No. 17A560

In the
Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,

Applicants,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.,

Respondents.

RESPONDENTS' OPPOSITION TO APPLICATION FOR STAY

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CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, respondents make the following disclosures:

1) The parent corporation of respondent International Refugee Assistance Project is the Urban Justice Center, Inc.

2) Respondents HIAS, Inc., Middle East Studies Association of North America, Inc., Arab American Association of New York, Yemeni-American Merchants Association, Iranian Alliances Across Borders, and Iranian Students' Foundation do not have parent corporations.

3) No publicly held company owns ten percent or more of the stock of any respondent.

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INTRODUCTION

The government asks this Court to stay the preliminary injunction of the ban set forth in Proclamation 9565, 82 Fed. Reg. 45161 (the "Proclamation"), even though the district court already limited the injunction to conform to this Court's prior order, *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080 (2017) (per curiam), by protecting only individuals who can credibly claim bona fide relationships with persons or entities in the United States. The requested stay would upend the status quo, rather than preserve it, and would threaten the plaintiffs with grave and irreversible hardships. It should not be granted.

Exercising its "equitable judgment," the Court refused in June to grant a similar stay that would have allowed enforcement of the Proclamation's predecessor, 82 Fed. Reg. 13209 ("EO-2"), against individuals with bona fide U.S. relationships. The Court explicitly recognized what the government again ignores here: the palpable harms that these bans visit on the plaintiffs and others similarly situated. *See IRAP*, 137 S. Ct. at 2087.

Those harms are even more acute under the Proclamation, which replaces the "temporary pause" set forth in EO-2 with an indefinite ban that more profoundly stigmatizes the plaintiffs and threatens to permanently separate them from their families. On the other side of the balance, the government advances the same generalized interests it did in its last stay application. Because the impending harms to the plaintiffs and others similarly situated are greater, and the

government's asserted interests are no different, the equities now tip even more decidedly in the plaintiffs' favor.

Further, preserving the status quo by leaving the preliminary injunction in place does nothing to inhibit the robust vetting process currently in effect—under which visa applicants already bear the burden of proving eligibility. Nor does it limit the government's authority to refuse a visa or to deny entry when an individual's identity is in question or when an individual presents a potential threat to national security. The government has not made an equitable showing that could possibly justify a stay here, given the Court's resolution of its earlier stay application.

The government is also unlikely to succeed on the merits of its challenge to the district court's preliminary injunction. The government attempts to divorce the Proclamation from its history and context, in large part because certain agencies carried out a review and recommendation process before the President issued the third iteration of the ban. But that process does not wipe away the history of the President's efforts to ban Muslims, especially given the remarkable similarity between the current ban and its predecessors; EO-2's directives, which effectively "pre-ordained" the outcome of the review-and-recommendation process; the acknowledged, post-hoc manipulation of the results of the process, yielding an even more pronounced and differential impact on Muslims than the process purportedly had prescribed; and the President's own statements "cast[ing] the Proclamation as the inextricable re-animation of the twice-enjoined Muslim ban." Addendum to

Stay Application ("Add."), at 76, 83. The district court was right to rely on the probative, uncontested evidence of the Proclamation's purpose and effect, and right to conclude it is likely to be held unconstitutional.

The Proclamation also violates the Immigration and Nationality Act ("INA"). It discriminates on the basis of national origin in direct violation of 8 U.S.C. § 1152(a)(1)(A), as the district court found, and it also exceeds the President's statutory authority under 8 U.S.C. § 1182(f) by unilaterally replacing Congress's detailed admissions system with one designed by the President. The government's breathtaking position—that the President can override Congress at will, recrafting the immigration system however he sees fit regardless of the Congressional judgments embodied in the INA—is anathema to the separation of powers.

This case remains pending in the court of appeals, with oral argument before the en banc court scheduled for December 8. The government has failed to demonstrate any reason why a stay is necessary now, less than two weeks before argument, and after nearly ten months of continuous protection for the individuals covered by the district court's injunction. The application should be denied.

STATEMENT

The Proclamation is the third order the President has signed this year banning more than one hundred million individuals from Muslim-majority nations from coming to the United States. *See generally* Add. 5-21 (district court findings of fact). Unlike its predecessors issued in January and March, the current

Proclamation, issued in September, seeks to impose a ban without any temporal limit.

On October 17, the district court held that the Proclamation likely violates the INA and the Establishment Clause, and preliminarily enjoined its enforcement as to "individuals who have a credible claim of a bona fide relationship with a person or entity in the United States." Add. 88 (internal quotation marks omitted). The government appealed the preliminary injunction and sought a stay from the court of appeals. The court of appeals expedited the appeal, setting the government's requested schedule, and will hear oral argument en banc on December 8. The stay motion was fully briefed as of October 30 and has not been ruled on.

1. The preliminary injunction currently on appeal in the Fourth Circuit maintains a well-established status quo. Between February 3 (one week after the first order was signed) and June 26, the ban provisions of the relevant executive orders were enjoined in all their applications.[1] On June 26, this Court granted the government's application to stay the preliminary injunctions that were then in effect, but only "with respect to foreign nationals who lack any bona fide relationship with a person or entity in the United States." *IRAP*, 137 S. Ct. at 2087.

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[1] *See Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (per curiam) (affirming injunction of ban provisions in January 27 Executive Order, 82 Fed. Reg. 8977 ("EO-1")); *Int'l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 545 (D. Md.) (preliminarily enjoining ban provision in EO-2), *aff'd in relevant part*, 857 F.3d 554, 577 (4th Cir.) (en banc), *vacated as moot*, 86 USLW 3175 (U.S. Oct. 10, 2017); *Hawai'i v. Trump*, 245 F. Supp. 3d 1227 (D. Haw.), *aff'd in relevant part,* 859 F.3d 741 (9th Cir. 2017) (per curiam), *vacated as moot*, 86 USLW 3199 (U.S. Oct. 24, 2017).

The injunctions remained in place "with respect to respondents and those similarly situated"—and thereby prohibited the government from enforcing the ban "against foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States." *Id.* at 2087-2088. EO-2's 90-day ban ran its entire course with that restriction in place, and "expired by its own terms on September 24." 86 USLW 3175.

On the day that EO-2 expired, the President signed the Proclamation, which set forth visa issuance and entry restrictions on nationals of eight countries. The Proclamation indefinitely suspends the issuance of all immigrant visas and various non-immigrant visas for nationals of Chad, Iran, Libya, North Korea, Somalia, Syria, and Yemen, as well as some non-immigrant visas for individuals associated with certain government agencies in Venezuela. While the Proclamation took immediate effect in most respects, the President deferred the effective date of the new ban for over three weeks as to individuals with bona fide relationships with United States persons or entities. During that deferral period, plaintiffs in these consolidated cases and elsewhere sought and obtained court orders preventing the Proclamation's new ban from going into full effect. The district court below patterned its preliminary injunction on this Court's June 26 order, preventing enforcement of the Proclamation with respect to individuals (other than nationals of North Korea and Venezuela) "who have a credible claim of a bona fide relationship with a person or entity in the United States." Add. 88 (internal quotation marks omitted).

Thus, because of court orders, including this Court's June 26 order, and the President's choices, the individuals protected by the preliminary injunction have continuously been exempt from any ban since February 3.

2. The individual plaintiffs in this litigation are U.S. citizens and lawful permanent residents whose relatives—including spouses, parents, and children—will be unable to obtain visas if the Proclamation takes effect. The organizational plaintiffs—which include legal and social services organizations and associations of scholars, merchants, and young people—have similarly situated members and clients. As the district court recognized, the organizational plaintiffs are also injured in their own right. Add. 27-28.

Several of the plaintiffs have relatives who are gravely ill and are seeking urgent family reunification that will be prevented by the Proclamation. *See, e.g.*, CA4 J.A. 1245-1246 (critically ill infant), 1256 (father-in-law with cancer), 591 (husband with terminal cancer). Some of the plaintiffs' loved ones have little connection with their country of nationality, but are excluded nonetheless. *See, e.g.*, Add. 51 (Syrian national who has never been to Syria). And several plaintiffs fear that if the Proclamation takes effect, their loved ones will have no choice but to return to countries where they face grave danger. *See, e.g.*, CA4 J.A. 611-613, 1159, 1250, 1266.

3. The record contains repeated promises by President Donald Trump to ban Muslims from the United States, beginning with his "Statement on Preventing Muslim Immigration" during his electoral campaign, which called for "a total and

complete shutdown of Muslims entering the United States." Add. 67. He justified those promises with assertions that "Islam hates us" and "we're having problems with the Muslims, and we're having problems with Muslims coming into the country." Add. 5. Subsequently, he explained that he would use geography as a proxy for religion, "talking territory instead of Muslim," because "[p]eople were so upset when I used the word Muslim." Add. 6; s*ee generally* CA4 J.A. 987-988; Amicus. Br. of MacArthur Justice Ctr. (Doc. No. 87, 4th Cir. filed Nov. 15, 2017); Amicus. Br. of Civil Rights Orgs. at 9-17 (Doc. No. 91-2, 4th Cir. filed Nov. 17, 2017).[2]

On his eighth day in office and with "no consultation with the Department of State, the Department of Defense, the Department of Justice, or the Department of Homeland Security," the President signed the first ban order, EO-1. *IRAP*, 241 F. Supp. at 545. EO-1 "appeared to take th[e] exact form" that President Trump had promised as a candidate: a nationality-based ban overwhelmingly impacting Muslims. *IRAP*, 857 F.3d at 594. EO-1 also invoked the term "'honor' killings," a "well-worn tactic for stigmatizing and demeaning Islam" that President Trump had repeatedly employed as a candidate and that has nothing to do with international terrorism. *Id.* at 596 n.17. And the order provided preferential treatment for religious minorities, which the President explained, on the day he signed the order,

[2] The President adopted this nationality-based approach based on the recommendation of an "immigration commission" whose explicit task was to "look at the 'Muslim ban'" and come up with a way to implement it "legally." No. 16-1436 IRAP Br. 2.

was designed to give Christians priority over Muslims. *Id.* at 576; *see also id.* at 632-633 (Thacker, J., concurring).

The second iteration of the ban, signed after EO-1 was enjoined and the government decided to stop defending it, reproduced the original in most respects, including its 90-day ban period and its reference to honor killings. EO-2, like EO-1, directed reviews of the information other countries share with the United States to facilitate vetting of visa applicants. EO-2 § 2(a)-(b); *see* EO-1 § 3(a)-(b). It further directed that, once the vetting review was complete, the Secretary of Homeland Security "shall" submit "a list of countries" to be subjected to an *indefinite* ban. EO-2 § 2(e)-(f); *see* EO-1 § 3(e)-(f).

4. While the Department of Homeland Security was undertaking the review and recommendations required by EO-2, the President repeatedly issued public statements promising to put a "tougher version" of the ban into place. Add. 14-15; *see id.* (describing EO-2 as "watered down" and "politically correct"); CA4 J.A. 789-792. The White House also put an individual in charge of the Department of Homeland Security's task force on implementing executive orders, including EO-2's directives, who said in 2014 that a blanket ban on visas for Muslim-majority countries is one of "these sort of great ideas that can never happen,"[3] and who

[3] Eric Hananoki, *New DHS Senior Advisor Pushed "Mosque Surveillance Program," Claimed that Muslims "By-And-Large" Want to Subjugate Non-Muslims*, Media Matters (Mar. 14, 2017), https://www.mediamatters.org/research/2017/03/14/new-dhs-senior-adviser-pushed-mosque-surveillance-program-claimed-muslims-and-large-want-subjugate/215634.

recently asserted that a notorious mass shooter was simply "a Muslim who is following the strictures of Islam."[4]

As directed, the Department of Homeland Security submitted a list of countries to ban. And on September 24, the President issued the indefinite ban that EO-2 envisioned: the Proclamation.

The Proclamation, like the first two bans, would largely ban Muslims. Five of the six countries banned in both EO-1 and EO-2—Iran, Libya, Somalia, Syria, and Yemen—are also banned in the Proclamation. One Muslim-majority country—Sudan—was dropped; another—Chad—was added. North Korea was also added, along with individuals affiliated with certain government agencies in Venezuela. The Proclamation bans immigrant visas, which lead to permanent resident status and the possibility of U.S. citizenship, from each designated country except Venezuela. Restrictions on nonimmigrant visas vary among the banned countries. *See* Add. 17-19; CA4 J.A. 511, 868-869 (charts comparing bans for each country).

Chad and the five countries banned by the Proclamation, EO-1, and EO-2, are majority-Muslim, and have a combined population of approximately 150 million. Add. 20; CA4 J.A. 852-859. Almost everyone whom the Proclamation will prevent

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[4] Noah Lanard, *A Fake Jihadist Has Landed a Top Job at Homeland Security*, Mother Jones (Nov. 1, 2017), http://www.motherjones.com/politics/2017/11/a-fake-jihadist-has-landed-a-top-job-at-homeland-security/. This individual's role overseeing executive order implementation at DHS came to light on November 1, after the district court issued its decision, so the relevant sources are not in the record below.

from obtaining visas or entering the United States is from one of those six nations—which collectively are approximately 95% Muslim. CA4 J.A. 234-248.

In contrast, virtually no one from North Korea or Venezuela—the two countries named in the Proclamation that are not majority-Muslim—will be affected. North Korea accounts for a negligible number of visas. Add. 74 (district court observing that North Koreans will represent "a fraction of one percent of all those affected by the Proclamation"). And for Venezuela, only officials of particular government agencies and their families are banned, and then only from obtaining tourist or temporary visas. To illustrate, if it had been in effect in 2016, the Proclamation would have barred 12,998 Yemenis, 7,727 Iranians, 9 North Koreans, and no Venezuelans from obtaining immigrant visas. CA4 J.A. 868.

To justify the bans, the Proclamation asserts that countries were assessed against a set of "baseline" criteria. Yet the Proclamation acknowledges that Somalia (a majority-Muslim country) was banned even though it satisfies the government's baseline criteria, and that Venezuela (a country that is not majority-Muslim) was effectively exempted even though it fails to meet the baseline. Proclamation §§ 2(f), 2(h).[5] Moreover, the study's criteria were not applied uniformly. *See* CA4 J.A. 1283-1300 (David Bier, *Travel Ban Is Based on Executive Whim, Not Objective Criteria*, Cato Institute, Oct. 9, 2017) (explaining, for example,

[5] The Proclamation states that the government has other ways of verifying Venezuelans' identity. But it does not suggest that Venezuela is unique in that regard. *See* CA4 J.A. 1300 (David Bier, *Travel Ban Is Based on Executive Whim, Not Objective Criteria*, Cato Institute, Oct. 9, 2017) (observing that "there is absolutely no doubt that this factor applies to all eight travel ban countries").

that more than 80 countries fail to issue electronic passports, yet three of the banned Muslim-majority countries do issue such passports); Br. of Cato Institute, *IRAP v. Trump*, No. 17-2231 (Doc. No. 94-1, 4th Cir. filed Nov. 17, 2017).

The Proclamation is premised on the government's asserted need for additional information from foreign governments about visa applicants. However, like its predecessors, the Proclamation does not acknowledge the statutory vetting system under which individuals bear the burden of establishing their identity and admissibility, and under which consular officials must deny visas where such information is lacking. *See* 8 U.S.C. §§ 1201(g), 1361. It also does not cite any visa vetting failures or otherwise explain how the President concluded that existing vetting procedures were or might be inadequate.

The Proclamation's criteria for evaluating countries, meanwhile, are virtually the same as the factors Congress established for participation in a program permitting *visa-less* travel to the United States—the Visa Waiver Program. *See infra* n.14. Congress has not applied those requirements to travel *on visas*. In fact, the statutory system imposes no information-sharing requirements that foreign governments must meet for their nationals to access the ordinary, individualized visa system.

A sworn declaration by a bipartisan group of 49 former national security officials explains that the ban "does not further . . . U.S. national security" because of the "rigorous system of security vetting" already in place, and will instead "cause serious harm" to national security. CA4 J.A. 897-898, 901.

5. The district court concluded that the Proclamation's nationality-based ban on the issuance and use of immigrant visas likely violates the INA's anti-discrimination provision, 8 U.S.C. § 1152(a). Add. 42-48 (rejecting the government's distinction between visa issuance and entry). The court declined to hold the rest of the Proclamation invalid under 8 U.S.C. § 1182(f) at this stage, but it noted that "[i]f there is an example of a § 1182(f) order, past or present, that exceeds the authority of that statute, it would be this one." Add. 59.

The district court then held that the Proclamation likely violates the Establishment Clause. Add. 61-84. In light of the President's statements, the content of EO-1 itself, and other publicly available evidence of its purpose and effect, the district court concluded "that the purpose of EO-1 was to accomplish, as nearly as possible, President Trump's promised Muslim ban" by banning travel and immigration from Muslim-majority countries. Add. 68-69 (internal quotation marks omitted). The district court further concluded, relying again on publicly available evidence and the order itself, that in the second iteration "the core policy outcome of a ban on entry of nationals from the Designated Countries remained intact, that EO-2 continued to have the same practical mechanics of a Muslim ban by another name that President Trump had so publicly described, and that the national security rationale, under the circumstances, represented at most a secondary purpose for the travel ban." Add. 71.

Finally, relying once more on publicly available evidence, from not only the campaign but from the President's tenure, and the text of the Proclamation itself,

the district court found that the plaintiffs are likely to succeed on the merits of their Establishment Clause claim against the Proclamation. The district court rejected the government's argument that the Proclamation's "review process" or the "inclusion of two non-majority Muslim nations" negated the ample evidence of improper purpose and effect. Add. 74, 76. The district court explained that the Proclamation arose from EO-2's criteria for banning countries and from EO-2's requirement that the review process yield a list of banned countries. Add. 80. It observed that the "underlying architecture of [EO-1, EO-2,] and the Proclamation is fundamentally the same." Add. 75. And it canvassed public statements by the President since EO-2, which showed that "even before President Trump had received any reports on the DHS Review," he "had already decided that the travel ban would continue." Add. 82. The court concluded that "the Proclamation [i]s the inextricable re-animation of the twice-enjoined Muslim ban," only this time it is "no longer temporary." Add. 83.

Accordingly, the district court issued a preliminary injunction prohibiting the government from enforcing Section 2 of the Proclamation. The preliminary injunction does not cover North Korea and the limited group of Venezuelans subject to the ban. Add. 89. The district court also limited the injunction's protection to "those individuals who have a credible claim of a bona fide relationship with a person or entity in the United States," relying explicitly on the equitable balance

that this Court struck in its June 26 decision.[6] Add. 88 (internal quotation marks omitted).

ARGUMENT

The government bears a "heavy burden" in justifying the "extraordinary" relief of a stay. *Whalen v. Roe*, 423 U.S. 1313, 1316 (1975) (Marshall, J., in chambers). And the applicant's burden is particularly demanding where, as here, the court of appeals has not yet rendered an opinion. "When a matter is pending before a court of appeals, it long has been the practice of members of this Court to grant stay applications only upon the weightiest considerations." *Fargo Women's Health Org. v. Schafer*, 507 U.S. 1013 (1993) (O'Connor, J., concurring) (citation omitted) (denying stay where appeal was expedited and oral argument scheduled within two weeks).

A stay is not warranted here. The government seeks to dramatically reverse the status quo, immediately imposing severe injuries on plaintiffs and thousands of others. But it has offered no persuasive reason for this Court to second guess the "equitable balance" it struck when it denied the government's last stay application with regard to the same category of individuals. *IRAP*, 137 S. Ct. at 2089. Nor is the district court's judgment likely to be reversed if and when this Court reviews it. *See Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010).[7] The Proclamation violates

[6] The plaintiffs have cross-appealed that limitation, but have not sought interim relief with respect to the cross-appeal.

[7] Because the Court previously granted certiorari, and because the issues in this case are important, at this stage the plaintiffs do not contest that there is "a

the INA's antidiscrimination mandate and rewrites the fundamental premise of Congress's visa scheme. And, like its predecessor EO-2, the new ban disfavors Muslims and denigrates their faith in violation of the Establishment Clause. No stay is warranted.

I. THE GOVERNMENT HAS NOT DEMONSTRATED ANY CHANGE IN THE BALANCE OF THE EQUITIES THAT COULD JUSTIFY A STAY.

The government's stay application seeks to overturn the status quo that has remained constant for the past 10 months. Since the President's first attempt to institute a ban was enjoined on February 3, no version of the ban has been permitted for noncitizens with a credible claim of a bona fide relationship with a U.S. person or entity. And in its disposition of the government's motion for a stay of the injunction of EO-2 in this very case, this Court left in place nationwide injunctions premised on the recognition that the hardships imposed on the plaintiffs, and those similarly situated, "were sufficiently weighty and immediate to outweigh the Government's interest in enforcing" EO-2's ban. *IRAP*, 137 S. Ct. at 2087. The Court concluded that the government's interest justified a stay only with respect to noncitizens who could not make "a credible claim of a bona fide

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reasonable probability" that the Court will grant certiorari should the Fourth Circuit affirm the district court's injunction. *Cf. Hollingsworth*, 558 U.S. at 190 (listing stay factors). The plaintiffs note, however, that the Fourth and Ninth Circuits have yet to rule, and those decisions may cast this question in a different light; and moreover, factual developments could forestall review, as happened with EO-1 and EO-2.

relationship with a person or entity in the United States." *Id.* at 2088. Nothing about the Proclamation shifts this balance.

The government in essence asks this Court to grant the complete stay it previously declined to issue in the EO-2 litigation. But in asking for extraordinary relief altering the status quo, the government offers no good reason to think there is any urgent need to ban close family members of U.S. persons and others with bona fide relationships under the Proclamation—or that the equitable balance now favors a broader stay. The existing visa scheme still allows the government to deny entry to anyone who fails to provide sufficient information to qualify for entry or who the government has reason to believe poses a national security threat. In fact, the harms the Proclamation inflicts on the plaintiffs and others in the United States are, if anything, more severe this time, and the government's asserted interests are not meaningfully different. No stay is warranted.

1. As this Court previously recognized, the injuries inflicted on the plaintiffs and others similarly situated have at every stage of this litigation been crucial to the courts' "exercise of equitable discretion." *IRAP*, 137 S. Ct. at 2087-2088. Those harms have only become more severe since this case was last before the Court. What the government portrayed as a "pause" under EO-2 has now been transformed into an indefinite and potentially permanent ban under the Proclamation. The current appeal is unlikely to be fully resolved within 90 days, so a stay would last much longer than with the June application. And the ban's

indefinite nature would multiply the uncertainty and distress suffered by individuals and entities throughout the United States.

The government's motion for stay once again ignores the impact of being separated, possibly forever, from spouses, family members, friends, and colleagues—reducing the personal importance of these relationships to mere abstractions. They are not. *See IRAP*, 857 F.3d at 585 ("From Doe #1's perspective, the Second Executive Order does not apply to arbitrary or anonymous 'aliens abroad.' It applies to his wife.").

In many cases even a short delay could be devastating to these plaintiffs and their relatives. For example, Plaintiff Muqbil is a U.S. citizen married to a Yemeni national. CA4 J.A. 1244. When their 13-month-old daughter's medical condition (spina bifida) worsened, Mr. Muqbil had to bring her to the United States for treatment, while his wife and older daughter waited in Egypt for a visa. *Id.* at 1245. Since arriving in the United States, his younger daughter has undergone several life-threatening surgeries, and doctors expect that she will have to undergo several more. *Id.* at 1246. If the Proclamation goes into effect, Mr. Muqbil and his younger daughter will continue to struggle through this situation while indefinitely separated from his wife and older daughter. *Id.* at 1247.

Many plaintiffs face similarly unbearable circumstances. IAAB Plaintiff Jane Doe #5 is a 79-year-old lawful permanent resident of the United States who lives in Maryland with her 90-year-old husband. CA4 J.A. 1170-1171. She uses a wheelchair, and her husband has significant health problems. *Id.* at 1171. Her

youngest son, an Iranian national, is awaiting final approval for an immigrant visa. *Id.* Plaintiff Doe #5 fears she will never see him again if the Proclamation goes into effect. *Id.*; *see also, e.g.*, CA4 J.A. 1256 (plaintiff whose father-in-law has cancer); 591 (plaintiff whose husband has terminal cancer).

Several plaintiffs fear that if the Proclamation takes effect, their loved ones will have no choice but to return to countries where they face grave danger. For example, Plaintiff Eblal Zakzok's eldest daughter would be forced to remain in Turkey, where she has no legal status. CA4 J.A. 1250–1252. She faces the danger of being sent back to Syria, where her father was detained and tortured by the Syrian regime. *Id.* And the Arab-American Association of New York has clients whose relatives are stranded in war zones in both Syria and Yemen. CA4 J.A. 568-570; *see also, e.g.*, CA4 J.A. 1159, 1250, 1266 (other examples).

The plaintiffs also understand and experience the Proclamation as a condemnation of their religion and a clear message "from the highest elected office in the nation" that they "are outsiders, not full members of the political community." *See IRAP*, 857 F.3d at 604, 605 (quoting *Santa Fe Indep. Sch. Dist. V. Doe*, 530 U.S. 290, 309 (2000)). Plaintiff Fahed Muqbil feels "'as if I and my fellow American Muslims are unwanted, different, and somehow dangerous' as a result of the Proclamation." Add. 34. IRAP Plaintiff Jane Doe No. 2 has experienced depression and doubt about whether to remain in the United States because of the ban's anti-Muslim message. Add. 33. The ban makes Plaintiff Afsaneh Khazaeli

"feel like a 'second-class citizen' in this country." *Id.* And IAAB Plaintiff Jane Doe No. 2 likewise feels she is "being treated as an outsider in my own country." *Id.*

The government, seeking to discount the plaintiffs' injuries, simply recycles the same arguments from its last stay application. Stay Application ("App."), at 38; *compare* No. 16A1190 App. Stay 37-38. But this Court previously declined to stay the injunctions as to individuals with bona fide U.S. ties—the same individuals protected by the injunction at issue here. And the Proclamation, because it is indefinite and potentially permanent, imposes even more severe injuries than those caused by EO-2, which "were sufficiently weighty and immediate to outweigh the Government's interest in enforcing" EO-2's ban. *IRAP*, 137 S. Ct. at 2087.

2. The government invokes harms on its side of the balance that are strikingly similar to those it claimed in its previous stay application. Once again, it invokes a *per se* injury from a presidential order being enjoined and generalized interests in "national security and . . . foreign relations." *Compare* App. 35-38 *with* No. 16A1190 App. Stay 33-34 (similar).

The government's principal argument to distinguish this stay application from the last one is to assert that there is now "a Presidential determination concerning the adequacy of foreign governments' information-sharing" based on cabinet-level review and recommendations. App. 37. But it does not explain how that could alter the *equitable* balance. The government argued that the last ban, too, was based on a "formal national security determination by the President of the United States" based on the recommendation of "Cabinet-level officials." No.

16A1190 App. Stay 3, 33. Nor does the government explain how the "temporary" nature of EO-2, App. 37, *helps* the government on this application—on the contrary, the fact that this ban is indefinite and potentially permanent markedly tips the balance in plaintiffs' favor and in favor of maintaining the status quo.

3. The government also criticizes the district court for concluding that the preliminary injunction will not impair the government's ability to protect national security while this litigation is pending. App. 36-37. But the government has not offered any evidence that the ban would avert any security threat, or any reason to believe that such evidence exists. And as always, where consular or border officials entertain any doubts about an individual's admissibility, they can deny the visa or admission. 8 U.S.C. §§ 1201(g), 1361; 9 FAM 306.2-2(A)(a)(1); 8 C.F.R. § 235.1(f)(1); 22 C.F.R. § 40.6.

The record evidence supports the district court's conclusion. The government's own intelligence analysts concluded that citizenship is an unreliable indicator of terrorist threat, and that more screening would have little to no impact in preventing terrorism. *IRAP*, 857 F.3d at 575, 596. Nothing in the Proclamation undermines that basic premise. Similarly, a sworn declaration by a bipartisan group of 49 former national security officials explains that the ban "does not further . . . U.S. national security" in light of the existing "rigorous system of security vetting" already in place, and will instead "cause serious harm" to national security. CA4 J.A. 897, 898, 901.

Furthermore, the injunction does not interfere with the wide range of other tools that Congress has made available to the President to address security concerns relating to travel and entry of non-citizens. Indeed, the government has *already* slowed the issuance of visas to nationals of the countries targeted by the ban, a development that continued even while EO-2 was fully enjoined and that may reflect heightened screening requirements for visas.[8] *See* Amicus Br. of T.A. 24-25 (Doc. No. 78, 4th Cir. filed Nov. 9, 2017). The government has also continued to institute new measures directed at groups of Muslim-majority countries. For example, it imposed additional rules for air passengers departing from ten airports in Muslim-majority countries and arriving in the United States.[9] And it has instituted a mandatory review of a visa applicant's social media accounts if the applicant has been to a territory controlled by ISIS.[10]

4. The government's interests are, if anything, weaker than the last time this case was before the Court. For one thing, it no longer asserts that a ban is

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[8] Memorandum for the Sec'y of State, the Att'y Gen., the Sec'y of Homeland Sec. (Mar. 6, 2017), https://www.whitehouse.gov/the-press-office/2017/03/06/memorandum-secretary-state-attorney-general-secretary-homeland-security; Dep't of State, Supplemental Questions for Visa Applicants, https://tr.usembassy.gov/wp-content/uploads/sites/91/2017/05/DS-5535-Supplemental-Questions-for-Visa-Applicants.pdf.

[9] DHS Fact Sheet: Aviation Security Enhancements for Select Last Point of Departure Airports with Commercial Flights to the United States, *available at* https://www.dhs.gov/news/2017/03/21/fact-sheet-aviation-security-enhancements-select-last-point-departure-airports-01.

[10] *See, e.g.*, Michael D. Shear, Trump Administration Orders Tougher Screening of Visa Applicants, N.Y. Times (Mar. 23, 2017), *available at* https://www.nytimes.com/2017/03/23/us/politics/visa-extreme-vetting-rex-tillerson.html.

necessary to free up resources to conduct a review—a justification this Court specifically noted in its June order. *See IRAP*, 137 S. Ct. at 2086.[11]

Moreover, even more time has now elapsed since the President first sought to impose a broad nationality ban—some ten months as of the date of this filing—and the government still has not developed any evidence or allegation of actual urgency, particularly with respect to the group of people protected by the preliminary injunction. Far from "depart[ing] from the status quo," App. 37, the preliminary injunction simply preserves it. There was no ban on individuals with bona fide relationships in place when the district court issued its preliminary injunction, nor has there been since February. And apart from the days that EO-1 was in effect, there is no "historical practice," *id.*, that the Proclamation resembles. Just the opposite: This country has not had a nationality-based visa system for fifty years, and has had individualized visa vetting for almost a century. *See* infra Part II.B. An order permitting the full ban to go into effect now would upend the Nation's immigration system, and would throw the plans, hopes, and lives of U.S. citizens, lawful permanent residents, and entities across the country into disarray.

Indeed, since EO-1 was enjoined in February, the government has never acted as though there were an urgent need to ban the individuals protected by this

[11] The Proclamation posits that the ban is necessary as leverage to "elicit improved identity-management and information-sharing" practices. Proclamation § 1(h)(i). But the government has made no showing of any urgency in connection with this theory that would justify the extraordinary interim relief it now seeks, nor even that that the partial ban the district court permitted—as to those lacking bona fide U.S. relationships—is less effective as leverage.

preliminary injunction. When the government last sought a stay from this Court in June, it did not ask for further expedition of the case if its stay motion were denied (as it was, in part). That willingness to defer the merits for months indicated that the government had and has no need to impose its ban immediately. Following this Court's partial stay, the government waited until the prior ban's very last day before issuing the current iteration, prolonging the period during which it would definitely be prohibited from banning individuals with bona fide relationships. Then the government further delayed the implementation of the ban (as to persons with qualifying relationships) for 24 days—from when it was signed on September 24 to October 18. Proclamation § 7(b). Finally, the government waited five weeks after the preliminary injunction was issued (and more than three weeks after its stay motion was fully briefed in the Fourth Circuit) to seek a stay from this Court. These recent decisions to tolerate limitations on the ban follow similar delays in the context of EO-2, where the government waited nearly four months between the injunction of its first ban and its stay application in this Court. *See* No. 16-1436 IRAP Stay Opp. 20-22.

The government is able to move much more quickly when speed truly matters. For example, in *Kiyemba v. Obama*, 555 F.3d 1022, 1024 n.2 (D.C. Cir. 2009), *vacated*, 559 U.S. 131 (2010), and *United States v. New York Times Co.*, 444 F.2d 544, 544 (2d Cir. 1971), *rev'd*, 403 U.S. 713 (1971), the government moved for a stay the same day that the relevant court ruled. *See* Br. for Pet'r 9-10, *New York Times Co. v. United States*, 1971 WL 134368 (U.S. 2004). The government's

multiple decisions to allow time to pass without a ban on individuals with bona fide relationships "blunt [its] claim of urgency and counsel[] against the grant of a stay." *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1318, (1983) (Blackmun, J., in chambers).

II. THE DISTRICT COURT'S JUDGMENT IS NOT LIKELY TO BE REVERSED.

A. The Proclamation Is Not Immune from Judicial Review.

As it did in its last stay application, the government again contends that the claims in this case are not justiciable. App. 19-24; *see* No. 16A1190 App. Stay 22-26. With regard to the plaintiffs' statutory claim, the government continues to assert that its § 1182(f) bans should be wholly immune from review. That troubling position, which no court has ever adopted, would give this and future Presidents unreviewable power to rewrite the INA wholesale and violate direct statutory commands. The government cannot show that the Court is likely to adopt that position. With regard to the Establishment Clause claim, the government again asserts that plaintiffs lack standing. That claim, too, is unlikely to succeed. The Proclamation inflicts severe and personal injuries on the plaintiffs that are plainly cognizable.

1. This Court has long reviewed statutory challenges to presidential exclusion policies. In *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 170-188 (1993), the Court reviewed statutory claims against a § 1182(f) order on the merits, rejecting the government's argument that § 1182(f) orders were unreviewable. *See*

U.S. Br. 13-18 & n.9, 55-57, 1992 WL 541276, Reply Br. 1-4, 1993 WL 290141, *Sale v. Haitian Ctrs. Council, Inc.* (No. 92-344). And in *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544-547 (1950), the Court reviewed two statutory challenges to an order issued under § 1182(f)'s predecessor statute. The Court's longstanding practice of reviewing § 1182(f) policies reflects the fact that, even in the foreign affairs context, interpreting statutes and enforcing Congress's will is "a familiar judicial exercise." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012); *see also Dames & Moore v. Reagan*, 453 U.S. 654, 669-688 (1981) (reviewing statutory claims against multiple executive orders).

The government invokes the lower courts' consular non-reviewability doctrine, App. 19-20, but the circuits have uniformly limited its application to "a particular determination in a particular case," and held that it does not apply to "general" policies like the Proclamation. *Int'l Union of Bricklayers & Allied Craftsmen v. Meese*, 761 F.2d 798, 801 (D.C. Cir. 1985); *see Patel v. Reno*, 134 F.3d 929, 931-932 (9th Cir. 1997) (same); *Mulligan v. Schultz*, 848 F.2d 655, 657 (5th Cir. 1988) (same); *cf. Saavedra Bruno v. Albright*, 197 F.3d 1153, 1158-1160, 1162 (D.C. Cir. 1999) (routine application to single non-citizen's visa denial). The government suggests that the Court should adopt and expand that doctrine to eliminate statutory review of all admissions policies. App. 20. But the government is likely to fail in that novel request, which, in all events, presents no basis for an emergency stay.

2. The government notes that the President is not an "agency" for purposes of the APA. *Hawai'i* App. 22. But the Proclamation is not thereby "insulate[d]" from "judicial review under the APA." *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1327 (D.C. Cir. 1996) (Silberman, J.). As Justice Scalia explained, presidential action can be reviewed "in a suit seeking to enjoin the officers who attempt to enforce the President's directive." *Franklin v. Massachusetts*, 505 U.S. 788, 828 (1992) (Scalia, J., concurring in part and concurring in the judgment); *Reich*, 74 F.3d at 1327-1328; *see, e.g.*, Dep't of Homeland Sec., Fact Sheet: The President's Proclamation, Sept. 24, 2017 (explaining DHS policy to implement the Proclamation).[12] And in any case, no APA cause of action is necessary to review the President's violations of federal law in equity. *Dames & Moore*, 453 U.S. at 669-688 (reviewing executive orders in equity); *see also Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384-1385 (2015). The government's objections to APA review turn entirely on its positions that review is precluded by sources outside the APA, App. 21 (citing 5 U.S.C. §§ 701(a)(1), 702(1)), and that the President's authority is substantively unlimited, *id.* (citing 5 U.S.C. § 701(a)(2)). As explained above and below, *see supra* Part II.A.1; *infra* Part II.B, both positions are wrong.

3. The government's ripeness objections are misplaced. *See* App. 22-23. As before, plaintiffs have brought a challenge that "is squarely presented for [the

[12] https://www.dhs.gov/news/2017/09/24/fact-sheet-president-s-proclamation-enhancing-vetting-capabilities-and-processes.

Court's] review and is not dependent on the factual uncertainties of the waiver process." *IRAP*, 857 F.3d at 587. Moreover, several of the plaintiffs' relatives have already completed their interviews and are awaiting the administrative processing of their visas. *See, e.g.*, CA4 J.A. 587-588, 603, 605-606, 1171, 1175, 1247, 1255, 1268. Their injuries from the Proclamation's ban are all too imminent. App. 22-23.

4. Finally, as to the Establishment Clause claim, the government repeats its refrain that plaintiffs whose family, friends, clients, colleagues, and members will be denied visas because of the Proclamation somehow lack standing. App. 22-24. That argument is wrong, *see* No. 16-1436 IRAP Br. 16-25, and the district court correctly held that at least twelve individual plaintiffs, three organizational plaintiffs, and the members of two organizations have standing to challenge the Proclamation. Add. 24-35.

To begin with, the government completely ignores the organizational plaintiffs' direct injuries, *see* Add. 27-30 (documenting harms to their "proprietary and organizational interests"), which are enough to make this case justiciable. *See Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006). Plaintiffs who suffer "direct" injuries like these have long been able to raise Establishment Clause claims, even without "any infringement of their own religious freedoms." *McGowan v. State of Maryland*, 366 U.S. 420, 429, 430 (1961); *see Two Guys From Harrison-Allentown v. McGinley*, 366 U.S. 582, 585-586 (1961).

The individual plaintiffs include Muslims whose loved ones are banned by a Proclamation designed to exclude Muslims, and which delivers a clear public

message of hostility to Islam. They too have standing to raise Establishment Clause claims. When the government singles out a particular religion for disfavor, a plaintiff who comes into contact with that message and suffers injury as a result has standing, even though that injury is likely to be "noneconomic or intangible." *Suhre v. Haywood Cty.*, 131 F.3d 1083, 1086 (4th Cir. 1997) (Wilkinson, J.). This Court has accordingly reached the merits in numerous Establishment Clause cases where a plaintiff encountered a religious display that caused the plaintiff to feel marginalized. *See, e.g.*, *Van Orden v. Perry*, 545 U.S. 677, 681 (2005); *County of Allegheny v. ACLU Greater Pittsburgh Chapter,* 492 U.S. 573, 580, 587 (1989).

Here, the plaintiffs' proximity to the Proclamation is at least as immediate. The Proclamation has jeopardized the visas of their spouses, children, and other family members, threatened to prolong—and even make permanent—their separation from their loved ones, rendered their future plans uncertain, and could alter their lives forever. *See, e.g.*, CA4 J.A. 591-592, 611-613, 1159, 1170-1171, 1245-1246, 1252-1253, 1256, 1266. It has inflicted severe pain on them and undermined their dignity as full members of the community. *See, e.g.*, Add. 33-34; CA4 J.A. 567, 571-572, 574-575, 578, 580, 585, 588-589, 600-601, 606-607, 608.

The plaintiffs are thus asserting violations of their *own* rights. The government's reliance on *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), is misplaced. The plaintiffs in that case were complete strangers to the action they challenged and alleged no condemnation injuries. The property transfer they challenged had no

impact on them at all—"they claim[ed] nothing" beyond the fact of a constitutional violation. *Id.* at 765. The plaintiffs in this case could not be more different. They did not "roam the country in search of governmental wrongdoing," *id.* at 766; the Proclamation injected itself into their lives.[13]

And the Court has consistently recognized that individuals in the United States can raise claims alleging that their rights have been violated by the exclusion of a foreign national abroad. *See Kleindienst v. Mandel*, 408 U.S. 753, 764-765 (1972); *Kerry v. Din*, 135 S. Ct. 2128, 2140-2142 (2015) (Kennedy, J., concurring); *cf.* Oral Arg., *Washington v. Trump*, No. 17-35105, 2017 WLNR 4070578 (9th Cir. Feb. 7, 2017) (government conceding that "a U.S. citizen with a connection to someone seeking entry" would have standing to challenge EO-1).

B. The Proclamation Violates the Immigration and Nationality Act.

For millions of people in the United States and abroad, the Proclamation replaces Congress's intricate visa system with a new one of the President's design. Its scale is unprecedented: It bans more people than the forty-three § 1182(f) orders issued between 1952 and 2017 *combined*. With its sweeping bans, detailed waiver provisions, and indefinite duration, it reads very much "like a statute," *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952)—just not the one Congress enacted.

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[13] *In re Navy Chaplaincy,* 534 F.3d 756, 759-765 (D.C. Cir. 2008), is inapposite for the same reasons. The plaintiffs in that case, who asserted no condemnation injury, were in no way affected by the challenged action and acknowledged that on their theory anyone, even a judge on the panel, would have standing.

The Proclamation contravenes two of the INA's core features: It reinstitutes a nationality-based system that Congress rejected fifty years ago. And it overrides Congress's individualized visa process, which has governed for a century. Congress has repeatedly reaffirmed these features, including in response to recent security and vetting concerns. The President has no "power to cancel" them. *Clinton v. City of New York*, 524 U.S. 417, 436 (1998) (internal quotation marks omitted).

1. The Proclamation Violates the INA's Non-Discrimination Mandate.

As the lower courts correctly held, the Proclamation violates Congress's prohibition against nationality-based discrimination. *See* Add. 42-48; *Hawai'i* Add. 33-35; *see also Hawai'i*, 859 F.3d at 776-779. By banning immigration from entire nations indefinitely, the Proclamation reinstitutes a modern-day national-origins system. Congress emphatically outlawed that approach more than fifty years ago.

1. The INA's non-discrimination mandate is straightforward: It bars discrimination "in the issuance of an immigrant visa because of the person's . . . nationality." 8 U.S.C. § 1152(a)(1)(A). As Judge Sentelle observed, "Congress could hardly have chosen more explicit language." *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State* ("*LAVAS*"), 45 F.3d 469, 473 (D.C. Cir. 1995), *vacated on other grounds*, 519 U.S. 1 (1996).

The Proclamation flouts that clear mandate, even more explicitly than its predecessors. It provides that nationals of the six Muslim-majority countries and North Korea may not come to the United States "as immigrants," indefinitely, solely because of their nationality. Proclamation § 2(a)-(h); *see id.* § 1(h)(ii). The ban's

purpose and effect is to discriminate "in the issuance of [] immigrant visa[s] because of . . . nationality." 8 U.S.C. § 1152(a)(1)(A); *see* Proclamation § 3(c)(iii) (requiring a waiver for "the issuance of a visa"); *see also* CA4 J.A. 633 (State Department public notice describing the Proclamation as a "Presidential Proclamation on Visas.")

The breadth of this nationality-based ban has no parallel in the last half century. Congress enacted § 1152(a)(1)(A) in 1965, prohibiting nationality discrimination by the executive at the same time that it abolished the national-origins quota system. The quota system had imposed nationality-based bans and restrictions in order to maintain "the ethnic composition of the American people." Add. 42-43 (quoting H. Rep. No. 89-745, at 9 (1965)). Under that "harsh" and "un-American" regime, "[f]amilies were kept apart because a husband or a wife or a child had been born in the wrong place." Lyndon B. Johnson, Remarks at the Signing of the Immigration Bill, 1 Weekly Comp. Pres. Doc. 364, 365 (Oct. 3, 1965). That is exactly what the Proclamation in fact does. *Cf.* CA4 J.A. 832-833 (President Trump calling, in September, for a "larger, tougher" ban and opposing "CHAIN MIGRATION").

Congress emphatically rejected that system in the 1965 Act, whose legislative history is "replete with the bold anti-discriminatory principles of the Civil Rights Era." *Olsen v. Albright*, 990 F. Supp. 31, 37 (D.D.C. 1997). And Congress *specifically* sought to prevent the President from overriding its scheme by making immigration decisions on the basis of national origin. *See* Amicus Br. of Scholars of Immigration Law at 17-19 (Doc. No. 104-1, 4th Cir. filed Nov. 17, 2017).

2. Despite the force of that rejection and the clarity of § 1152(a)(1)(A), the government maintains that the President can disregard it at will. It advances several theories, but they all boil down to one contention—that the President can "effortlessly evade" § 1152(a)(1)(A) whenever he wants. *EC Term of Years Trust v. United States*, 550 U.S. 429, 434 (2007). Each version of that contention is wrong.

The government first claims that instead of barring visa issuance, the President can simply render disfavored nationals "ineligible to receive a visa." App. 25 (quoting 8 U.S.C. § 1201(g)). That is incorrect. Section *1182(a)* lists "[c]lasses of aliens" who are "ineligible for visas." 8 U.S.C. § 1182(a) (providing that "aliens who are inadmissible under the following [specified grounds] are ineligible to receive visas"). But *§ 1182(f)* does not mention eligibility for visas or inadmissibility at all, nor does § 1182(a) include § 1182(f) in the ten grounds of inadmissibility it specifies. The government's "ineligibility" theory is incompatible with the statute. And it would allow the President to reinstate the pre-1965 quota system in its entirety, simply by declaring that the relevant nationals were now "ineligible" for immigrant visas. The INA's core anti-discrimination principle is not so easily evaded.

Next, the government argues that § 1182(f) displaces § 1152(a)(1)(A) altogether, because § 1152(a)(1)(A) does not "mention the President or entry." App. 32-33. That too is inconsistent with the statutes' language and multiple canons of statutory construction. Section 1152(a)(1)(A) applies categorically, without reference to particular officials. Section 1182(f) does not authorize the President to override other parts of the INA, as explained below. *See infra* Part II.B.2. And if

there were any conflict, § 1152(a) would control. It is the later-enacted and more specific statute, because it addresses nationality discrimination in the issuance of visas, whereas § 1182(f) is silent as to both visa issuance in general and discrimination in particular. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 & n.7 (1976). Moreover, § 1152(a) specifies multiple exceptions, which do not include § 1182(f). *See* 8 U.S.C. § 1152(a)(1)(A)-(B); *Leatherman v. Tarrant Cty.*, 507 U.S. 163, 168 (1993) ("*Expressio unius est exclusio alterius*.").

Finally, the government points to two instances in which nationals of countries with which the United States was embroiled in an acute bilateral crisis were barred. App. 26 (describing "Iranian Hostage Crisis" and Cuban illegal migration crisis). Those suspensions were never challenged under § 1152(a)(1)(A). In any event, nothing in the Proclamation purports to identify any comparable "national emergency," *LAVAS*, 45 F.3d at 473, in connection with the "information-sharing" practices of foreign governments. *Cf.* App. 26 (hypothesizing emergencies involving "the brink of war" and "a particular threat from an unidentified national" of a specific country). Whatever the President's authority in those limited circumstances, he cannot transform the congressionally-enacted visa process into a congressionally-rejected national-origins system.

2. The Proclamation Exceeds the President's Authority Under 8 U.S.C. § 1182(f).

Section 1182(f) is not, contrary to the government's contention, a limitless grant of authority to the President to rewrite the INA as he chooses. But that is precisely what the Proclamation does. For nearly a hundred years, the visa system set forth by Congress has relied on individual visa applicants—not foreign governments—to establish their eligibility and provide the necessary documentation. Congress has reaffirmed this system countless times, including after the September 11 attacks and in response to the rise of ISIS and al Qaeda. Section 1182(f) does not authorize the President to reject the basic structure of that system, especially with so little relevant explanation.

1. The government recognizes no limits on the President's § 1182(f) authority. *See Hawai'i* App. 26-27 (claiming the President can make "expansive" changes "on a broad scale" with a one-line recitation and need not "disclose his reasons"). In its view, the President could declare that family-based immigration poses unique security threats, and then ban entry on all family visas indefinitely. *Cf.* Proclamation § 1(h)(ii). Or he could declare that the 150 countries that do not meet the criteria for the Visa Waiver Program pose unacceptable risks, and then

ban all of their nationals permanently. *Cf.* Proclamation § 1(c)(i)-(iii) (listing "baseline" criteria that almost perfectly match the Visa Waiver Program's).[14]

"Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring). The Framers were "acutely conscious" of the dangers of subjecting national policy decisions to the "arbitrary action of one person." *INS v. Chadha*, 462 U.S. 919, 951 (1983). And, as this Court has continually reaffirmed, statutes dealing with "travel controls" cannot "grant the Executive totally unrestricted freedom of choice." *Zemel v. Rusk*, 381 U.S. 1, 17 (1965). Instead, the Court has required the Executive to exercise delegated immigration authority in line with the "declared policy of Congress." *Mahler v. Eby*, 264 U.S. 32, 40 (1924); *see also United States v. Witkovich*, 353 U.S. 194, 199-200 (1957) (even apparently "unbounded authority" must be exercised consistent with the "purpose of the legislative scheme"); *Knauff*, 338 U.S. at 543 (similar). Indeed, Congress enacted § 1182(f) mere months after this Court had reaffirmed, in an immigration case, that a "delegation of legislative power" is "permissible" only when "the executive judgment is limited by adequate standards." *Carlson v. Landon*, 342 U.S. 524, 542-544 (1952). Section 1182(f) thus

[14] As the district court observed, the Proclamation's criteria are "strikingly similar" to the Visa Waiver Program's. Add. 55. Both require a foreign government to issue electronic passports, 8 U.S.C. §§ 1187(a)(3)(B), (c)(2)(B)(i), report lost or stolen passports, *id.* § 1187(c)(2)(D), share terrorism and crime information about its nationals, *id.* § 1187(c)(2)(F), not provide safe haven for terrorists, *id.* § 1187(a)(12)(D)(ii)(III), maintain control over its territory, *id.* §§ 1187(c)(5)(B)(i)-(ii), and receive its deported nationals, *id.* § 1187(c)(2)(E).

does not grant the President authority to reverse Congress's own policy decisions codified in the INA.

2. The text of § 1182(f) confirms that limit. It requires an explicit "find[ing]" of detriment, which cannot conflict with Congress's own determinations about what would serve "the interests of the United States." 8 U.S.C. § 1182(f). And it only allows the President to "suspend" entry for a limited "period," not to remake the system indefinitely. *Id.*[15] These limits make sense: "Immigration policy shapes the destiny of the Nation." *Arizona v. United States*, 567 U.S. 387, 415 (2012). The President cannot arrogate that power to himself alone and take action inconsistent with the scheme that Congress enacted.

Unsurprisingly, no other President has ever tried to use § 1182(f) to rewrite a structural feature of the statutory scheme. Every prior § 1182(f) suspension has responded to situations that Congress had not yet addressed—like recent governmental instability, *e.g.*, Proc. 8015 (2006), crises of illegal entry, *e.g.*, Exec. Order 12807 (interdiction at issue in *Sale*), and culpable behavior not covered by the INA's grounds of inadmissibility, *e.g.*, Proc. 8342 (2009); Proc. 7750 (2004). And nearly all have applied to only a small handful of individuals based on their "objectionable conduct" or "affiliation." 9 Foreign Affairs Manual 302.14-3(B)(1)(b)(2), (3) (2016); *see* CA4 J.A. 844-848 (listing § 1182(f) suspensions).

[15] Section 1182(f) also eschews the language of other parts of the INA that explicitly commit immigration decisions to sole executive discretion. *See, e.g.*, 8 U.S.C. § 1182(a)(9)(B)(v), (a)(10)(C)(iii)(II); *see also, e.g.*, 22 U.S.C. § 1631a(c).

3. A fundamental feature of Congress's immigration scheme is a two-track admissions system for visa and visa-less travel. The visa system relies on individual *applicants* to establish their eligibility; the visa-less system relies on foreign *governments*. Over multiple decades, Congress has repeatedly reaffirmed this structure, which represents a careful balance between security needs and countervailing economic, cultural, and family-unification interests. But the Proclamation—citing no issues or events that Congress has not already thoroughly addressed—for the first time collapses the visa and visa-less systems, banning millions of individuals who can meet their burden under the INA because of perceived failures by their governments. As explained above, § 1182(f) does not allow the President to reject the basic design of Congress's system.

The individualized visa system has governed since 1924.[16] It places all burdens on the applicant, who must provide documentation to establish his identity and eligibility, 8 U.S.C. § 1202(a)-(d), undergo an in-person interview, *id.* § 1202(h), and establish that he is not subject to any ground of inadmissibility, including numerous terrorism and public-safety bars, *e.g.*, *id.* §§ 1182(a)(2), (a)(3)(A), (B), (F). If the applicant cannot provide enough information to meet those burdens, he must be denied a visa. *Id.* §§ 1361, 1201(g). The visa statutes impose no information-sharing requirements on foreign governments, in part because individual visa applicants already must collect and submit extensive information from their governments to carry their burden of demonstrating visa eligibility. *See* Report of

[16] Immigration Act of 1924, Pub. L. No. 68-139, §§ 7, 23, 43 Stat. 153.

the Comm. on Imm. & Naturalization, at 9, H.R. Rep. 68-176, 68 Cong., 1st Sess. (Feb. 9, 1924) (noting that an applicant would have to produce "all available public records concerning him kept by the government to which he owes allegiance").

The visa-less admission system—the Visa Waiver Program—functions the opposite way. It allows certain foreign nationals to enter the country without visas if their *governments* meet certain criteria. *See* 8 U.S.C. § 1187(c). Reliance on foreign governments for identity and security information makes sense in the context of visa-less entry, because individuals are no longer supplying that information through the visa application process.

Congress steadfastly retained this clear distinction even after the September 11 attacks. Despite the actual visa vetting failures that preceded those attacks—the Proclamation, in contrast, identifies none—Congress declined to alter its individualized visa process by making visas contingent on foreign government action. In bill after bill, Congress strengthened both admission tracks while keeping them separate.[17] Just two years ago, Congress acted yet again to update its system in response to the rise of ISIS and al Qaeda. In an "abundance of caution," in the words of the bill's principal sponsor, 4 Cong. Rec. H9051 (Dec. 8, 2015) (Rep. Miller), Congress chose the "targeted improvement[]" of transferring certain individuals from the visa-less track to the visa track, which would provide a

[17] *See* Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 711, 121 Stat. 266; Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, §§ 5301, 5302, 118 Stat. 3638; Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, §§ 303(c)(1), 307(a), 501(b), 116 Stat. 543.

"rigorous security screening process[]," 4 Cong. Rec. H9057 (Rep. Schiff); *see* Pub. L. 114-113, div. O, tit. II, § 203, 129 Stat. 2242. The "collective premise of these statutes" is to reaffirm the INA's individualized visa process. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 139 (2000).

4. Even taken entirely on its own terms, the Proclamation profoundly disrupts this deliberate structure. For the first time in a hundred years, it shifts the burden to justify individual visas from applicants to foreign governments. It thus discards Congress's individualized system: Even if an applicant can "establish to the satisfaction of the consular officer that he is eligible to receive a visa" and "is not inadmissible," 8 U.S.C. § 1361, he will *still* be denied a visa, purportedly because the President has decided that the government that issued his passport has fallen short of his standards. Moreover, the Proclamation's criteria for evaluating governments for *visa* travel by their nationals are virtually identical to Congress's criteria for evaluating them for *visa-less* travel. *See supra* n.14 (listing similarities). The resulting conflict is stark: Under Congress's scheme, if a country fails these criteria its nationals must *apply* for visas, but under the Proclamation's scheme, nationals of those countries are *barred* from receiving visas. The President cannot contravene Congress's will in this manner. *Brown & Williamson*, 529 U.S. at 137 (holding that the Executive cannot revisit a "problem" that "Congress has directly addressed").

Moreover, even if the President could effect such a dramatic alteration, the Proclamation makes no adequate "find[ing]." 8 U.S.C. § 1182(f). While it purports

to identify deficient practices by foreign *governments*—which, under Congress's system, might justify excluding their nationals from *visa-less* travel—it contains no findings at all about its real target: the visa system. It asserts that its unprecedented bans are "necessary to prevent the entry" of visa applicants about whom consular officers "lack[] sufficient information," Proclamation § 1(h)(i), but fails to mention that existing law *already* requires consular officers to deny visas when they lack sufficient information, 8 U.S.C. §§ 1361, 1201(g); 22 C.F.R. § 40.6. It claims that the bans are necessary to elicit information from foreign governments, Proclamation § 1(b), (h), but fails to acknowledge that the INA's visa scheme does not rely on foreign governments for that information, it relies on individuals.[18]

The Proclamation thus provides *no* explanation as to "why the country suddenly needs to shift from this tested system of individualized vetting . . . to a national origin-based ban." Nat'l Sec. Officials Decl. ¶ 7, CA4 J.A. 898. It cites no new circumstances, no vetting errors, no problems with fraud, and no other reason to doubt the efficacy of Congress's visa system. These are glaring omissions for such a sweeping and indefinite order. The Proclamation strikes at the basic premise of

[18] In any case, Congress recently considered the specific question of how to encourage information-sharing by countries that do not participate in the Visa Waiver Program, and settled on a dramatically different solution: helping those countries supply the information, rather than banning their nationals. *See* 8 U.S.C. § 1187a (providing for "assistance to non-program countries" in meeting certain program criteria); *see also* Pub. L. No. 108-458, § 7204(b) (directing the President to encourage secure passport and information sharing practices by seeking "international agreements").

our visa system—that individuals, not governments, bear the burden—without tying that premise to any actual "detriment[] to the interests of the United States." 8 U.S.C. § 1182(f).

The Proclamation therefore exceeds the President's delegated statutory authority. He cannot rewrite the core structure of Congress's visa system, especially without explaining what he thinks is wrong with it. An emergency stay motion is certainly no occasion to grant the President such sweeping power. Nor should the established status quo be disturbed based on a statutory theory that, at its root, asserts that Congress has hidden an elephant—the ability to veto parts of the INA at will—in the mousehole that is § 1182(f). *See Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001).

C. The Proclamation Violates the Establishment Clause.

The principles of the Establishment Clause are "fundamental to freedom" and "rooted in the foundation soil of our Nation." *Epperson v. Arkansas*, 393 U.S. 97, 103 (1968). Its "clearest command . . . is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244, 255 (1982). This commitment to neutrality means that "the Establishment Clause forbids the government to use religion as a line-drawing criterion." *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 728 (1994) (Kennedy, J., concurring in the judgment).

The Court's Establishment Clause precedents have emphasized "the principle that the First Amendment forbids an official purpose to disapprove of a particular

religion." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993). And the Establishment Clause prohibits the government from even "appearing to take a position on questions of religious belief or from making adherence to a religion relevant in any way to a person's standing in the political community." *Cty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 594 (1989) (internal quotation marks omitted). The importance of these principles in the immigration context dates back to the framing. No. 16-1436 IRAP Br. 31.

The purpose of the Proclamation is to disfavor and denigrate Islam and Muslims. It is the third ban order signed by the President within the last year, part of a single continuous effort to make good on the promised Muslim ban. And its primary *effect* is to "burden . . . [a] selected religious denomination[]," *Larson*, 456 U.S. at 255, through restrictions concentrated overwhelmingly on the immigration of Muslims to the United States. Indeed, the contours of the ban—including the decisions to effectively exempt Venezuela, impose a ban on North Korea that will have almost no effect, and ban Somalia despite the government's own baseline—reflect a religious "gerrymander." *Lukumi*, 508 U.S. at 533-535, 538 (basing free-exercise analysis on Establishment Clause jurisprudence, and striking down as impermissible religious "gerrymander" an ordinance for which "almost the only conduct subject to" it was associated with a particular religion).

In response, the government again contends that under *Mandel* even an affirmative showing of bad faith is insufficient to look beyond the four corners of the Proclamation. App. 29-30; *but see Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring

in the judgment). And it incorporates its prior laundry list of sweeping arguments that the Court should ignore perfectly probative evidence. App. 31. This Court denied the government's last stay application, as relevant here, in the face of the same arguments. *See* No. 16A1190 App. Stay 27-33. It should do so again.

1. As Justice Kennedy explained in his controlling concurrence in *Kerry v. Din,* when a challenger makes "an affirmative showing of bad faith," *Mandel* teaches that it *is* appropriate to "look behind" the face of the Order. *Din,* 135 S. Ct. at 2141 (quoting *Mandel*, 408 U.S. at 770). All the government's arguments amount to nothing more than a plea to "read[] out *Mandel*'s 'bona fide' test altogether." *IRAP*, 857 F.3d at 592; *see* No. 16-1436 IRAP Br. 33-37 (addressing those arguments).

The government is wrong to suggest that this Court's decision in *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1693-1694 (2017), is to the contrary. *Morales-Santana* does not cite *Mandel* at all. Instead, it cites *Fiallo v. Bell*, 430 U.S. 787, 788 (1977). But *Fiallo*—like *Morales-Santana*—involved an equal protection challenge to congressional line-drawing on the face of a statute. 430 U.S. at 788, 794. The plaintiff was not seeking to "look behind" the statute's text to evidence of purpose, and thus the Court had no occasion in that case to address how such evidence would be treated. *See id*. at 798-799.

2. The government would have this Court ignore much of what led to the issuance of the Proclamation. But the courts below properly declined the government's repeated requests "to ignore evidence, circumscribe [their] own

review, and blindly defer to executive action." *IRAP*, 857 F.3d at 601. And the plaintiffs have fully rebutted the government's various attempts to limit the evidence this Court may consider. No. 16-1436 IRAP Br. 43-50. The "remarkable facts" in this litigation require no "impermissible inquiry" into secret motives or long-forgotten off-hand comments. *Hawai'i v. Trump*, 241 F. Supp. 3d 1119, 1136-1137 (D. Haw. 2017). The ruling the government seeks—that courts must ignore such facts—would, as Justice Jackson warned in *Korematsu v. United States*, "lie[] about like a loaded weapon," threatening yet more damage for decades to come. 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

"[T]he history and context" of challenged government action is particularly critical in Establishment Clause cases. *Santa Fe*, 530 U.S. at 317 (2000); *see id*. at 315 ("We refuse to turn a blind eye to the context in which this policy arose . . . ."); *see also Edwards v. Aguillard*, 482 U.S. 578, 595 (1987. The government's pleas to focus only on "the latest news about the last in a series of governmental actions" thus cannot be squared with this Court's precedents, which recognize that "the world is not made brand new every morning," and that reasonable observers, from whose perspective the Proclamation must be judged, "have reasonable memories." *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 866 (2005).

Here, as in both *Santa Fe* and *McCreary*, the government seeks to defend the third iteration of a government policy. As the district court correctly observed, "EO-1 and EO-2 were each likely to violate the Establishment Clause, and the third iteration, the Proclamation, was issued close on their heels—within nine and six

months, respectively," so it is only "'common sense' that the Proclamation stands in their shadow." Add. 72 (quoting *McCreary*, 545 U.S. at 866).

As a candidate, President Trump announced that he would ban Muslim immigration because, in his view, "Islam hates us." Add. 5. He convened a commission to recommend how to effectuate a Muslim ban legally, then acted on its proposal of using nationality as a proxy. Add. 5-6, 8. He explained that he began "talking territory instead of Muslim," because "[p]eople were so upset when I used the word Muslim." Add. 6. And he repeatedly denied that he was "changing [his] position" or that the shift to territories was a "rollback" from his proposed Muslim ban, and on the day he signed EO-1, he explained that its religious minority preference was designed to give Christians priority over Muslims. CA4 J.A. 818, 998, 1000; *see IRAP*, 857 F.3d at 633 (Thacker, J., concurring).

A week into his presidency, without consulting any of the government agencies tasked with defending national security, President Trump signed an executive order that did the very thing he promised he would do as a candidate: suspend entry by nationals of overwhelmingly Muslim countries. Add. 68-69; *IRAP*, 241 F. Supp. 3d at 545; *IRAP*, 857 F.3d at 632 (Thacker, J., concurring). After the first order was enjoined, he issued a second. Aides made clear that it was the same fundamental policy. Add. 9. The President later explained that he only issued the "politically correct" second order because "the lawyers" said he should, and lamented that he did not stick with "the first one and go all the way," which is what he "wanted to do in the first place." Add. 13-14, 82; CA4 J.A. 780. Yet, even then,

EO-2 directed reporting on "honor killings," which have nothing to do with international terrorism, but are a common way to denigrate Islam. *IRAP*, 857 F.3d at 596 n.17.

The Proclamation is on its face a successor to and continuation of EO-2. The new order implements the indefinite ban that EO-2 expressly contemplated and that the President has long promised. And as the district court observed, the "underlying architecture of [EO-1, EO-2,] and the Proclamation is fundamentally the same." Add. 75. Each invokes 8 U.S.C. § 1182(f), and each bars nationals of various countries from entering the United States, subject to a case-by-case waiver procedure. Such use of nationality was the "exact form" the President had earlier promised for his Muslim ban. *IRAP*, 857 F.3d at 594.

3. The government objects that the Proclamation is "a different order," relying in particular on the addition of "other countries that are both majority-Muslim and non-majority-Muslim," and the removal of Sudan. App. 30-32. But, as the district court recognized, the inclusion of two non-Muslim-majority countries will have "little practical consequence": The ban will affect only certain Venezuelan officials and "fewer than 100" North Koreans. Add. 74.

In fact, as a practical matter, the Proclamation, like the executive orders from which it springs, almost exclusively targets Muslims. While the Proclamation removed Sudan from the list, it added Chad—another Muslim-majority country. The Muslim-majority countries the Proclamation bans—which are the only

countries banned in any practical sense—are together approximately 95% Muslim. CA4 J.A. 234-248, 852-859.

The Proclamation repeatedly deviates from the very test that it purports to impose, banning more Muslims and exempting more non-Muslims than its "baseline" criteria would dictate. Somalia, for example, is still banned, and Venezuela is effectively exempt despite, rather than because of, the government's own criteria. And many more inconsistencies emerge on closer inspection. *See* CA4 J.A. 1283-1300 (David Bier, Travel Ban Is Based on Executive Whim, Not Objective Criteria, Cato Institute, Oct. 9, 2017) (documenting dozens of countries that fail various criteria but were not banned); Nat'l Sec. Officials Decl. ¶ 12, CA4 J.A. 900 (noting that "non-Muslim majority countries such as Belgium" were not banned despite "widely-documented problems with information sharing" and nationals who "have carried out terrorist attacks on Europe").

When examining the same criteria as the Proclamation, Congress—balancing various policy considerations—chose *not* to ban entire nations from entering, but instead to require individualized vetting. *See supra* Part II.B.2. The supposedly "tailored entry restrictions" imposed by the Proclamation, App. 3, 32, do not obscure the reality that Muslims—especially those seeking to permanently immigrate—will overwhelmingly be the ones excluded from the country. Such governmental targeting of minorities based on faith violates the mandates of the Establishment Clause—even when the order studiously avoids mentioning the words "Islam" or "Muslim." *Kiryas Joel*, 512 U.S. at 699; *see also Lukumi*, 508 U.S. at 534

(Establishment Clause "extends beyond facial discrimination" to "forbid[] subtle departures from neutrality and covert suppression of particular religious beliefs") (internal quotation marks omitted); *Santa Fe*, 530 U.S. at 307 n.21.

4. Ultimately, the government asserts that this ban is something other than the indefinite continuation of its two predecessors by repeatedly invoking the "multi-agency review process," arguing that it renders the President's promises to establish a Muslim ban "inapposite." App. 33, 35. But nothing about that process or the officials' recommendations can overcome the ban's clear purpose and effect: to deliver the promised Muslim ban. Notably, the government has flatly refused to disclose what was recommended by those officials. It has declined even to say whether there were "material inconsistencies" between the DHS report, the DHS recommendation, and the Proclamation as actually issued. CA4 J.A. 952-955; *see id*. (conceding that "it's potentially possible that various government advisors disagree among themselves"). As the district court recognized, such hidden recommendations can offer "little to 'assure the public'" that the Proclamation is anything but another attempt to ban Muslims. Add. 80-81 (quoting *Felix v. City of Bloomfield*, 841 F.3d 848, 863-864 (10th Cir. 2016)). What the courts and the public *do* know—beyond the President's many calls for a nationality-based Muslim ban—forecloses the government's argument that the involvement and unknown recommendations of agency officials cure the Establishment Clause violation.

First, EO-2 *required* the Secretary of Homeland Security to "submit to the President a list of countries recommended for inclusion in a Presidential

proclamation that *would prohibit the entry* of appropriate categories of foreign nationals." EO-2 § 2(e) (emphasis added); *see id.* (Secretary "shall" submit list). As the district court explained, EO-2's directive itself reveals "that the President had decided, even before the study had been conducted, that regardless of the results, some nationals would be subject to a travel ban." Add. 76.

Second, any doubt that the continuation of these nationality-based bans was preordained was dispelled by the President himself, who criticized his own second order as "watered down," and announced publicly his plan to impose a "much tougher version" of the ban even before EO-2's review process was underway. Add. 81-82. And the day the DHS report was submitted, he reiterated his call for "the travel ban into the United States" to "be far larger, tougher and more specific." *Id.* at 82. The government asserts a lack of evidence that the Secretary "felt constrained" by EO-2's dictates, App. 34, but the President made his own wishes and intentions abundantly clear.

Third, the Proclamation's extreme disproportionate effect on Muslims is the result of the President's longstanding effort to ban Muslims. As the district court observed, "many of the criteria . . . used to justify the ban on specific countries in the Proclamation[] were substantially similar to those used to select the list of countries banned by EO-2"—and EO-1 before that. Add. 76-77 (describing overlap between the criteria). Moreover, it has recently come to light that the White House placed an official who has a record of overt anti-Muslim animus to oversee the report and recommendation process at the Department of Homeland Security. *See*

supra notes 3, 4; *contra* App. 29 (relying on review and recommendation by "government officials whose motives have never been questioned"). And there are other troubling indications that White House pressure may well have warped the agency recommendations.[19] The fact that a report and recommendation were produced—which may not even match the ban—does not break the straight line from the President's promises of a Muslim ban through all three ban orders.

More fundamentally, the involvement of Executive Branch officials does not and cannot insulate the Proclamation from the President's record of religious denigration and promises to ban Muslims, because, as the government itself concedes, "[a]t the end of the day, the President is the one who made the decision and the President has adopted the rules he wants by issuing the proclamation." CA4 J.A. 952-953. Candidate Trump promised a ban on Muslims, and never repudiated that promise. President Trump, one week into office, issued EO-1 without consulting any of the relevant national security agencies. After he issued EO-2 to replace it, he repeatedly asserted that he accepted the alterations only at the urging of his lawyers, and that in his view he "should have stayed with the original." Add. 14, 82. And he recently reaffirmed his hostility to Islam, tweeting "a

[19] *See* Jonathan Blitzer, How Stephen Miller Single-Handedly Got the U.S. to Accept Fewer Refugees, The New Yorker (Oct. 13, 2017 (indicating that the parallel agency process for recommending the new annual refugee cap—which both EO-1 and EO-2 addressed—was "purely political" and dictated by White House senior advisor Stephen Miller), https://www.newyorker.com/news/news-desk/how-stephen-miller-single-handedly-got-the-us-to-accept-fewer-refugees; *cf*. *IRAP*, 857 F.3d at 575 (discussing the conclusions of two DHS reports that contradict the premise of all three bans, which became public only after being leaked to the press).

statement that . . . shooting Muslims with bullets dipped in pig's blood[] should be used to deter future terrorism." *See* Add. 81. As the district court found, these statements—regardless of what DHS recommended or why—"cast the Proclamation as the inextricable re-animation of the twice-enjoined Muslim ban." Add. 83.

III. THE NATIONWIDE INJUNCTION IS APPROPRIATE.

The district court appropriately granted nationwide relief. The government principally rehashes its argument that the Court "should stay the injunction to the extent it affords relief beyond respondents themselves." App. 39 (citing *U.S. Dep't of Defense v. Meinhold*, 510 U.S. 939 (1993)). It made the exact same argument in its last stay application. No. 16A1190 App. Stay 39. This Court, however, recognized that the scope of relief is a matter of "equitable judgment," and properly refused to stay the prior injunction not only as to the plaintiffs but also all "those similarly situated." *IRAP*, 137 S. Ct. at 2087. The district court sought to track that line in fashioning the injunction now before the court, and no further narrowing is warranted.

The government contends that the nature of the Establishment Clause injuries in this case is irrelevant to the scope of the injunction. But just the opposite is true. Just as one could not remedy the Establishment Clause violation from an unconstitutional religious display by covering it with a curtain only when plaintiffs walk by, so too here, the injury would not be remedied by allowing the anti-Muslim Proclamation to remain in place as to everyone but the individual plaintiffs' relatives. It is thus appropriate to enjoin the ban altogether. *Cf. Santa*

Fe, 530 U.S. at 313-314 (facially invalidating a school policy that had never been applied because "the mere passage" of a law establishing a religion inflicts "constitutional injuries"); *see* No. 16-1436 IRAP Br. 60.

The government likewise dismisses the geographic dispersal of the plaintiffs, which renders a limited injunction inappropriate. But it has never grappled with the bigger problem: A policy as sweeping and disruptive as this one will injure millions of people, harming the plaintiffs in complex and unpredictable ways. *See* No. 16-1436 IRAP Br. 60-61 (describing examples of the varied harms caused by EO-2). It would be exceptionally difficult, if not impossible, to effectively tailor an injunction to the plaintiffs. The "systemwide impact" here warrants a "systemwide remedy." *Lewis v. Casey*, 518 U.S. 343, 359 (1996 (internal quotation marks omitted).

CONCLUSION

The application should be denied.

Respectfully submitted,

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