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IN THE SUPREME COURT OF THE UNITED STATES  
- - - - -  
DONALD J. TRUMP, PRESIDENT OF THE )  
UNITED STATES, ET AL., )  
Petitioners, )  
v. ) No. 17-965  
HAWAII, ET AL., )  
Respondents. )

-----  
Washington, D.C.  
Wednesday, April 25, 2018

The above-entitled matter came on for oral  
argument before the Supreme Court of the United  
States at 10:02 a.m.

APPEARANCES:  
GEN. NOEL J. FRANCISCO, Solicitor General,  
Department of Justice, Washington, D.C.;  
on behalf of the Petitioners.  
NEAL K. KATYAL, ESQ., Washington, D.C.; on behalf  
of the Respondents.

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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument today in Case 17-965, Trump, President  
5 of the -- Donald Trump, President of the United  
6 States, versus Hawaii.

7 Mr. Francisco.

8 ORAL ARGUMENT OF GENERAL NOEL J. FRANCISCO

9 ON BEHALF OF THE PETITIONERS

10 GENERAL FRANCISCO: Mr. Chief Justice,  
11 and may it please the Court:

12 After a worldwide multi-agency review,  
13 the President's acting Homeland Security  
14 Secretary recommended that he adopt entry  
15 restrictions on countries that failed to  
16 provide the minimum baseline of information  
17 needed to vet their nationals.

18 The proclamation adopts those  
19 recommendations. It omits the vast majority of  
20 the world, including the vast majority of the  
21 Muslim world, because they met the baseline.  
22 It now applies to only seven countries that  
23 fall below that baseline or had other problems,  
24 and it exerts diplomatic pressure on those  
25 countries to provide the needed information and

1 to protect the country until they do.

2 The proclamation reflects a foreign  
3 policy and national security judgment that  
4 falls well within the President's power under  
5 1182(f) and has been successful, which is why  
6 the country of Chad was recently dropped from  
7 the list. But it --

8 JUSTICE GINSBURG: You -- you  
9 mentioned 1182(f). And the worrisome thing  
10 about this is that the President acts; Congress  
11 is the one responsible for making the laws  
12 about immigration. It has been suggested in  
13 one of the briefs that we read 1182(f) to allow  
14 the President to suspend entry but only for a  
15 period of time long enough for Congress to say  
16 yea or nay.

17 GENERAL FRANCISCO: Your Honor, yes,  
18 1182(f) is a broad and flexible power in a  
19 narrow area. Here, however, I think that you  
20 don't need to explore those outer limits  
21 because the proclamation's meant to help  
22 implement the INA by making sure that we have  
23 the minimum level of information needed to  
24 determine if aliens are admissible under the  
25 INA.

1           In terms of a time limit, I think  
2           that's simply inconsistent with the text of the  
3           statute and inconsistent with virtually every  
4           1182(f) proclamation ever issued. Here, we  
5           have a fair --

6           JUSTICE SOTOMAYOR: I'm sorry, Mr. --  
7           General. I thought that Congress had looked at  
8           the situation and created a statutory system  
9           that addressed the very concern the President  
10          is expressing. Congress said you can have visa  
11          waivers if you -- if you can meet the three  
12          criteria that this special committee of the  
13          President looked at, and if you don't, you have  
14          to have a very heightened, extreme vetting  
15          process. And it created that vetting process  
16          and suggested its parameters.

17          More importantly, it took terrorist  
18          countries and designated which ones supported  
19          terrorism and added another layer of review and  
20          said, if you're a national from one of those  
21          countries or you have visited one of those  
22          countries in the recent past, you also have to  
23          get the permission of the Attorney General and  
24          the Secretary of State to -- to affirm that you  
25          are not a danger to the U.S.

1                   GENERAL FRANCISCO:  And --

2                   JUSTICE SOTOMAYOR:  So I -- but what I  
3   see the President doing here is saying, I'm  
4   going to add more to the limits that Congress  
5   set --

6                   GENERAL FRANCISCO:  Right.

7                   JUSTICE SOTOMAYOR:  -- and to what  
8   Congress said was enough.  Where does a  
9   President get the authority to do more than  
10  Congress has already decided is adequate?

11                  GENERAL FRANCISCO:  Well, there are --  
12  there's a lot packed into your question, Your  
13  Honor, and so let me try to unpack it a little  
14  bit.

15                  I think the basic answer is that  
16  1182(f) gives the President the authority to  
17  impose restrictions in addition to those set  
18  forth in the INA, but to go to the statutes  
19  that Your Honor was --

20                  JUSTICE SOTOMAYOR:  But -- it might,  
21  but --

22                  GENERAL FRANCISCO:  Right, but --

23                  JUSTICE SOTOMAYOR:  -- on the very  
24  grounds that Congress has already looked at?

25                  GENERAL FRANCISCO:  And that's exactly

1     what I was going to address next, Your Honor.  
2     The Visa Waiver Program provides a special  
3     benefit to our closest allies and some of the  
4     safest countries in the world.  Neither the  
5     Visa Waiver Program nor any of the other  
6     statutes that they cite addresses whether we  
7     get the minimum level of information needed to  
8     determine the admissibility of individuals  
9     coming in from some of the riskiest countries  
10    in the world.

11             And 1182(f) then does give the  
12    President the authority to supplement that  
13    vetting system.  After all, the whole vetting  
14    system is essentially determined by the  
15    executive branch.  It's up to the executive  
16    branch to set it up.  It's up to the executive  
17    branch to maintain it.  And it's up to the  
18    executive branch to constantly improve it.

19             And, here, you have something that  
20    really is at the core of 1182(f) since its main  
21    purpose is to help implement the INA by making  
22    sure we have that minimum baseline of  
23    information.

24             And if you look at the proclamation,  
25    what we're talking about is very basic pieces



1 of information. Not the ideal, but the  
2 minimum. Are they reporting terrorism history  
3 information? Are they reporting criminal  
4 history? Do they cooperate with us on a  
5 real-time basis?

6 And I could give you an example to  
7 help illustrate how this works. Suppose that  
8 Jane Doe shows up at our border with a valid  
9 visa, but after that visa was issued, pursuant  
10 to the entire process, Your Honor, that you  
11 described, her home country learns that she is  
12 associated with a terrorist organization but  
13 doesn't tell us.

14 Once she shows up at the border, we  
15 cannot make an intelligent determination as to  
16 whether or not she's admissible under the INA.  
17 And that's what this proclamation really does  
18 go to: Making sure we have that minimum  
19 baseline of information needed to determine  
20 admissibility.

21 And so the proclamation really does  
22 reflect a -- it is different than past  
23 proclamations, but it is typical in the sense  
24 that it seeks to identify harmful conduct that  
25 a foreign government is engaging in, and then

1 it imposes sanctions in order to pressure that  
2 government to change.

3 That's what President Carter did with  
4 respect to Iran, what President Reagan did with  
5 respect to Cuba. Here, the harmful conduct is  
6 the failure to provide us with that minimum  
7 baseline of information.

8 JUSTICE SOTOMAYOR: Can you represent  
9 that no other country that -- that fails all  
10 three of the criteria was excluded from this  
11 list?

12 GENERAL FRANCISCO: Well, Your Honor,  
13 what I can represent is that the -- the -- the  
14 analysis was holistic. It wasn't if you failed  
15 any one or the others. It was if your overall  
16 score was sufficiently low.

17 JUSTICE SOTOMAYOR: So given --

18 GENERAL FRANCISCO: So I can represent  
19 that all of the countries listed in the  
20 proclamation are the same countries that fell  
21 below the baseline, with the exception of  
22 Somalia, which the proclamation makes quite  
23 clear, and the exception of Iraq, which did  
24 fall below -- below the baseline but was not  
25 subjected to sanctions.

1           And I think that this reflects the  
2 tailored nature of this proclamation and the  
3 fact that it was meant to impose tailored  
4 pressure on these countries while also taking  
5 into account other types of national security  
6 and foreign policy considerations to try to  
7 move those countries across the line into  
8 acceptability, which we've now seen has been  
9 successful, as with the case of the government  
10 of Iraq -- of Chad.

11           JUSTICE KENNEDY: In fact, if you  
12 compare this proclamation to the Reagan and the  
13 Carter proclamations, which I think were one or  
14 two sentences, this is longer than any  
15 proclamation that -- that I've seen in this  
16 particular area.

17           GENERAL FRANCISCO: This is, Your  
18 Honor, the most detailed 1182 --

19           JUSTICE KENNEDY: I'd say "longer  
20 detail" --

21           GENERAL FRANCISCO: Yes.

22           JUSTICE KENNEDY: -- is -- is a better  
23 word.

24           GENERAL FRANCISCO: Yes. This is the  
25 more detailed 1182(f) proclamation in history.

1 It is not --

2 JUSTICE SOTOMAYOR: General, the  
3 proclamations by Reagan and Carter, however,  
4 were not as broad as this one.

5 GENERAL FRANCISCO: Your Honor, they  
6 were almost as broad, but --

7 JUSTICE SOTOMAYOR: And -- and --

8 GENERAL FRANCISCO: -- to complete my  
9 answer to Justice Kennedy's question, this is  
10 the most detailed proclamation ever issued in  
11 American history. Yes, Your Honor, to be sure,  
12 this covers more countries than either  
13 President Reagan's or President Carter's  
14 covered. But it's --

15 JUSTICE SOTOMAYOR: And more -- and  
16 more immigrants, because Carter's only applied  
17 to certain immigrants, not to all.

18 GENERAL FRANCISCO: President Carter's  
19 actually applied to all immigrants but then had  
20 an exception much like the waiver provision  
21 here for national interests and humanitarian  
22 concerns. So I think President Carter's was  
23 actually very similar to the proclamation here.  
24 And --

25 CHIEF JUSTICE ROBERTS: Is your

1 consular non-reviewability argument -- is that  
2 a jurisdictional argument?

3 GENERAL FRANCISCO: Your Honor, I --  
4 yes, I think it is a jurisdictional argument.  
5 And that's why I don't think you really should  
6 address any of these issues.

7 The basic rule is that the exclusion  
8 of aliens is a political act imbued with  
9 foreign policy and national security concerns  
10 and, therefore, subject to --

11 CHIEF JUSTICE ROBERTS: I -- I thought  
12 in *Sale*, that we decided that this -- this  
13 wasn't jurisdictional or at least decided the  
14 merits despite the non-reviewability argument  
15 that the government made.

16 GENERAL FRANCISCO: I think the second  
17 thing that you just said, Mr. Chief Justice, is  
18 accurate. The Court didn't address the  
19 reviewability issue at all. And so we don't  
20 think it's precedential one way or another.

21 CHIEF JUSTICE ROBERTS: Was the -- was  
22 the argument raised in that case by the  
23 government?

24 GENERAL FRANCISCO: Yes, it was, Your  
25 Honor. Actually, you could --

1 CHIEF JUSTICE ROBERTS: So -- so it's  
2 an argument we would have been required to  
3 address if it were, in fact, jurisdictional?

4 GENERAL FRANCISCO: I think so. And  
5 so I think one way you could understand it is  
6 that it doesn't go to Article III jurisdiction,  
7 though it is a justiciability argument and we  
8 would urge this Court to accept it because we  
9 think it's correct.

10 But even if you don't think that it's  
11 correct, we think that this proclamation  
12 satisfies the merits because it does fall well  
13 within the power of the President under  
14 1182(f).

15 JUSTICE BREYER: If you're about --

16 JUSTICE KAGAN: May I turn, General,  
17 to the constitutional claims in this case?

18 GENERAL FRANCISCO: Yes, Your Honor.

19 JUSTICE KAGAN: And your principal  
20 response to the Establishment Clause claim is  
21 to cite Mandel and to say that, once the  
22 government comes forward with a legitimate  
23 reason -- of course, national security is the  
24 most important reason one can come forward with  
25 -- the game is over, essentially. And I just

1 want to press on that a little bit.

2 GENERAL FRANCISCO: Sure.

3 JUSTICE KAGAN: So, first, I want to  
4 ask whether that means -- you started off by  
5 talking a lot about the process of this  
6 proclamation. But I -- I take it that that  
7 argument would apply irrespective of what  
8 process was used.

9 In other words, you would have made  
10 the same Mandel argument to the first executive  
11 order in this case, or would you not?

12 GENERAL FRANCISCO: We would have made  
13 a Mandel argument, but it is far stronger given  
14 that you have the process and substance upon  
15 which this proclamation was based, because  
16 whatever you --

17 JUSTICE KAGAN: Well, I guess I wonder  
18 why that is, just because, when I read Mandel,  
19 I don't see anything about process or you have  
20 to meet a certain kind of bar.

21 GENERAL FRANCISCO: Uh-huh.

22 JUSTICE KAGAN: Mandel really is kind  
23 of you state a reason and this Court stops.

24 GENERAL FRANCISCO: And I think that  
25 that is right, but I think that when you, in

1 addition to that, have the extensive worldwide  
2 process that we had that resulted in a  
3 cabinet-level recommendation, that applied a  
4 neutral baseline to every country in the world,  
5 concluded that almost all the world, including  
6 almost all of the Muslim-majority world passed  
7 that baseline, but a tiny number of countries  
8 didn't, I think that whether you apply Mandel  
9 or whether you apply McCreary, that makes the  
10 constitutional case in our favor overwhelmingly  
11 strong. It's a --

12 JUSTICE KAGAN: So let me give you a  
13 hypothetical, and it's just -- you know, I  
14 think that there are ways to distinguish Mandel  
15 in this case, but -- but -- but, you know, just  
16 in terms of thinking about what Mandel really  
17 forecloses here.

18 GENERAL FRANCISCO: And I -- because  
19 Mandel, there are only two cases in the area,  
20 and it's -- it's hard to understand the full  
21 contours of it.

22 JUSTICE KAGAN: I agree. So this is a  
23 hypothetical that you've heard a variant of  
24 before that the government has, at any rate,  
25 but I want to just give you.



1           So let's say in some future time a --  
2           a President gets elected who is a vehement  
3           anti-Semite --

4           GENERAL FRANCISCO: Uh-huh.

5           JUSTICE KAGAN: -- and says all kinds  
6           of denigrating comments about Jews and provokes  
7           a lot of resentment and hatred over the course  
8           of a campaign and in his presidency and, in the  
9           course of that, asks his staff or his cabinet  
10          members to issue a proc -- to issue  
11          recommendations so that he can issue a  
12          proclamation of this kind, and they dot all the  
13          i's and they cross all the t's.

14          And what emerges -- and, again, in the  
15          context of this virulent anti-Semitism -- what  
16          emerges is a proclamation that says no one  
17          shall enter from Israel.

18          GENERAL FRANCISCO: Right.

19          JUSTICE KAGAN: Do you say Mandel puts  
20          an end to judicial review of that set of facts?

21          GENERAL FRANCISCO: No, Your Honor, I  
22          don't say Mandel puts an end to it, but I do  
23          say that, in that context, Mandel would be the  
24          starting point of the analysis, because it does  
25          involve the exclusion of aliens, which is where

1 Mandel applies.

2           If his cabinet -- and this is a very  
3 tough hypothetical that we've dealt with  
4 throughout -- but if his cabinet were to  
5 actually come to him and say, Mr. President,  
6 there is honestly a national security risk here  
7 and you have to act, I think then that the  
8 President would be allowed to follow that  
9 advice even if in his private heart of hearts  
10 he also harbored animus.

11           JUSTICE KAGAN: Well, the question is  
12 --

13           GENERAL FRANCISCO: I would also  
14 suggest, though -- if I could finish that, Your  
15 Honor -- that I think it would be very  
16 difficult for that to even satisfy Mandel  
17 rational basis scrutiny. I'd need to know what  
18 the rational was. Given that Israel happens to  
19 be one of the country's closest allies in the  
20 war against terrorism, it's not clear to me  
21 that you actually could satisfy --

22           JUSTICE KAGAN: Well --

23           GENERAL FRANCISCO: -- Mandel's  
24 rational basis standard on that, unless it  
25 truly were based --

1 JUSTICE KAGAN: Yes.

2 GENERAL FRANCISCO: -- on a  
3 cabinet-level recommendation that was about  
4 national security.

5 JUSTICE KAGAN: General, I'm -- let's  
6 -- this is a out-of-the-box kind of President  
7 in my hypothetical. And --

8 (Laughter.)

9 GENERAL FRANCISCO: We -- we -- we  
10 don't have those, Your Honor.

11 JUSTICE KAGAN: And -- and, you know,  
12 he thinks that there are good diplomatic  
13 reasons, and there might -- who knows what the  
14 future holds, that there might be good  
15 diplomatic reasons to put pressure on Israel or  
16 to say we want Israel to vote a certain way in  
17 the U.N. and this is a way to better our  
18 diplomatic hand, and so this is what he does.

19 And -- and who knows what his heart of  
20 hearts is. I mean, I take that point. But the  
21 question is not really what his heart of hearts  
22 is. The question is what are reasonable  
23 observers to think --

24 GENERAL FRANCISCO: Right.

25 JUSTICE KAGAN: -- given this context,

1 in which this hypothetical President --

2 GENERAL FRANCISCO: Sure.

3 JUSTICE KAGAN: -- is making virulent  
4 anti-Semitic comments.

5 GENERAL FRANCISCO: Right. And, Your  
6 Honor, it's a tough hypothetical, but it's why  
7 I also think that this is a relatively easy  
8 case, because we're willing to even assume for  
9 the sake of argument that you consider all of  
10 the statements.

11 And we're even willing to assume for  
12 the sake of argument, though we think that it's  
13 wrong, that you applied some kind of domestic  
14 establishment clause jurisprudence, because  
15 we're quite confident that, given the process  
16 and substance that form the basis of this  
17 proclamation, no matter what standard you  
18 apply, this proclamation is constitutional.

19 Since we don't have the extreme  
20 hypothetical that you're suggesting, Your  
21 Honor, we do have a multi-agency worldwide  
22 review and a cabinet-level recommendation that  
23 applied a neutral baseline. And this wasn't  
24 done just by the cabinet secretaries but by the  
25 agencies to every country in the world and

1 concluded --

2 JUSTICE SOTOMAYOR: Mr. General, you  
3 just --

4 JUSTICE KENNEDY: If -- if you have  
5 that extreme hypothetical, would that present a  
6 free exercise or an Establishment Clause claim  
7 or both?

8 GENERAL FRANCISCO: It could  
9 definitely present a free exercise clause  
10 challenge, Your Honor, just as you had a free  
11 speech type claim in the Mandel case.

12 And there would be people who could  
13 bring that claim and who could potentially  
14 succeed on that claim.

15 JUSTICE KENNEDY: And -- and the  
16 people that could bring that claim, I assume,  
17 were relatives of people that were excluded,  
18 father, son?

19 GENERAL FRANCISCO: On free exercise,  
20 potentially. I think all --

21 JUSTICE KENNEDY: Yeah, what about a  
22 university?

23 GENERAL FRANCISCO: I think a  
24 university could bring a free speech-type claim  
25 under Mandel, much --

1 JUSTICE SOTOMAYOR: Why not an  
2 Establishment Clause claim?

3 GENERAL FRANCISCO: And -- and --  
4 because, Your Honor, and the reason why I think  
5 they haven't pursued those types of claims is  
6 because I don't think they would possibly  
7 support the types of nationwide injunction that  
8 they're asking for.

9 Your Honor, the reason why I don't  
10 think that they could bring an Establishment  
11 Clause claim is because the proclamation  
12 doesn't actually apply to the Respondents. It  
13 only applies to aliens abroad who have no  
14 constitutional right to enter.

15 JUSTICE SOTOMAYOR: No, but the claim  
16 is that it -- that the proclamation is in place  
17 because of a dislike of a particular religion.  
18 And I thought the Establishment Clause at its  
19 heart is that we cannot be anything but neutral  
20 with respect to religion or its practice.

21 GENERAL FRANCISCO: That is true, Your  
22 Honor, but as the Valley Forge decision makes  
23 clear, not everybody has standing to challenge  
24 that negative message injury. Otherwise, the  
25 plaintiffs in Valley Forge would have had

1 standing to challenge the land transfer from  
2 the government to the Christian college on the  
3 ground that it sent a pro-Christian or  
4 anti-atheist message. That --

5 JUSTICE SOTOMAYOR: But these people  
6 are saying that that negative religious  
7 attitude is stopping them --

8 GENERAL FRANCISCO: Right.

9 JUSTICE SOTOMAYOR: -- from doing  
10 things that they would otherwise be able to do:  
11 To associate with scholars from these  
12 countries, to bring in students, to have family  
13 members join them.

14 GENERAL FRANCISCO: Right.

15 JUSTICE SOTOMAYOR: Which is one of  
16 the purposes of the INS.

17 GENERAL FRANCISCO: And -- and that's  
18 where they might have free exercise or free  
19 speech claims along the type that Justice  
20 Kennedy suggested --

21 JUSTICE SOTOMAYOR: Well, but I --

22 GENERAL FRANCISCO: -- but which  
23 couldn't support a nationwide injunction. I  
24 don't think that that gives them an  
25 Establishment Clause claim when the

1 proclamation doesn't actually apply to them  
2 because --

3 JUSTICE SOTOMAYOR: General, today,  
4 can we go back to something that's been  
5 bothering me here, which is -- and it was  
6 argued in a case this week about the unitary  
7 executive theory, which basically says the  
8 President is at the head, I think -- I'm  
9 summarizing in an incomplete way --

10 GENERAL FRANCISCO: Uh-huh.

11 JUSTICE SOTOMAYOR: -- but that the  
12 President is the head of the executive branch  
13 and that he should have, for those who are in  
14 the extreme of this theory or -- or on one end  
15 of the theory --

16 GENERAL FRANCISCO: Uh-huh.

17 JUSTICE SOTOMAYOR: -- not extreme,  
18 that he can hire or fire anyone he wants and  
19 that he can put in place whatever policy he  
20 wants.

21 GENERAL FRANCISCO: Uh-huh.

22 JUSTICE SOTOMAYOR: If we take Justice  
23 Kagan's hypothetical President --

24 GENERAL FRANCISCO: Uh-huh.

25 JUSTICE SOTOMAYOR: -- who basically



1 says to his review committee, I want to keep  
2 out Jews --

3 GENERAL FRANCISCO: Uh-huh.

4 JUSTICE SOTOMAYOR: -- period; find a  
5 way. That's their charge.

6 So, in that situation, why would the  
7 actions of the committee, whatever this is,  
8 Executive Committee, not be subject to great  
9 suspicion and to thorough review -- which  
10 actually wasn't completely --

11 GENERAL FRANCISCO: Uh-huh.

12 JUSTICE SOTOMAYOR: -- done here --  
13 given that they are responsible to the  
14 executive --

15 GENERAL FRANCISCO: Right.

16 JUSTICE SOTOMAYOR: -- and they've  
17 been told what the outcome of their  
18 deliberations must be?

19 GENERAL FRANCISCO: Sure. And I have  
20 two responses to that, Your Honor.

21 The first is that the President's  
22 cabinet, just like all of us here, is  
23 duty-bound to protect and defend the  
24 Constitution. So I would expect that if any  
25 cabinet member were given that order, that

1 cabinet member would refuse to comply or resign  
2 in the face of a plainly unconstitutional  
3 order. So I think that would be the initial  
4 check.

5           Secondly, if you had an extreme  
6 scenario where all of that broke down, then, if  
7 the President actually did make that  
8 statement -- I want to keep out a particular  
9 race or a particular religion, no matter  
10 what -- that would undermine the facial  
11 legitimacy of the action, even under the Mandel  
12 standard.

13           Here, however, you don't have anything  
14 like that. Rather, you have the cabinet doing  
15 its job through the agencies, where they ask  
16 the agencies to construct and apply this  
17 neutral standard to every country in the world,  
18 including every Muslim country. They concluded  
19 that the vast majority of the world, including  
20 the vast majority of the Muslim world, was just  
21 fine, but there were problems with a small  
22 number of countries and so imposed pressure,  
23 recommended pressure, to help move those  
24 countries across the line.

25           JUSTICE SOTOMAYOR: General, the

1 problem is that I don't see that that material  
2 was reviewed by the judges below, by the Ninth  
3 Circuit or the Fourth Circuit judges.

4 I thought that the government had kept  
5 confidential and refused to share, either with  
6 the litigants or the courts, exactly what was  
7 done, how, what the evaluation and how --

8 GENERAL FRANCISCO: Right.

9 JUSTICE SOTOMAYOR: -- it was applied  
10 to all those countries in the world.

11 I understand some of the  
12 confidentiality that might concern you, but if  
13 the backdrop is the way that Justice Kagan  
14 described it --

15 GENERAL FRANCISCO: Right.

16 JUSTICE SOTOMAYOR: -- that -- that  
17 heated --

18 GENERAL FRANCISCO: Well, I -- yeah --

19 JUSTICE SOTOMAYOR: -- anti-Semitic  
20 background, don't you think that once you get  
21 through the Mandel preliminary stage, that you  
22 need an independent arbiter to look at all of  
23 that to ensure the process, in fact, is what is  
24 claimed it was?

25 GENERAL FRANCISCO: Well, Your Honor,

1 a couple of responses to that.

2 First of all, I think that the  
3 proclamation is very transparent and lays out  
4 in great detail both the process and the  
5 substance upon which the proclamation is based.

6 And I think that under the duty of  
7 regularity or good faith, or whatever you want  
8 to call it, that one branch of the government  
9 owes to another coequal branch of the  
10 government, there is a very strong presumption  
11 that what is being set out there is the truth.

12 JUSTICE KAGAN: You -- you said  
13 something earlier, General, I want to make sure  
14 that I got it right. You said if at the time  
15 the President had said we don't want Muslims  
16 coming into this country --

17 GENERAL FRANCISCO: Uh-huh.

18 JUSTICE KAGAN: -- that that would  
19 undermine the proclamation.

20 GENERAL FRANCISCO: Yes.

21 JUSTICE KAGAN: Did I get you right?

22 GENERAL FRANCISCO: Yes.

23 JUSTICE KAGAN: So I -- I think, you  
24 know, honestly, the difference here then seems  
25 to be is everything that the President said

1 effectively that?

2 GENERAL FRANCISCO: I think there are  
3 two issues, Your Honor, there. The first is  
4 whether you can ever consider things like  
5 campaign statements. And we are very much of  
6 the view that campaign statements are made by a  
7 private citizen before he takes the oath of  
8 office and before, under the Opinions Clause of  
9 the Constitution, receives the advice of his  
10 cabinet, and that those are constitutionally  
11 significant acts that mark the fundamental  
12 transformation from being a private citizen to  
13 the embodiment of the executive branch. So  
14 that those statements should be out of bounds.

15 But for --

16 JUSTICE KENNEDY: But suppose you have  
17 a local mayor and, as a candidate, he makes  
18 vituperative hate -- hateful statements, he's  
19 elected, and on day two, he takes acts that are  
20 consistent with those hateful statements.  
21 That's -- whatever he said in the campaign is  
22 irrelevant?

23 GENERAL FRANCISCO: Your -- Your  
24 Honor, if he takes the same oath --

25 JUSTICE KENNEDY: You would say

1 whatever he said in the campaign is irrelevant?

2 GENERAL FRANCISCO: I would say two  
3 things. And that was the -- and the second  
4 thing is the point I was about to turn to. I  
5 would say yes, because we do think that oath  
6 marks a fundamental transformation, but I would  
7 also say here it doesn't matter, because, here,  
8 the statements that they principally rely on  
9 don't actually address the meaning of the  
10 proclamation itself.

11 This is not a so-called Muslim ban.  
12 If it were, it would be the most ineffective  
13 Muslim ban that one could possibly imagine  
14 since not only does it exclude the vast  
15 majority of the Muslim world, it also omits  
16 three Muslim-majority countries that were  
17 covered by past orders, including Iraq, Chad,  
18 and Sudan.

19 And so this order is what it purports  
20 to be and what its process and substance  
21 confirms that it is. It is an order that is  
22 based on a multi-agency worldwide review that  
23 applied neutral criteria all across the world  
24 and concluded, under those neutral criteria,  
25 most of the world was fine, but a small part of

1 it failed to provide us with that minimum  
2 baseline of information, the minimum, not the  
3 ideal, the bare minimum -- terrorism history,  
4 criminal history -- that we need to protect the  
5 country.

6 JUSTICE BREYER: All right. Can --  
7 can I ask a more -- I did read, I think, almost  
8 all the 80 briefs. Now your time -- what do --

9 CHIEF JUSTICE ROBERTS: Yeah, don't  
10 worry. Please go ahead.

11 JUSTICE BREYER: All right. All  
12 right. All right. Almost 80, and I think I --  
13 some were repetitive, not too many. And I  
14 think I know the basic arguments, but there's  
15 one question I'm left with and it starts with  
16 an assumption, which I think you share, but I  
17 want to be sure. All right.

18 I noticed that the Carter order and  
19 the Reagan order both had case-by-case  
20 exceptions.

21 GENERAL FRANCISCO: Uh-huh.

22 JUSTICE BREYER: And I looked at this  
23 order, and this has case-by-case exceptions.  
24 And then it says -- you know, it says  
25 case-by-case waivers may be appropriate in

1 individual circumstances, such as, giving some  
2 examples, the following.

3           And then they have to be no  
4 terrorists. Well, that's the law anyway. And  
5 they -- they have to be in the interests of the  
6 United States. And there can't be undue  
7 hardship, which the only time the word  
8 "hardship" appears in the immigration laws, it  
9 says "extreme hardship."

10           GENERAL FRANCISCO: Uh-huh.

11           JUSTICE BREYER: So "undue" must be  
12 less than "extreme."

13           GENERAL FRANCISCO: Uh-huh.

14           JUSTICE BREYER: Okay? So I'm -- then  
15 they have a list: people with foreign contacts  
16 previously established, business reasons,  
17 they've been here studying, or other long-term  
18 activity, they want to visit or reside with a  
19 close family member, they have a disease or  
20 something that they need --

21           GENERAL FRANCISCO: Uh-huh.

22           JUSTICE BREYER: -- treatment for,  
23 they -- previously been employed. And there  
24 are about five other things.

25           GENERAL FRANCISCO: Yeah.



1 JUSTICE BREYER: All right. Focus on  
2 that class of individuals.

3 GENERAL FRANCISCO: Uh-huh.

4 JUSTICE BREYER: Now, in countries --  
5 150 million people, all together, there must be  
6 quite a few who have -- do fall within that  
7 class. So --

8 GENERAL FRANCISCO: Well, yes, Your  
9 Honor, but there's only a small number of  
10 people that seek to come into our country.

11 JUSTICE BREYER: Well, that's what I'm  
12 asking about.

13 GENERAL FRANCISCO: Yeah.

14 JUSTICE BREYER: You see?

15 GENERAL FRANCISCO: Yeah.

16 JUSTICE BREYER: That's now -- if you  
17 -- you think -- now, as far as we're concerned,  
18 if they fall within that class, there --  
19 there's no reason given here why they should be  
20 excluded, other than the -- the normal  
21 processes?

22 GENERAL FRANCISCO: Well, a couple of  
23 responses, Your Honor.

24 JUSTICE BREYER: What?

25 GENERAL FRANCISCO: First, in terms of

1 the numbers --

2 JUSTICE BREYER: I'm not asking about  
3 the numbers.

4 GENERAL FRANCISCO: Oh, oh, you're not  
5 asking --

6 JUSTICE BREYER: I want to ask about  
7 --

8 GENERAL FRANCISCO: So -- so, in terms  
9 of the reason --

10 JUSTICE BREYER: Yeah.

11 GENERAL FRANCISCO: -- they should be  
12 excluded, one of the principal purposes of the  
13 proclamation is to exert diplomatic pressure on  
14 governments in order to get them to change and  
15 provide us with the information --

16 JUSTICE BREYER: So you think they  
17 should be excluded?

18 GENERAL FRANCISCO: Not if they meet  
19 the criteria for the --

20 JUSTICE BREYER: Not if they meet the  
21 criteria.

22 GENERAL FRANCISCO: -- for the waiver.

23 JUSTICE BREYER: Okay. Okay. So  
24 there's --

25 GENERAL FRANCISCO: That's why we have

1 -- that's why we have the waiver.

2 JUSTICE BREYER: That's -- that's --  
3 that's what I thought you would say.

4 GENERAL FRANCISCO: Yeah.

5 JUSTICE BREYER: Then I get -- can ask  
6 my question. Sorry.

7 GENERAL FRANCISCO: Yes.

8 JUSTICE BREYER: But I want to be sure  
9 we're the same wavelength.

10 GENERAL FRANCISCO: Yes.

11 (Laughter.)

12 JUSTICE BREYER: Okay. Now, falling  
13 within that class, here is the problem. It  
14 seems to me that there are probably a  
15 significant number of such people. And you  
16 read the briefs, you think, hey, there's the  
17 business community complaining, there's the  
18 academic community, there were 46 scholars at  
19 Harvard, there -- there are families in the  
20 Lisa Blatt brief, you know, that -- that they  
21 say we were trying to get medical treatment and  
22 nobody told us about this, and -- and they've  
23 only admitted two and there's supposed to be  
24 guidance, and --

25 GENERAL FRANCISCO: That's not true.

1           JUSTICE BREYER:  -- you haven't put in  
2     the guidance, and -- and -- and the most there  
3     are is 100.  And so there is my question.  If  
4     you have done the same thing that the Reagan  
5     people did and the Carter people did, then it  
6     might be -- I'm not expressing a definite  
7     opinion -- but, well, you've got the same thing  
8     here, but if this is, as one brief says, just  
9     window dressing and they never apply it --

10           GENERAL FRANCISCO:  Right.

11           JUSTICE BREYER:  -- then you have  
12     something new and different going well beyond  
13     what President Reagan did.

14           GENERAL FRANCISCO:  Sure.

15           JUSTICE BREYER:  Okay.  So I want to  
16     know how do I find out -- how do I find out  
17     when there is not that information in the  
18     brief, do we have to -- can we have another  
19     hearing?  Do we send it back?  Do we say, look,  
20     the government, of course, thinks this isn't  
21     window dressing --

22           GENERAL FRANCISCO:  Right.

23           JUSTICE BREYER:  -- but the other side  
24     says there are only two people, no notice,  
25     nobody knows.

1                   GENERAL FRANCISCO:  So, Your Honor,  
2   two --

3                   JUSTICE BREYER:  There are people in  
4   Yemen, there are people in Somalia --

5                   GENERAL FRANCISCO:  Yeah.

6                   JUSTICE BREYER:  -- decent people.  
7   Business -- you see my point?

8                   GENERAL FRANCISCO:  Yes.

9                   JUSTICE BREYER:  What's the answer?

10                  GENERAL FRANCISCO:  And two responses.

11                  JUSTICE BREYER:  Yes.

12                  GENERAL FRANCISCO:  Our reply brief  
13   has our most -- most current number on waivers,  
14   and I believe the number at page 17, footnote  
15   -- well, it's -- it's over 400.  I can't  
16   remember the exact statement.

17                  JUSTICE BREYER:  All right.  That's  
18   400 out of 150 million.

19                  GENERAL FRANCISCO:  And then --

20                  JUSTICE BREYER:  And -- and is it well  
21   publicized in these countries that they know  
22   all they have to do is go to the visa office  
23   and say:  I understand the thing, I want an  
24   exception?

25                  GENERAL FRANCISCO:  No, Your Honor,

1 and I have two -- two responses --

2 JUSTICE BREYER: Yeah.

3 GENERAL FRANCISCO: -- to that. One  
4 is I don't know how well publicized it is, but  
5 I suspect that people understand how to get it.

6 My second principal response is,  
7 though, that, frankly, in terms of the  
8 legality, I think that the waiver is not  
9 necessary, although it is a very good thing,  
10 which is why --

11 JUSTICE BREYER: Not necessary. There  
12 -- there you have President Reagan --

13 GENERAL FRANCISCO: -- which is why  
14 most -- which is why most governments don't --  
15 which is why it's -- it's a good thing, which  
16 is why most of these proclamations often have  
17 them. But there's nothing in --

18 JUSTICE BREYER: Okay. So you want me  
19 to consider --

20 GENERAL FRANCISCO: -- the law that  
21 actually requires it.

22 JUSTICE BREYER: That's what you want.  
23 You want me to consider the lawfulness of this  
24 order on the assumption that there is no  
25 waiver.

1                   GENERAL FRANCISCO: I don't --

2                   JUSTICE BREYER: Which is not what --  
3 not what President Reagan did, not what -- not  
4 what President Carter did, and if you go  
5 through every action that Congress took,  
6 waiver, waiver, waiver, possibility,  
7 case-by-case, case-by-case here, that's the --  
8 that's the --

9                   GENERAL FRANCISCO: Right. The answer  
10 to my -- your question, Your Honor, is, no, I  
11 don't want you to consider the proclamation on  
12 the -- on the hypothetical situation that it is  
13 what it isn't, but I do think that the  
14 proclamation as written and as applied falls  
15 well within the President's authority under  
16 1182(f).

17                   Thank you, Mr. Chief Justice.

18                   CHIEF JUSTICE ROBERTS: Thank you,  
19 General. We will afford you rebuttal time.

20                   GENERAL FRANCISCO: Thank you.

21                   CHIEF JUSTICE ROBERTS: Mr. Katyal.

22                   ORAL ARGUMENT OF NEAL K. KATYAL

23                   ON BEHALF OF THE RESPONDENTS

24                   MR. KATYAL: Thank you, Mr. Chief  
25 Justice, and may it please the Court:

1           The executive order is unlawful for  
2 three reasons: It conflicts with Congress's  
3 policy choices. It defies the bar on  
4 nationality discrimination, something you never  
5 heard my friend talk about. And it violates  
6 the First Amendment.

7           Congress has already specified a  
8 three-part solution to the very same problem  
9 the order addresses: Aliens seeking entry from  
10 countries that don't cooperate with the United  
11 States in vetting, including "state sponsors of  
12 terrorism and countries that provide inaccurate  
13 information."

14           First, aliens have to go through the  
15 individualized vetting process with the burden  
16 placed on them.

17           Second, when Congress became aware  
18 that some countries were failing to satisfy the  
19 very same baseline criteria you just heard  
20 about, that the order uses, Congress rejected a  
21 ban. Instead, it used carrots. When countries  
22 cooperated, they'd get extra credit, a track --  
23 faster track for admission. Legislation to use  
24 big sticks like nationality bans failed.

25           And, third, Congress was aware



1 circumstances could change on the ground, so it  
2 required reporting to them so it could change  
3 the law.

4 CHIEF JUSTICE ROBERTS: Well, let's  
5 take big sticks fail. Let's suppose that the  
6 intelligence agencies go to the President and  
7 say, we have 100 percent solid information  
8 that, on a particular day, 20 nationals from  
9 Syria are going to enter the United States with  
10 chemical and biological weapons. They could  
11 kill tens of thousands of Americans.

12 In that situation, could the President  
13 ban the entry of Syrian nationals on that one  
14 day?

15 MR. KATYAL: He could for two reasons.  
16 There's two different arguments. There's the  
17 nationality discrimination ban, 1152, and then  
18 there's, you know, whether or not this comports  
19 with Congress's policy judgments.

20 And with respect to both, I think it  
21 would. It wouldn't be nationality  
22 discrimination for the reasons Judge Sentelle  
23 said in LAVAS, when you have an emergency  
24 fast-moving situation like the Syria example  
25 you're saying.

1 CHIEF JUSTICE ROBERTS: Well, just to  
2 stop, interrupt you there. I mean, what if  
3 it's a week? What if it's a week a month from  
4 now? That's what the intelligence information  
5 is.

6 In other words, I'm trying to --

7 MR. KATYAL: Right.

8 CHIEF JUSTICE ROBERTS: -- respond to  
9 your point that it has to be an immediate  
10 decision.

11 MR. KATYAL: Yeah. So I think, you  
12 know, this Court's dealt with that in  
13 Youngstown and Hamdan and said, look, you know,  
14 the President's going to get a pass absolutely  
15 on, you know, what he says the emergency is.  
16 But the ultimate question is, can you go to  
17 Congress and get any legislative impediment  
18 removed? And that he can have deference about.

19 But here we are 460 days on -- later,  
20 Mr. Chief Justice. He's never even introduced  
21 legislation about this. So we're so far from  
22 that hypothetical, we'll concede the  
23 hypothetical.

24 CHIEF JUSTICE ROBERTS: Well, imagine  
25 -- imagine, if you can, that Congress is unable

1 to act when the President asked for  
2 legislation.

3 (Laughter.)

4 MR. KATYAL: Right.

5 CHIEF JUSTICE ROBERTS: And someone  
6 introduces a bill saying let's authorize --  
7 first of all, the President may have qualms  
8 about sharing that absolute intelligence  
9 broadly, but let's say there's a bill  
10 introduced to say let's authorize the President  
11 and there's a bill introduced to say let's  
12 block the President, and neither bill moves.

13 MR. KATYAL: Absolutely. We  
14 understand the President will have residual  
15 authority to keep the country safe. Our point  
16 here, though, is that Congress has thought  
17 about this exact problem, including, you know  
18 -- you know, about -- there -- there's only one  
19 problem he's identifying, which is countries  
20 not cooperating.

21 He's not talking about people coming  
22 in or something like that, like your  
23 hypothetical. And with respect to that,  
24 Congress has said here's how we deal with it.  
25 We deal with it with the individualized vetting

1 system, which pushes all the burdens on a  
2 person coming in. That's 1361.

3 You've got to show biometric ID under  
4 the statute. You've got to have an in-person  
5 interview, if there's any risk that the person  
6 is from a country that's a state sponsor of  
7 terrorism, like your hypothetical or anything  
8 else.

9 So Congress has really said in a  
10 robust way, here's how we would deal with it.  
11 And to the extent countries aren't cooperating,  
12 we offer carrots.

13 Congress rejected exactly what they're  
14 trying to propose here, which is a flat  
15 nationality ban. And that's where I think the  
16 force of our argument lies with respect to the  
17 first point, which is this is countermanding  
18 Congress's policy judgments.

19 My friend on the other side actually  
20 in his brief --

21 JUSTICE ALITO: Well, Congress did --  
22 Congress did act. It enacted 1182(f).

23 MR. KATYAL: Correct.

24 JUSTICE ALITO: Why doesn't this fall  
25 squarely within the language of 1182(f)?

1           MR. KATYAL: For -- for -- we have  
2 both textual reasons that it's not a class, for  
3 reasons Justice Breyer was talking about. It's  
4 not perpetuated -- it's perpetual, like Justice  
5 Ginsburg was talking about. But we think  
6 there's a much bigger point, Justice Alito,  
7 which is --

8           JUSTICE ALITO: Well, maybe you could  
9 talk about the text. It's not a class?  
10 Doesn't 11 -- doesn't 1182(f) say whenever the  
11 President finds that the entry of any aliens --

12          MR. KATYAL: Correct.

13          JUSTICE ALITO: -- or any class of  
14 aliens. So put class aside, although I don't  
15 really see why people who are nationals of a  
16 particular country don't constitute a class.  
17 What about any aliens?

18          MR. KATYAL: Right. So we think it is  
19 any, you know -- because the power in 1182 is  
20 so broad and sweeping and does allow the  
21 President to supplement what Congress has done,  
22 we think that you have to -- you have to be  
23 careful and read limit -- you have to read it  
24 just the way you read every other statute to  
25 say, how do we harmonize that broad text of

1 1182(f) with the rest of the INA?

2           And our point in our briefs, which I  
3 don't think you heard an answer to, is, if you  
4 accept their idea that the President has such a  
5 sweeping power, he could end, for example,  
6 family -- the family preference system and  
7 impose, you know, and end so-called chain  
8 migration or anything like that. He could do  
9 -- countermand any of the provisions of the INA  
10 and turn it into a line item veto.

11           So, for that reason, we think there  
12 has to be some limit. That's something this  
13 Court's dealt with in, you know, the tobacco  
14 case or --

15           JUSTICE ALITO: Well, does this  
16 proclamation do anything like that? Does this  
17 proclamation purport to establish a new  
18 permanent immigration policy for the United  
19 States?

20           MR. KATYAL: Absolutely, Your Honor.  
21 This is a perpetual policy that bans. It does  
22 exactly what Congress in 1965 said you can't  
23 do. And it countermands Congress's  
24 fine-grained reticulated judgment from 2001,  
25 2015, and several other times, which is to say,

1 instead of these flat bans, we're going to have  
2 -- we're going to balance foreign policy  
3 considerations, economic considerations, like  
4 the U.S. companies brief, humanitarian, image  
5 of the United States views, all of that  
6 together, and said we won't do the flat ban.

7           Instead, we're going to have a much  
8 more fine-grained approach with individualized  
9 vetting and carrots for the countries that  
10 don't disagree -- that don't cooperate.

11           JUSTICE ALITO: What is your basis for  
12 saying that it is perpetual?

13           MR. KATYAL: Well, there's nothing in  
14 the order that ends it. And you heard my  
15 friend say, oh, that would doom all executive  
16 orders. But that's not true. Half of these --

17           JUSTICE KENNEDY: I thought it had to  
18 be reexamined every 180 days?

19           MR. KATYAL: No, that's not what it  
20 says. It says there's a report that has to  
21 come in at 180 days, and nothing happens at the  
22 end of the report.

23           JUSTICE KENNEDY: Well, that -- that  
24 indicates there will be a reassessment?

25           MR. KATYAL: Well, in --

1 JUSTICE KENNEDY: And then the -- and  
2 -- and the President has continuing discretion?

3 MR. KATYAL: Justice Kennedy, this  
4 argument wouldn't be there if there was  
5 anything about reassessment, the way there are  
6 in about half the orders, including the Cuba  
7 order, which says it sunsets once the crisis  
8 ends. There's nothing like that in this.

9 And it's just like a reporting  
10 requirement to Congress in which Congress isn't  
11 necessarily required to do anything. Congress  
12 has statutes like that all the time.

13 This is that. And that's why this is  
14 unlike any other executive order. If you go  
15 back and look at all 43 executive orders that  
16 Presidents have issued, none of them have even  
17 arguably countermanded Congress's judgment in  
18 the area. They've all been consistent.  
19 They've all been supplements.

20 JUSTICE KENNEDY: Well, the statute  
21 says first that -- that -- that 1182 for such  
22 period as he deems necessary, and he can have  
23 continuing supervision over whether it's still  
24 necessary.

25 MR. KATYAL: Again, we wouldn't have a



1 problem with that if it was tailored to a  
2 crisis, it says it sunsets, and then, you know,  
3 could be re-upped or something like that.  
4 That's not what this says. This is about a  
5 perpetual problem.

6 JUSTICE KENNEDY: So you want the  
7 President to say, I'm convinced that in six  
8 months we're going to have a safe world?

9 MR. KATYAL: Well -- well -- well, no,  
10 Justice Kennedy, that's not our argument. Our  
11 argument is, here, the President is identifying  
12 something that is a perennial problem. Our  
13 brief says it goes back 100 years, you know,  
14 when the Soviet Union was around, we don't have  
15 countries that cooperate with us in vetting.

16 And the solution has always been from  
17 Congress not to have a flat ban but instead to  
18 have a fine-grained vetting system to balance  
19 these considerations.

20 CHIEF JUSTICE ROBERTS: What if the  
21 military advisors tell the President that, in  
22 their judgment, the President ought to order a  
23 strike, an air strike against Syria, and the  
24 President says, well -- does that mean he can't  
25 because you would regard that as discrimination

1 against a majority Muslim country?

2 MR. KATYAL: Absolutely not. There's  
3 nothing to do with the text of the statute.  
4 The 1152 statute's about discrimination and the  
5 "issuance of visas." And that's all that --

6 CHIEF JUSTICE ROBERTS: So, under  
7 1182(f), you would say that there's no problem  
8 under that provision?

9 MR. KATYAL: Well, under 1182, as I  
10 understand, it was a strike. And so I don't  
11 think there's any immigration issue in your  
12 hypothetical. I might be misunderstanding it,  
13 Mr. Chief Justice.

14 CHIEF JUSTICE ROBERTS: Well, any type  
15 of targeted action that would have a impact on  
16 the Muslim population.

17 MR. KATYAL: Absolutely. We think the  
18 President has wide authorities to do things  
19 that have impacts on the Muslim population.  
20 Take the laptop ban that was introduced --

21 CHIEF JUSTICE ROBERTS: Why under your  
22 theory wouldn't that constitute or the argument  
23 would be that that's discrimination under your  
24 Establishment Clause argument --

25 MR. KATYAL: Oh.

1 CHIEF JUSTICE ROBERTS: -- that that's  
2 discrimination on the basis of faith because he  
3 has said in the past, if you accept the --

4 MR. KATYAL: Yeah.

5 CHIEF JUSTICE ROBERTS: -- accept the  
6 arguments, that he -- he is anti-Muslim?

7 MR. KATYAL: Not at all, Your Honor,  
8 and no President has run afoul of this, you  
9 know, and that's because, here, the President  
10 and his advisors have directly tied this policy  
11 to those statements. And the red brief at page  
12 70, I think, is the greatest illustration of  
13 that.

14 That's a constitutional claim. And I  
15 certainly want to get there, but before doing  
16 so, I just want to make very clear the  
17 consequences of their position for the INA is  
18 that the President can take a wrecking ball to  
19 the statute and countermand Congress's  
20 fine-grained judgments that --

21 CHIEF JUSTICE ROBERTS: He can never  
22 --

23 JUSTICE KAGAN: Well, you might think  
24 --

25 JUSTICE GORSUCH: Mr. Katyal -- Mr.

1     Katyal, if I might on -- on the statutory  
2     question before we leave it. We've been  
3     proceeding so far on the assumption that we can  
4     reach the merits, but the government makes the  
5     argument, for example, that aliens who are  
6     removed from this country have to bring their  
7     claims personally and third parties can't  
8     vindicate those rights of aliens being -- who  
9     are present in this country, and asks the  
10    question why it should be that third persons  
11    should be able to assert the rights of aliens  
12    who are not present in this country. What's  
13    the answer to that?

14                 MR. KATYAL: Well, several. This is  
15    not a third-party case. These are United  
16    States citizens bringing this challenge in a  
17    state --

18                 JUSTICE GORSUCH: Oh behalf of --

19                 MR. KATYAL: -- of the United States.

20                 JUSTICE GORSUCH: -- aliens not  
21    present in the country?

22                 MR. KATYAL: Well, but they are  
23    directly -- they are directly harmed  
24    themselves. Let me just give you one example.  
25    Not just the State of Hawaii, whose university

1 is directly impacted, but let's just take, for  
2 example, the Alomari -- Mr. Alomari, the  
3 10-year-old in the PARS Equality brief, Justice  
4 Breyer, that you were referring to. This is a  
5 10-year-old daughter in Yemen who is -- who's  
6 trying to come here because she has cerebral  
7 palsy.

8 JUSTICE GORSUCH: I understand that,  
9 but those arguments don't work with respect to  
10 aliens present in the country. So why do they  
11 work for aliens who are not present in the  
12 country?

13 MR. KATYAL: Because I --

14 JUSTICE GORSUCH: Those very same  
15 arguments would not succeed.

16 MR. KATYAL: Well --

17 JUSTICE GORSUCH: I think you'd  
18 concede that they wouldn't succeed for aliens  
19 present --

20 MR. KATYAL: Right. And they don't  
21 succeed because there you have a better  
22 plaintiff might not be willing to bring them in  
23 the United States, and that's why the court,  
24 you know, says no third party. But, here,  
25 these folks are directly impacted.

1           And the most important thing to say is  
2           Sale answers this. You heard my friend concede  
3           Sale was jurisdictional, the issues in Sale.  
4           That's how they briefed it up. That's how he  
5           just described it. This Court had exactly that  
6           situation, United States plaintiffs, and it  
7           reached the merits.

8           Our statutory point to you is that if  
9           you accept this order, you're giving the  
10          President a power no President in 100 years has  
11          exercised, an executive proclamation that  
12          countermands Congress's policy judgments. He  
13          has zero examples to say that when Congress has  
14          stepped into the space and solved the exact  
15          problem, that the President can then come in  
16          and say: No, I want a different solution.

17          If you do that, you'd -- it's not just  
18          family preferences that you're allowing him to  
19          get rid of; you'd get rid of all sorts of even  
20          small things in the Code or big things, like  
21          there's a preference for specialty occupations  
22          like software engineers in the INA. The  
23          President could say: The economics are such  
24          I'm going to ban software engineers from going  
25          to California or something like that under that

1 sweeping 1182 power.

2 JUSTICE KAGAN: I -- I guess the  
3 question, though, Mr. Katyal, is maybe you're  
4 entirely right that 1182(f) needs to have some  
5 limits to prevent the President from doing  
6 something that's completely contrary to another  
7 section of the statute.

8 But you're suggesting, well, the  
9 President can't do anything that's not  
10 contemplated by the rest of the statute.

11 MR. KATYAL: That is not our argument.

12 JUSTICE KAGAN: Okay. So then I want  
13 to know, what are you saying this is directly  
14 contrary to? Because it seems to me you would  
15 have to point to some kind of clear and direct  
16 conflict --

17 MR. KATYAL: Right.

18 JUSTICE KAGAN: -- between what the  
19 President is doing and another statutory  
20 provision.

21 MR. KATYAL: So our view is that the  
22 President can supplement; he just can't  
23 supplant. In this Court's decisions in the  
24 Brown & Williamson case and the UARG greenhouse  
25 gas, and Concepcion and Abilene Cotton, the

1 Savings Clause cases, all say there are three  
2 things you look at. And it's not a flat bar.  
3 It can't be like a direct contravention. Even  
4 they say it's not a direct contravention in  
5 their reply brief at page 19.

6 So the three things are, first, can  
7 these two solutions coexist or not? Second,  
8 has Congress prescribed a reticulated  
9 comprehensive scheme? And, third, you know, is  
10 there any other indication that Congress  
11 considered the issue and went in a different  
12 direction?

13 With respect to all of those for  
14 here -- and, again, only this proclamation  
15 satisfies all three of those factors --  
16 Congress has a comprehensive reticulated scheme  
17 that deals with the exact single problem that  
18 he's identified, which is countries not  
19 cooperating. It can't coexist with the  
20 solution of a flat ban. It makes no sense, for  
21 example, to have the in-person visa requirement  
22 -- visa interview, which is in 12 --  
23 1202(h)(2), which is for -- for people who come  
24 from state sponsors of terrorism or who have a  
25 "group" with a likelihood of providing



1     inaccurate information. Congress said there  
2     has to be an in-person interview for that.

3             It doesn't make sense to say, well,  
4     you're going to have a flat ban. It doesn't  
5     make sense to have a Visa Waiver Program which  
6     is all about countries that provide zero  
7     information to the United States -- state  
8     sponsors of terrorism and the like -- and say  
9     we're going to give you a carrot and then say,  
10    oh, no, forget about the Visa Waiver Program.

11            JUSTICE ALITO: Can -- can you imagine  
12    any situation in which the threat of the  
13    infiltration of the United States by terrorists  
14    was so severe with respect to a particular  
15    country that the other measures that you have  
16    mentioned could be deemed by a President to be  
17    inadequate?

18            MR. KATYAL: Yes.

19            JUSTICE ALITO: You cannot imagine any  
20    such situation?

21            MR. KATYAL: Yes, I can. And the  
22    President would have a robust authority to deal  
23    with that. That is not our argument. So --

24            JUSTICE KENNEDY: And your argument is  
25    that courts have the -- the duty to review

1 whether or not there is such a national  
2 exigency; that's for the courts to do, not the  
3 President?

4 MR. KATYAL: No. I think you have  
5 wide deference, Justice Kennedy. It's exactly  
6 what you said when you joined Justice Breyer's  
7 opinion in Hamdan, which is, as long as -- you  
8 know, Presidents have wide berth in this area,  
9 but if -- you know, certainly, if there's any  
10 sort of emergency that precludes it.

11 But when you have a statute that  
12 considers the very same problem and there's  
13 nothing new that they've identified in this  
14 worldwide review process that Congress didn't  
15 consider exactly the same types of things, it  
16 is a perennial problem that countries do not  
17 cooperate with the United States when it comes  
18 to vetting. You know, the --

19 CHIEF JUSTICE ROBERTS: But that's in  
20 the abstract. I mean, they may have more --  
21 the President may have more particular problems  
22 in light of particular situations developing on  
23 the ground, and, yes, Congress addressed the  
24 question of the adequacy of vetting, but those  
25 questions arise in particular contexts.

1           And it seems to me a difficult  
2           argument to say that Congress was prescient  
3           enough to address any particular factual  
4           situation that might arise.

5           MR. KATYAL: Well, that, again --  
6           that's, again, Mr. Chief Justice, not our  
7           argument. So, for example, if something came  
8           along like a virus that, you know, wiped out  
9           the visa-processing software in all these other  
10          countries, absolutely, the President would have  
11          the power to do it. But here --

12          CHIEF JUSTICE ROBERTS: What about --  
13          what about a change of administration in a  
14          particular country --

15          MR. KATYAL: Yes.

16          CHIEF JUSTICE ROBERTS: -- in which  
17          perhaps the vetting procedures are not going to  
18          be taken seriously?

19          MR. KATYAL: Right.

20          CHIEF JUSTICE ROBERTS: That Congress  
21          could not have anticipated?

22          MR. KATYAL: Well, but, again,  
23          Congress anticipated a country that is a "state  
24          sponsor of terrorism" and even for -- with  
25          respect to that, providing no information and

1 indeed fomenting against the United States,  
2 Congress said, oh, we're not going to have a  
3 nationality ban. You know, they flatly banned  
4 that and said we're going to have  
5 individualized vetting and this Visa Waiver  
6 Program carrot to try and deal with that, you  
7 know, dangerous regime.

8 Now, again, I can imagine an emergency  
9 situation in which the President would have  
10 even greater authority for that. But, here, we  
11 are 460 days later and I would caution the  
12 Court not to make a decision about the  
13 emergency you're concerned about. That can be  
14 bracketed as it was in Youngstown, as it was in  
15 Hamdan. This is so far from that.

16 The text of 1152 is flatly violated  
17 here. It says there shall be no discrimination  
18 on the basis of nationality with the issuance  
19 of visas.

20 That is 39 percent of all the visas  
21 this executive order covers. It's not a small  
22 part. It's a large part. And it is the most  
23 important part because immigrant visas are the  
24 kind of heart about, you know, what the nation  
25 becomes. It's people who want to come here and

1     become part of our long-term polity. This  
2     executive order flatly contradicts that.

3             Now, if you accept his  
4     interpretation -- he says, well, you know,  
5     we're discriminating at the entry side, not at  
6     the visa side. If you do that, you are giving  
7     the President the power to undo -- and he's  
8     actually just done it -- he's undone the ban on  
9     nationality-based discrimination. He's imposed  
10    country quotas of zero for these countries at  
11    the border.

12            CHIEF JUSTICE ROBERTS: If your --  
13    your argument based on discrimination based on  
14    the campaign statements, is there a statute of  
15    -- no the one that you do make based on the  
16    campaign statements, is there a statute of  
17    limitations on that, or is that a ban from  
18    presidential findings for the rest of the  
19    administration?

20            MR. KATYAL: So, Mr. Chief Justice, I  
21    first want to be very clear about this. Our  
22    point about 1152 and the discrimination has  
23    nothing to do with any campaign statements or  
24    anything else.

25            It's purely the text of the

1 proclamation, which is nationality-based  
2 discrimination through and through. Judge  
3 Sentelle said you couldn't imagine a clearer  
4 text than this. And this is -- it violates it.

5 Now --

6 CHIEF JUSTICE ROBERTS: My question  
7 was on the --

8 MR. KATYAL: -- you're asking about  
9 the First Amendment.

10 CHIEF JUSTICE ROBERTS: Yes.

11 MR. KATYAL: I just want to make  
12 absolutely clear that we're -- that's not --  
13 you know, you don't need to do any of that for  
14 purposes of 1152. And that would knock out  
15 39 percent of the most important part of the  
16 executive order.

17 CHIEF JUSTICE ROBERTS: My question,  
18 of course --

19 MR. KATYAL: Yes. Now I'm getting --

20 CHIEF JUSTICE ROBERTS: -- was not on  
21 1152.

22 MR. KATYAL: Yes. I'm getting there.  
23 Okay.

24 With respect to that, we don't think  
25 -- we think that the test, as this Court has

1 said, a reasonable, objective observer viewing  
2 all the statements, and we think, absolutely,  
3 my friend is right, you shouldn't look to  
4 campaign statements in general or stuff like  
5 that, statements of a private citizen.

6 The only thing is, here, they  
7 themselves, the President and his staff, have  
8 rekindled exactly that. If you look at page 70  
9 of our red brief, you have a very good example  
10 of this.

11 After the executive order, this latest  
12 executive order was promulgated, the President  
13 tweeted these three virulent anti-Muslim  
14 videos. And then the press spokesman was  
15 asked: What does this mean? What is this  
16 about? And the answer was: The President has  
17 spoken about exactly this in the proclamation.

18 CHIEF JUSTICE ROBERTS: My question  
19 was whether or not the inhibition on the  
20 ability to -- to enter one of the proclamations  
21 applies forever?

22 MR. KATYAL: Right. No, I think the  
23 President could have disclaimed -- you know,  
24 easily moved away from all of these statements,  
25 you know, but instead they embraced them.

1 That's the difference.

2 And so, absolutely, the President  
3 would have wide berth to say that's a --

4 CHIEF JUSTICE ROBERTS: So, if  
5 tomorrow he issues a proclamation saying he's  
6 disavowing all those statements, then the next  
7 day he can reenter this proclamation?

8 MR. KATYAL: That's exactly what this  
9 Court said in McCreary. This Court in McCreary  
10 said, you know, the same policy can be  
11 constitutional if said -- if promulgated by one  
12 entity and not by another, depending on the  
13 circumstances around it.

14 CHIEF JUSTICE ROBERTS: Is your answer  
15 to my question yes?

16 MR. KATYAL: Yes. The answer is --

17 CHIEF JUSTICE ROBERTS: Tomorrow, he  
18 issues a proclamation disavowing those  
19 statements --

20 MR. KATYAL: Absolutely. And that's a  
21 --

22 CHIEF JUSTICE ROBERTS: -- then the  
23 next day he could reenter this and your  
24 discrimination argument would not be  
25 applicable?



1 MR. KATYAL: And -- and -- and, Mr.  
2 Chief Justice, that's exactly what I told the  
3 Ninth Circuit in May. The President didn't do  
4 that. That's what's -- that's -- you know,  
5 that's what a reasonable, objective observer --

6 JUSTICE SOTOMAYOR: So if another --  
7 JUSTICE ALITO: Mr. Katyal, would any  
8 reasonable observer reading this proclamation,  
9 with -- without taking into account statements,  
10 think that this was a Muslim ban?

11 I mean, there are -- I think there are  
12 50 predominantly Muslim countries in the world.  
13 Five -- five countries -- five predominantly  
14 Muslim countries are on this list.

15 The population of the -- of the  
16 predominantly Muslim countries on this list  
17 make up about 8 percent of the world's Muslim  
18 population.

19 MR. KATYAL: Absolutely.

20 JUSTICE ALITO: If you looked at the  
21 10 countries with the most Muslims, exactly  
22 one --

23 MR. KATYAL: Right.

24 JUSTICE ALITO: -- Iran, would be on  
25 that list of the top 10.

1 MR. KATYAL: Right.

2 JUSTICE ALITO: So would a reasonable  
3 observer think this was a Muslim ban?

4 MR. KATYAL: If it were -- if it were  
5 just the text of the order alone, it might  
6 raise eyebrows, for fit and other reasons that  
7 the briefs go into, but we wouldn't be here.  
8 We absolutely agree that just -- it's the same  
9 test as in Lukumi and other cases. You have to  
10 look to all the circumstances around it that  
11 are said, the publicly available ones.

12 You know, and, Justice Alito, the fact  
13 that the order only come -- encompasses some  
14 Muslim countries I don't think means it's not  
15 religious discrimination. For example, if I'm  
16 an employer and I have 10 African-Americans  
17 working for me and I only fire two of them, I  
18 don't think -- you know, and say, well, I've  
19 left the other eight in, I don't think anyone  
20 can say that's not discrimination.

21 JUSTICE ALITO: No, I -- I understand  
22 that. And it is one of our fundamental values  
23 that there is religious freedom here for  
24 everybody in that, number -- adherence to every  
25 religion are entitled to equal treatment.

1           My only point is that if you look at  
2 what was done, it does not look at all like a  
3 Muslim ban. There are other justifications  
4 that jump out as to why these particular  
5 countries were put on -- on the list.

6           So you -- it seems to me the list  
7 creates a strong inference that this was not  
8 done for that invidious purpose.

9           MR. KATYAL: Justice Alito, I think if  
10 it were just the list, I think we'd be right --  
11 you'd be right, although I'd point out that  
12 you, yourself, in the Stormans case said that  
13 it's a religious -- it raises an inference of  
14 religious gerrymander, of "the burden imposed  
15 falls almost exclusively on those with  
16 religious objections."

17           This is a ban that really does fall  
18 almost exclusively on Muslims, between  
19 90.2 percent and 99.8 percent Muslims. And so  
20 it does look very much like what you said in  
21 Stormans. But even then, we wouldn't be here  
22 if it weren't for all of the different  
23 statements.

24           And the best evidence of this, about  
25 what a reasonable, objective observer would

1 think, is to look at the wide variety of amicus  
2 briefs in this case from every corner of  
3 society representing millions and millions of  
4 people from the U.S. Conference of Catholic  
5 Bishops, which calls it "blatant religious  
6 discrimination."

7 JUSTICE GORSUCH: Mr. Katyal, on that,  
8 it's been a long time since this Court has used  
9 the Lemon test, reasonable observer, even to  
10 strike down a domestic statute, let alone  
11 something with purely international  
12 application. What -- what do we do about that?

13 MR. KATYAL: Yeah, so two things.  
14 Number one is I think the very fact that this  
15 is immigration cuts the other way. I mean, the  
16 heart of the First Amendment is about  
17 immigration restrictions on, for example,  
18 Catholics at the founding and our protest of  
19 King George, which is all about using the  
20 immigration power to exclude people of a  
21 different faith. And that's what our  
22 Constitution is about. So that's the first  
23 thing.

24 And the second is we don't think you  
25 have to get into Lemon and all these other

1 tests that you all have struggled with. I  
2 think this Court in Lukumi was very clear in  
3 saying that, when you're talking about  
4 denigration of religion, all the tests point in  
5 the same direction.

6 JUSTICE SOTOMAYOR: Mr. Katyal, you  
7 said something earlier, you said you wouldn't  
8 be here if all of those statements, the  
9 background statements, were not made. Do you  
10 mean that on all of your bases? You wouldn't  
11 be here on the Establishment Clause claim?

12 MR. KATYAL: Only on the Establishment  
13 Clause claim, not on anything else. And our  
14 point is, you know, he talks about, for  
15 example, this worldwide vetting process.

16 Remember his own argument on 1182 is  
17 the statute puts the President --

18 JUSTICE SOTOMAYOR: So let's -- let's  
19 go back to not being here without the  
20 statements. Clearly, the statements, even  
21 conceded by your adversary, do give you a basis  
22 to look behind, all right, the reason.

23 So, if we're looking behind it, how do  
24 you deal with the General's suggestion that  
25 there was a cleansing that occurred because of

1 all of the agencies and departments who  
2 participated in this process?

3 MR. KATYAL: Yeah. So there's three  
4 things. Number one is that his -- his own  
5 argument is that 1182 puts the President in the  
6 driver's seat, so the cabinet's not important.  
7 It's the President's proclamation.

8 Second, the order itself says in its  
9 first lines, it harkens back to Executive  
10 Orders 1 and 2, and it says it's an outgrowth  
11 of that. So it was infected by the same thing  
12 that was struck down on Establishment Clause  
13 grounds in other cases.

14 And third, and most importantly, the  
15 President before this review process even began  
16 tweeted and said that he wanted a tougher ban,  
17 a non-politically-correct ban and the like.

18 So given all of those things, but, in  
19 particular, given the fact that 1182 itself  
20 forces the President to make the proclamation,  
21 it's the President's proclamation, so I don't  
22 think you even have to get into this whole  
23 unitary executive thing, but I do agree with  
24 you, Justice Sotomayor, that that's another  
25 problem, which is they're coming before the

1 Court and saying: Nope, it's the President  
2 who's in charge. And now they're saying here:  
3 Oh, no, no, no, it's these other people.

4 This is the President's proclamation  
5 through and through. No President has ever  
6 said anything -- anything like this. And  
7 that's what makes this different.

8 And the President --

9 JUSTICE KAGAN: And -- and yet, Mr.  
10 Katyal, you have a proclamation that says there  
11 are important national security interests at  
12 stake. And the question is how to do the kind  
13 of analysis that you want us to do without in  
14 some sense evaluating the adequacy of those  
15 national security interests, which for the most  
16 part we've said courts are not equipped to do.

17 MR. KATYAL: Right. We're not asking  
18 you to second-guess a national security  
19 judgment at all with the purpose of the  
20 Establishment Clause.

21 We're saying you just have to look to  
22 what a reasonable, objective observer would do.  
23 That's the ordinary test that you've used in  
24 cases like Lukumi. Is there an official  
25 purpose to disparage a religion? Here, there

1 very much is. That's, you know, everything  
2 that the President has said and that the order  
3 itself embodies. That's our fundamental  
4 problem.

5 JUSTICE BREYER: What do you think --  
6 it's a -- it's a -- it's still something I'm --  
7 I'm thinking about, perhaps to the side, but  
8 the statute you point to, one of the ones that  
9 is stronger for you. There are obviously  
10 objections to what you're saying in quite a few  
11 briefs, all right, but the one that you talked  
12 about, it does say you have to have an  
13 interview with a consular official if the  
14 person is from a country officially designated  
15 by the Secretary as a state sponsor of  
16 terrorism. It does say that.

17 So they'll say, but we do have that in  
18 respect to everyone under the exception. So  
19 there isn't much problem. We've gone beyond  
20 that in respect to other people. All right.  
21 Take their argument for a moment.

22 Because my question is, which I  
23 couldn't find in the briefs, is, is it true --  
24 I'm just taking what they say -- that really  
25 that isn't so, they don't publicize it, they



1 haven't put forth a guidance, people don't know  
2 they can come in and qualify for this.

3 And if it turns out that that is  
4 something that is important to the lawfulness  
5 of the order, because there are many, many  
6 categories there --

7 MR. KATYAL: Right.

8 JUSTICE BREYER: -- what do we do?

9 MR. KATYAL: So two things. Number  
10 one, this waiver process has excluded -- and  
11 you have this in the PARS Equality brief at  
12 page 14. A 10-year-old with cerebral palsy who  
13 wants to come to the United States to save her  
14 life and she can't move or talk. The  
15 10-year-old was denied a waiver, Justice  
16 Breyer.

17 He says there's 430 people who have  
18 gotten waivers. They've never told you the  
19 denominator and there's no publication of this  
20 process and how -- how often it is. And the  
21 data that we do have suggests as a matter of  
22 percentages it's very weak.

23 Just to give you some evidence of  
24 that, just the State of Hawaii has gotten about  
25 1,000 letters from people, most of which say

1 we're not even getting waivers on the like.

2 JUSTICE GORSUCH: That --

3 MR. KATYAL: We've heard very few  
4 instances --

5 JUSTICE GORSUCH: -- raises a question  
6 of remedy for me.

7 MR. KATYAL: Yes.

8 JUSTICE GORSUCH: We have this  
9 troubling rise of this nationwide injunction,  
10 cosmic injunction --

11 MR. KATYAL: Yeah, yeah.

12 JUSTICE GORSUCH: -- not limited to  
13 relief for the parties at issue or even a class  
14 action.

15 MR. KATYAL: Right.

16 JUSTICE GORSUCH: And, near as I can  
17 tell, that's -- that's a really new development  
18 where a district court asserts the right to  
19 strike down a -- a federal statute with regard  
20 to anybody anywhere in the world.

21 MR. KATYAL: Yeah.

22 JUSTICE GORSUCH: What -- what do we  
23 do about that?

24 MR. KATYAL: Obviously, the injunction  
25 here has been trimmed by this Court itself and

1 others. And I do think -- I -- I share your  
2 impulse, Justice Gorsuch. That's something  
3 that, I think, lower courts are debating right  
4 now in a number of different contexts, like the  
5 contraception case and the like.

6 I think this case is the poorest  
7 example to get into it because of United States  
8 versus Texas's point, which is this is an  
9 immigration case, and Article I Section 8 puts  
10 Congress in the driver's seat and says there  
11 must be a uniform rule of naturalization.

12 So I think, for those reasons, you  
13 know, I get why the Court might want to get  
14 into it. Getting into it here, I think, in the  
15 Supreme Court, probably doesn't make a  
16 tremendous amount of sense. It would almost be  
17 an advisory opinion.

18 Our fundamental point to you, though,  
19 is that Congress is in the driver's seat when  
20 it comes to immigration, and that this  
21 executive order transgresses the limits that  
22 every President has done with this proclamation  
23 power since 1918. And to accept it here is to  
24 accept that the President can take an iron  
25 wrecking ball to the statute and pick and

1 choose things that he doesn't want for purposes  
2 of our immigration code. That can't be the law  
3 of the United States.

4 CHIEF JUSTICE ROBERTS: Take five  
5 extra minutes. Okay?

6 MR. KATYAL: Okay.

7 (Laughter.)

8 CHIEF JUSTICE ROBERTS: You don't have  
9 to.

10 (Laughter.)

11 MR. KATYAL: Well, if there are -- if  
12 there are any other questions, I'm happy to  
13 take anything. Okay? Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you,  
15 counsel.

16 Five minutes for rebuttal, General.

17 REBUTTAL ARGUMENT OF GENERAL NOEL J. FRANCISCO  
18 ON BEHALF OF THE PETITIONERS

19 GENERAL FRANCISCO: Mr. Chief -- Mr.  
20 Chief Justice, and may it please the Court:

21 I -- I really do have just a few quick  
22 points, unless Your Honors have additional  
23 questions.

24 Justice Breyer, I did want to respond  
25 in more detail to your question about how the

1 waiver process works. The State Department  
2 does publish the waiver process on its website,  
3 but the waiver process actually is applied  
4 automatically by consular officers.

5 So, when somebody applies for a visa,  
6 the waiver -- the visa officer first determines  
7 whether the person is otherwise admissible  
8 under other provisions of the INA.

9 If they're inadmissible, you never  
10 even get to the proclamation. Then, for those  
11 people who are not inadmissible under other  
12 parts of the INA, like 1182(a), the consular  
13 officer then turns to the proclamation and  
14 first asks: Are you subject to an exception  
15 within the proclamation? If you are, fine, and  
16 the proclamation never applies.

17 If you're not subject to an exception,  
18 then the consular officer, him or herself,  
19 turns to the waiver provision and applies the  
20 criteria of the waiver provision.

21 JUSTICE GINSBURG: How do you deal  
22 with the --

23 GENERAL FRANCISCO: So it does get  
24 applied in every single case.

25 JUSTICE GINSBURG: How -- how do you

1 deal with the example that was brought up of  
2 the child with cerebral palsy?

3 GENERAL FRANCISCO: Your Honor, the  
4 waiver is built to address those issues. I am  
5 not familiar enough with the details of that  
6 case to tell you what happened in that  
7 particular case. But that's what the waiver  
8 provision --

9 JUSTICE BREYER: But that's -- that's,  
10 you see --

11 GENERAL FRANCISCO: -- is intended to  
12 address.

13 JUSTICE BREYER: You've read the  
14 briefs, as have I. All right. Now there are  
15 some that lists about 10 or 15 instances like  
16 the cerebral palsy. One has Parkinson's. Then  
17 there's another brief that lists all the people  
18 who are professors, scholars, at universities,  
19 and there are a lot. And -- and then there are  
20 people, they list the students from these  
21 countries, a lot.

22 GENERAL FRANCISCO: Yeah.

23 JUSTICE BREYER: And then the business  
24 community lists a -- a whole bunch and says, my  
25 goodness, they have been unable to get -- we

1 don't know what's going on.

2           And then they say: Well, what's going  
3 on is nothing is going on.

4           GENERAL FRANCISCO: Well, Your Honor  
5 --

6           JUSTICE BREYER: Now I don't -- I'm  
7 not taking sides on that. I'm just saying I  
8 don't know.

9           GENERAL FRANCISCO: Right. And the  
10 principal purpose of the proclamation is, of  
11 course, to assert pressure on these countries  
12 in order to provide us with the needed  
13 information, which brings me to the second  
14 point in the four that I'm hoping to try to  
15 make. And that is that the individual vetting  
16 process depends upon us having the minimum  
17 baseline of information needed to determine in  
18 that vetting process whether the person is  
19 admissible.

20           So, when the person shows up at our  
21 border with a visa that we may have validly  
22 issued pursuant to that individual vetting  
23 process, but if her home government knows  
24 something that we don't and doesn't tell us, we  
25 cannot intelligently make the admissibility

1 determination.

2 Third, I'd like to address the  
3 1152(a)(1)(A) point about nationality-based  
4 discrimination.

5 JUSTICE SOTOMAYOR: General, could you  
6 stop just one second?

7 GENERAL FRANCISCO: Yes, Your Honor,  
8 of course.

9 JUSTICE SOTOMAYOR: I for one am, like  
10 Justice Breyer, concerned about is this window  
11 dressing or not? What's in place to ensure  
12 it's not? What are you personally doing to  
13 represent to us that it is, in fact, a real  
14 waiver process --

15 GENERAL FRANCISCO: Your Honor, State  
16 Department consular officers automatically  
17 apply the waiver process in the course of every  
18 visa application. And they are doing that,  
19 which is why there have been -- and I looked at  
20 our brief -- 430 waivers that have been issued  
21 since --

22 JUSTICE SOTOMAYOR: Have you bothered  
23 --

24 GENERAL FRANCISCO: -- the  
25 proclamation was issued.



1 JUSTICE SOTOMAYOR: -- to look to see  
2 if there are reasons for all of those people's  
3 exclusions?

4 GENERAL FRANCISCO: Your Honor, I  
5 cannot claim that I have looked into every  
6 individual case.

7 JUSTICE KENNEDY: Could you make your  
8 1152 point?

9 GENERAL FRANCISCO: Yes, Your Honor.  
10 1152(a)(1)(A) addresses one thing, the issuance  
11 of immigrant visas. It doesn't address the  
12 broader question over whether somebody's  
13 allowed to enter in the first place.

14 That's governed by 1182, including  
15 1182(f). So, essentially, 1182 sets the  
16 universe of people who are eligible to come  
17 into the country in the first place.

18 And that is often a foreign policy and  
19 national security judgment. 1152(a)(1)(A) is  
20 one of the rules that governs how we distribute  
21 visas amongst that group that's eligible to  
22 come in.

23 And it's not just nationality-based  
24 distinctions that it applies to. It also  
25 applies to things like place of residence. So,

1 once you have that universe of eligible people,  
2 1152(a)(1)(A) governs how you distribute them.

3 But let's assume that you disagreed  
4 with me. All it would really mean is that we  
5 have to implement this proclamation in a  
6 slightly different way.

7 We would have to issue immigrant visas  
8 but not non-immigrant visas to people who  
9 aren't allowed to enter, but we wouldn't have  
10 to allow anyone to enter and we wouldn't have  
11 to issue any non-immigrant visas.

12 So the bottom line is I think they're  
13 simply wrong on that case -- on that issue.

14 My final point has to do with my -- my  
15 brother's recognition that, if the President  
16 were to say tomorrow that he was sorry, all of  
17 this would go away. Well, the President has  
18 made crystal-clear on September 25 that he had  
19 no intention of imposing the Muslim ban.

20 He has made crystal-clear that Muslims  
21 in this country are great Americans and there  
22 are many, many Muslim countries who love this  
23 country, and he has praised Islam as one of the  
24 great countries of the world.

25 This proclamation is about what it

1 says it's about: Foreign policy and national  
2 security. And we would ask that you reverse  
3 the court below.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel. The case is submitted.

6 (Whereupon, at 11:09 a.m., the case  
7 was submitted.)

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## Official

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