. Upon such communication, the visa becomes invalid from the date of issuance. On its face, § 221(i) "confines neither the consular officer nor the Secretary of State to any reason for revoking, and requires no notice to the alien, no opportunity to respond, nor any procedure for the revocation." Gordon et al., *Immigration Law & Procedure,* §12.06.12[b] (Apr. 2016).

There is a relevant distinction between revocation of a visa by a consular officer, who must provide a ground for revocation pursuant to regulations at 8 C.F.R. § 205, and revocation by the Secretary of State or his delegate, who is not bound by those regulatory limitations. *Noh v. INS*, 248 F.3d 938, 941 (9th Cir. 2001). As the Secretary of State is, in turn, a delegate of the President, and was directed to act in sections 5, 6, 7, and 9 of the March 6 EO, the general revocation power applies.

Section 221(i) is also a court-stripping provision, whereby Congress has barred judicial review of a revocation by any means (including *habeas corpus*),

with one narrow exception: visa revocations occurring "in the context of a removal proceeding if such revocation provides the sole ground for removal under section 237(a)(1)(B)." 8 U.S.C. § 1201(i). When exercised through the Department of State, the president's power of visa revocation by proclamation thus applies to both arriving applicants and admitted aliens alike.

Visa revocation does not strip aliens who were previously lawfully present of a due process right to a deportation hearing in many cases. *See, e.g.*, INA § 237(a)(1)(B): ("Deportable Aliens"/"Present in violation of law") (providing that any alien whose nonimmigrant visa has been revoked per § 221(i) after admission to the United States is deportable.) 8 U.S.C. § 1227(a)(1)(B). As noted *supra*, however, the March 6 EO specifically excludes from its scope, *inter alia*, LPRs and "any foreign national who is admitted to or paroled in the United States on or after the effective date of this order." March 6 EO § 3(a)-(b).

B. Additional specific laws enhance the executive's general authority for designated classes of immigrants, non-immigrants, and visa waiver program users.

IRLI also invites this Court's attention to relevant laws that support the general scheme outlined above, but apply only to certain alien immigrants, non-immigrants, or arriving aliens under the Visa Waiver Program ("VWP"). These provisions modify or limit congressional delegation to the President of authority under the general INA provisions summarized in (B) above.

First, INA § 205 ("Revocation of Approval of Petitions"/"Notice of Revocation; Effective Date"), codified at 8 U.S.C. § 1155, is a specialized plenary enactment by Congress authorizing the Secretary of Homeland Security to "revoke the approval of any petition approved under [INA] section 204." A "petition" is an application for an *immigrant* visa pursuant to detailed procedures in INA § 204. Congress provided that revocation may be ordered "at any time, for what he deems good and sufficient cause" and "shall be effective as of the date of approval." Significantly, visa revocation may occur whether or not the alien is in the United States.

As with the relevant statutes governing issuance and revocation of immigrant visas, Congress has also qualified its plenary delegation of executive branch authority over *non-immigrant* visas in two miscellaneous INA provisions, as well as two other specific statutes that limit the eligibility of aliens for travel to the U.S. or admission under the VWP.

Next, INA § 217(a)(6) ("Visa Waiver Program for Certain Visitors"/"Not a safety threat") bars entry under the VWP for any alien who has *not* been "determined not to represent a threat to the … safety or security of the United States." 8 U.S.C. § 1187(a)(6). The plain language of the text requires an affirmative discretionary act by the Secretary of Homeland Security. A related provision invoked by the President, INA § 217(a)(12) ("Visa Waiver Program for

Certain Visitors"/"Not present in Iraq, Syria, or any other country of concern"), codified at 8 U.S.C. § 1187(a)(12), bars entry under the VWP after March 1, 2011, to nationals of or visitors to Iraq, Syria, and designated "countries of concern," including Iran, Libya, Syria, Sudan or Yemen, absent a waiver by the Secretary of Homeland Security. That waiver in turn requires a secretarial determination "that such a waiver is in the law enforcement or national security interests of the United States." INA §§ 217(a)(12)(A), (C), (D).

For purposes of exclusion by proclamation, the INA § 217(a)(12) ban on VWP entries from the six nations under statutory scrutiny for concerns about inability to screen potential terrorists is closely related to another relevant statute codified in Title 8 but not part of the INA, 8 U.S.C. § 1735 ("Restriction on issuance of visas to nonimmigrants from countries that are state sponsors of terrorism."). Section 1735 restricts the issuance of visas to "any alien from a country that is a state sponsor of terrorism," unless the Secretary of State has determined, in consultation with the Attorney General and heads of other appropriate United States agencies, that such alien does not "pose a threat to the safety or national security of the United States." *Id.* Currently, Syria (1979), Iran (1984), and Sudan (1993) are designated state sponsors of terrorism. *See* https://www.state.gov/j/ct/list/c14151.htm (visited February 8, 2017).

Finally, INA § 207(c)(1) ("Annual Admission of Refugees and Admission of Emergency Situation Refugees"/"Admission of Attorney General of refugees"), conditions the entry of refugees and derivative relatives upon, *inter alia*, the determination by the President of a quota for so-called normal refugee admission, and the discretion of the Secretary of Homeland Security to admit special humanitarian refugees. 8 U.S.C. § 1157(c)(1). Refugee applications from non-designated countries are not accepted. That discretionary power over the admission of refugees (120-day suspension of USRAP) is evoked by Section 6 of the March 6 EO.

A refugee is only conditionally admitted to the United States, and may be placed in removal proceedings even if his refugee status has not been terminated. *Matter of Smirko*, 23 I. & N. Dec. 836, 840 (B.I.A. 2005). Conditionally admitted refugees must resubmit to inspection and admission within one year before earning automatic adjustment of status to LPR. INA § 209(a).

Department of Homeland Security policy does not permit aliens to circumvent statutory refugee application procedures by applying for asylum after travelling to a port of entry on a refugee visa. *See Matter of Pula*, 19 I. & N. Dec. 467 (B.I.A. 1987). The Secretary need not grant asylum even if an applicant meets the definition of a refugee. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 428 (1987). The Secretary of Homeland Security may bar the admission of an alien applying

for asylum at a U.S. port of entry who did *not* apply for refugee status, if he "determines that there are reasonable grounds for regarding the alien as a danger to the security of the United States." INA § 208(a)(2)(A)(iv), 8 U.S.C. § 1158(a)(2)(A)(iv).

The Attorney General has construed this exclusion to apply where the record as a whole demonstrates that the applicant presents "any non-trivial risk" to the national defense, foreign relations, or economic interests of the United States. *Matter of A-H-*, 23 I. & N. Dec. 774, 788, 790 (Att'y Gen. 2005). As that determination is by default made pursuant to individualized expedited screening procedures prescribed for arriving aliens under INA § 235(b)(1), it would be improper for this court to nullify its operation through the extremely broad grant of temporary injunctive relief requested by Plaintiffs.[6]

In summary, for virtually all classes of aliens – other than lawfully admitted permanent residents who are expressly excluded from the classes of aliens subject to the March 6 EO – multiple layers of express statutory authority exist to support all of the temporary restrictions on entry proclaimed by the President under the

[6] INA § 208(a)(2)(C) further authorizes the Secretary of Homeland Security to "establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for *asylum* under paragraph (1)" -- that is, in addition to status as a refugee. These additional conditions may only be imposed by regulation, and thus do not extend to the EO at issue. 8 U.S.C. § 1158(a)(2)(C).

March 6 EO, and even LPRs (who are not subject to the EO) could not claim general exemption from the President's exclusion-by-proclamation authority.

III. THE STATUTORY SCHEME FOR EXPELLING ALIENS BY EXECUTIVE PROCLAMATION DERIVES FROM PLEANARY POWER ASSIGNED IN THE CONSTITUTION TO CONGRESS AND DELEGATED TO THE PRESIDENT, AND IS PRESUMPTIVELY CONSTITUTIONAL.

The United States Constitution, and the Supreme Court's constitutional jurisprudence construing the separation of powers among the three branches of government, strongly undergirds Congress's comprehensive legislative scheme to regulate immigration. The Constitution assigns almost all immigration-related powers to Congress.

> The conditions for entry of every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to terminate hospitality to aliens, [and] the grounds on which such determination shall be based, have been recognized as matters solely for the responsibility of the Congress….

Harisiades v. Shaughnessy, 342 U.S. 580, 596-97, (1952) (Frankfurter, J., concurring).[7] Under Art. I, § 8, cl. 4, the plenary authority of Congress over aliens is not open to question. *INS v. Chadha*, 462 U.S. 919, 940 (1983).

[7] See also *Chae Chan Ping v. United States* (Chinese Exclusion Case), 130 U.S. 581, 604-05, 609 (1889) (finding *congressional plenary power* over immigration based on a cumulative range of enumerated powers over other issues, the structure of the Constitution, and the international law of sovereignty), *Fong Yue Ting v. United States*, 149 U.S. 698, 703 (1893) ("the power to exclude or to expel aliens

Congress has "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden." *Kleineinst v. Mandel*, 408 U.S. 753, 766 (1972) (quoting *Boutilier v. INS*, 387 U.S. 118, 123 (1967)).

"When Congress delegates this plenary power to the Executive, the Executive's decisions are likewise generally shielded from administrative or judicial review." *Cardenas v. United States*, 826 F.3d 1164, 1169 (9th Cir. 2016). In particular, the Supreme Court has "long recognized" that "the power to expel or exclude aliens is 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) (quoting *Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1953)).

The Constitution itself confers no enumerated powers over immigration upon the President. But under Constitution Art. II §§ 1and 2, the President has power to supervise conduct of the executive branch, including the agencies regulating immigration. *INS v. Legalization Assistance Project*, 510 U.S. 1301

... is to be regulated by treaty or *by act of Congress*."); *see, e.g.*, U.S. Const. art. I, § 9, cl. 1 ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited *by the Congress* prior to the Year one thousand eight hundred and eight ... ."); Art. I, § 8, cl. 4 (granting *Congress* the power "to establish a uniform Rule of Nationality"); *Zivitofsky v. Clinton*, 132 S. Ct. 1421, 1436 (2012) (Art. I, § 8, cl. 3, granting *Congress* the power "to regulate Commerce with foreign Nations, and among the several States" includes the power to regulate the entry of persons into this country); *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012) (citing Art.I, § 8, cl. 4 as giving rise to the power over immigration).

(1993). INA § 103 assigns to the Secretary of Homeland Security a duty to enforce all laws relating to immigration, and to guard against "the illegal entry of aliens." 8 U.S.C. § 1103(a)(1), (5). The legislative scheme delegates carefully circumscribed enforcement duties to the executive branch and provides statutory remedies for aliens seeking affirmative relief from removal.

If Plaintiffs were correct in their constitutional claims, large swaths of this comprehensive statutory scheme, repeatedly upheld by the Supreme Court, would be invalid. This result is immensely unlikely. Plaintiffs, therefore, are no more likely to succeed on their constitutional claims than on their statutory ones.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for a preliminary injunction and/or temporary restraining order should be denied.

DATED: March 14, 2017.

\s\ Michael M. Hethmon_____.
MICHAEL M. HETHMON (#15719)
IMMIGRATION REFORM LAW INSTITUTE
25 Massachusetts Ave., NW, Suite 335
Washington, DC 20001
Telephone: (202) 232-5590
Fax: (202) 464-3590
E-Mail: mhethmon@irli.org

Attorney for *Amicus Curiae*

CERTIFICATE OF SERVICE

I certify that a Copy of the *amicus curiae* brief of the Immigration Reform Law Institute was served upon the parties' attorneys via the online CM/ECF system on March 14, 2017.

DATED: March 14, 2017.

\s\ Michael M. Hethmon _____.
MICHAEL M. HETHMON

Attorney for *Amicus Curiae*