No.

In the Supreme Court of the United States

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

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Constitution and Acts of Congress confer on the President broad authority to prohibit or restrict the entry of aliens outside the United States when he deems it in the Nation's interest. Exercising that authority after a worldwide review by multiple government agencies of whether foreign governments provide sufficient information to screen their nationals, the President issued Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 27, 2017). In accordance with the recommendation of the Acting Secretary of Homeland Security following the multi-agency review, the Proclamation suspends entry, subject to exceptions and case-by-case waivers, of certain categories of aliens abroad from eight countries that do not share adequate information with the United States or that present other risk factors. The district court issued, and the court of appeals upheld, a preliminary injunction barring enforcement of the Proclamation's entry suspensions worldwide, except as to nationals of two countries or persons without a credible claim of a bona fide relationship with a person or entity in the United States. The courts concluded that the Proclamation likely violates the Establishment Clause.

The questions presented are:

1. Whether plaintiffs' challenge to the President's suspensions of entry of aliens abroad is justiciable.

2. Whether the Proclamation is a lawful exercise of the President's authority to suspend entry of aliens abroad.

3. Whether the Proclamation violates the Establishment Clause.

4. Whether the global injunction is impermissibly overbroad.

PARTIES TO THE PROCEEDING

All parties to the proceeding in these consolidated cases are described in the petition for a writ of certiorari, No. 17-1194, filed by the International Refugee Assistance Project and other plaintiffs in the consolidated cases.

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The Solicitor General, on behalf of President Donald J. Trump, et al., respectfully cross-petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in these consolidated cases. This cross-petition is not conditional on the Court's granting of the petition for a writ of certiorari, No. 17-1194, filed by the International Refugee Assistance Project and other plaintiffs in the consolidated cases (collectively, IRAP) on February 23, 2018.

OPINIONS BELOW

The opinion of the court of appeals (17-1194 Pet. App. (Pet. App.) 1a-310a) is not yet published in the Federal Reporter but is available at 2018 WL 894413. The opinion and order of the district court entering a preliminary injunction (Pet. App. 326a-433a, 434a-436a) are reported at 265 F. Supp. 3d 570.

JURISDICTION

The judgment of the court of appeals (Pet. App. 311a-325a) was entered on February 15, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Pertinent constitutional, statutory, and regulatory provisions are reproduced in the appendix to the petition for a writ of certiorari in No. 17-1194. Pet. App. 437a-531a.

STATEMENT

1. The Constitution and Acts of Congress confer broad authority on the President to suspend or restrict the entry of aliens abroad when he deems it in the Nation's interest. See *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950). Two provisions of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, are particularly relevant here. Section 1182(f) of Title 8 provides:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

Section 1185(a)(1) of Title 8 further grants the President broad authority to adopt "reasonable rules, regulations, and orders" governing entry or removal of aliens, "subject to such limitations and exceptions as [he] may prescribe."

2. In March 2017, the President ordered a comprehensive global review of whether foreign governments provide sufficient information and have other practices to allow the United States to properly screen their nationals before entry. See Pet. App. 482a-485a (describing the review previously ordered by the President). During the review, the Department of Homeland Security (DHS), in consultation with the Department of State and the Office of the Director of National Intelligence, undertook "to identify whether, and if so what, additional information will be needed from each foreign country to adjudicate an application by a national of that country for a visa, admission, or other benefit under the INA * * * in order to determine that the individual is not a security or public-safety threat." *Id.* at 482a. After completing the review, the Acting Secretary of Homeland Security recommended that the President impose entry restrictions on certain nationals from eight countries that, even after diplomatic engagement, continue to have inadequate identity-management protocols or information-sharing practices, or other heightened risk factors: Chad, Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen. *Id.* at 485a-486a.

After evaluating the Acting Secretary's recommendations in consultation with multiple Cabinet members and other officials, on September 24, 2017, the President issued Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 27, 2017) (Proclamation). Pet. App. 479a-511a; *id.* at 487a (§ 1(h)(i)). Considering numerous factors—including each country's "capacity, ability, and willingness to cooperate with our identity-management and information-sharing policies and each country's risk factors," as well as "foreign policy, national security, and counterterrorism goals"—the President found that entry of certain

foreign nationals from the eight countries identified by the Acting Secretary "would be detrimental to the interests of the United States." *Id.* at 481a, 487a (Preamble, § 1(h)(i)). Based on that finding, and "in accordance with the [Acting Secretary's] recommendations," the President imposed tailored restrictions on those nationals' entry. *Id.* at 487a-490a (§ 1(h)(i)-(iii) and 1(i)); see *id.* at 491a-498a (§ 2). As the Proclamation explains, the restrictions are "necessary to prevent the entry of those foreign nationals about whom the United States Government lacks sufficient information to assess the risks they pose to the United States," and "to elicit improved identity-management and information-sharing protocols and practices from foreign governments." *Id.* at 487a-488a (§ 1(h)(i)). The President determined that these "country-specific restrictions" would be the "most likely to encourage cooperation given each country's distinct circumstances," while "protect[ing] the United States until such time as improvements occur." *Ibid.*

The Proclamation provides for exceptions and case-by-case waivers when a foreign national demonstrates undue hardship and that his entry would not pose a threat to the national security or public safety and would be in the national interest. Pet. App. 500a-501a (§ 3(c)(i)(A)-(C)). It also requires the agencies to assess on an ongoing basis whether entry restrictions should be continued, modified, terminated, or supplemented, and to report to the President every 180 days. *Id.* at 504a-506a (§ 4).

3. a. The plaintiffs in these consolidated cases (petitioners and cross-respondents in this Court) are 23 individuals and seven organizations. Pet. App. 350a-352a. They filed suit in federal district court in Maryland challenging the Proclamation's entry restrictions under the

INA, various other statutes, the Establishment Clause, the Free Speech Clause, and the equal-protection and procedural-due-process components of the Due Process Clause of the Fifth Amendment. *Id.* at 32a. The individual petitioners are predominantly U.S. citizens or lawful permanent residents who have relatives in Iran, Syria, Yemen, or Somalia seeking immigrant or nonimmigrant visas. *Id.* at 350a-351a. Three of the organizational petitioners provide services to clients coming to the United States from abroad, including immigrants and refugees. *Id.* at 351a. The other organizational petitioners convene events on issues relating to the Middle East or advocate on behalf of their members. *Ibid.*

The district court granted a worldwide preliminary injunction barring enforcement of the Proclamation's entry suspensions, except as to nationals of Venezuela and North Korea and individuals who lack "a credible claim of a bona fide relationship with a person or entity in the United States." Pet. App. 429a (quoting *Trump* v. *IRAP*, 137 S. Ct. 2080, 2088 (2017)); see *id.* at 326a-433a. The court rejected petitioners' claim that the Proclamation violates 8 U.S.C. 1182(f). Pet. App. 386a. The court concluded, however—in a reversal of its prior position on the question—that the Proclamation likely violates 8 U.S.C. 1152(a)(1)(A), which bars "discriminat[ing]" or granting a "preference or priority" in the "issuance of an immigrant visa because of," *inter alia*, an alien's "nationality." Pet. App. 375a, 383a. And the court further held that the Proclamation likely violates the Establishment Clause. *Id.* at 424a-425a.

The government appealed and sought a stay. When the Ninth Circuit partially denied a stay of another injunction issued against the Proclamation's entry suspensions, *Hawaii* v. *Trump*, No. 17-17168, 2017 WL

5343014 (9th Cir. 2017), and the Fourth Circuit had not yet ruled on the government's motion for a stay, the government sought relief in this Court, which stayed both injunctions in full pending the government's appeals and further proceedings in this Court. *Trump* v. *IRAP*, 138 S. Ct. 542 (2017); *Trump* v. *Hawaii*, 138 S. Ct. 542 (2017).

b. The court of appeals, sitting en banc sua sponte, affirmed the preliminary injunction in a divided decision. Pet. App. 1a-310a. A majority of the en banc court held that the Proclamation likely violates the Establishment Clause, and did not address petitioners' statutory claims. See *id.* at 37a n.4.

i. The en banc majority first held that petitioners' constitutional challenge to the Proclamation is justiciable. Pet. App. 38a-39a. It found that several individual petitioners and two organizational petitioners have standing because they have "sufficiently alleged personal contact with unconstitutional religious animus." *Id.* at 39a. The majority further stated that petitioners' claim is ripe "[b]ecause the agencies have fully implemented the travel restrictions," *id.* at 51a, and because the mother-in-law of one petitioner (Iranian Alliances Across Borders Plaintiff John Doe No. 6) had been denied a visa and a waiver during the pendency of the litigation, *id.* at 49a.

On the merits, the en banc majority held that petitioners are likely to succeed on their Establishment Clause claim. Pet. App. 64a. The majority stated that petitioners had met their high burden of demonstrating that the Proclamation's national-security and foreign-relations purposes are not "bona fide" under *Kleindienst* v. *Mandel*, 408 U.S. 753, 770 (1972), because "the Government's proffered rationale for the Proclamation lies at odds with the statements of the President himself."

Pet. App. 53a. The majority therefore applied domestic Establishment Clause precedent and concluded that the government had failed to demonstrate that the primary purpose of the Proclamation is secular. *Id.* at 56a.

The en banc majority also affirmed the injunction's worldwide scope, Pet. App. 70a-73a, though it stated that it was "obligated" to follow this Court's precedent by limiting the injunction to individuals who possess "a credible claim of a bona fide relationship with a person or entity in the United States," *id.* at 68a (citing *IRAP*, 137 S. Ct. at 2088).

ii. Four judges filed concurring opinions, none of which garnered a majority. Chief Judge Gregory, joined in part by Judge Wynn, concluded that petitioners' statutory claims are justiciable and that the Proclamation is inconsistent with multiple provisions of the INA. Pet. App. 73a-145a. Judge Keenan, joined by Judge Thacker and in part by Judges Wynn and Diaz, concluded on somewhat different grounds that petitioners' statutory claims are justiciable and that the Proclamation violates the INA. *Id.* at 146a-174a. Judge Wynn opined that the Proclamation's entry suspensions exceed the authority Congress vested in the President in the INA. *Id.* at 174a-236a. Judge Harris, joined by Judges Motz and King, stated that it was proper to decide the case on constitutional grounds alone. *Id.* at 237a-242a.

iii. Four judges dissented. Judge Niemeyer, joined by Judges Agee and Shedd, concluded that petitioners' statutory and constitutional claims are not justiciable and that each of those claims fails on the merits. Pet. App. 243a-294a. Judge Agee, joined by Judges Niemeyer and Shedd, concluded that petitioners lack standing to assert claims under the Establishment Clause. *Id.* at 298a-310a. Judge Traxler also dissented, *id.* at 295a-297a, explaining

that, although he had voted to affirm an injunction of the President's prior entry-suspension order, the Proclamation "has sufficiently addressed [his] concerns" in light of the "investigation and analysis" of the multi-agency review process, the "consultation * * * between the President and his advisors," and "the logical conclusions and rationale for the Proclamation." *Id.* at 297a. Given the "extreme deference that courts must always give the President in matters of foreign policy and national security," Judge Traxler concluded, the "balance of the equities no longer favors the plaintiffs." *Ibid.*

4. The Proclamation was also challenged in other courts. The District Court for the District of Hawaii entered a temporary restraining order and then a global preliminary injunction barring implementation of the Proclamation's entry suspensions, except for nationals of Venezuela and North Korea, concluding that the Proclamation likely violates the INA. *Hawaii* v. *Trump*, 265 F. Supp. 3d 1140 (2017). The district court declined to address the *Hawaii* plaintiffs' claim under the Establishment Clause. *Id.* at 1154. The Ninth Circuit affirmed the Hawaii district court's preliminary injunction, except as to foreign nationals without a credible claim of a bona fide relationship with a person or entity in the United States, *Hawaii* v. *Trump*, 878 F.3d 662 (2017), also limiting its analysis to the INA, *id.* at 702.

This Court granted the government's petition for a writ of certiorari. *Trump* v. *Hawaii*, cert. granted, No. 17-965 (oral argument scheduled for Apr. 25, 2018). In addition to the government's questions presented, the Court directed the parties to brief and argue the question whether the Proclamation violates the Establishment Clause. See *Hawaii*, No. 17-965 (Jan. 19, 2018); Br. in Opp. at i, *Hawaii*, *supra* (No. 17-965).

REASONS FOR GRANTING THE CROSS-PETITION

As the government explained in its petition for a writ of certiorari in *Trump* v. *Hawaii*, cert. granted, No. 17-965, these cases present exceptionally important questions regarding the President's authority to exclude aliens abroad based on his foreign-policy and national-security judgment. The divided en banc court of appeals affirmed an injunction barring enforcement of a formal directive of the President that was adopted pursuant to his constitutional and statutory authority to protect the Nation and conduct foreign affairs. If left standing, the court's justiciability and Establishment Clause holdings would severely restrict the ability of this and future Presidents to protect the United States and its borders.

This Court, however, has already granted review of those questions in *Hawaii*. The government's petition for a writ of certiorari in that case presented the questions whether challenges to the Proclamation's suspensions of entry of aliens abroad are justiciable, whether the Proclamation is a lawful exercise of the President's authority under the INA to suspend entry, and whether the global injunction entered against the Proclamation's entry suspensions is impermissibly overbroad. See Pet. at I, *Hawaii*, *supra* (No. 17-965). This Court granted the government's petition and, as mentioned above, also ordered the parties to address whether the Proclamation violates the Establishment Clause. As a result, all of the issues decided by the court of appeals that warrant this Court's review are already before the Court in *Hawaii*. Accordingly, the Court should hold this cross-petition

pending its decision in *Hawaii* and then dispose of the cross-petition as appropriate in light of that decision.[*]

CONCLUSION

The cross-petition for a writ of certiorari should be held pending this Court's decision in *Trump* v. *Hawaii*, No. 17-965, and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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[*] As the government explained in its response to IRAP's petition for a writ of certiorari, the Court should not grant IRAP's petition, because doing so would bring no meaningful benefit to this Court's resolution of the issues and would prejudice the government, which has filed its opening brief in *Hawaii*. See Gov't Mem. 1-6. The only issue raised by IRAP's petition that is not already before the Court—whether petitioners are entitled to an injunction that reaches even aliens who lack any bona fide relationship to a person or entity in the United States—does not warrant this Court's review. *Id.* at 4-5. Instead, the Court should likewise hold IRAP's petition pending its decision in *Hawaii* and then dispose of that petition as appropriate. *Id.* at 2.