No. 17-965

IN THE

Supreme Court of the United States

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

Petitioners,

v.

STATE OF HAWAII, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The American Bar Association ("ABA") is the leading national membership organization of the legal profession. The ABA's membership of over 400,000 spans all 50 states and includes attorneys in private law firms, corporations, nonprofit organizations, government agencies, and prosecutorial and public defender offices, as well as legislators, law professors, and students.[2]

The ABA's mission is "[t]o serve equally our members, our profession and the public by defending liberty and delivering justice as the national representative of the legal profession."[3] Its goals include "[i]ncreas[ing] public understanding of and respect for the rule of law, the legal process, and the role of the legal profession at home and throughout the world," "[a]ssur[ing] meaningful access to justice for all persons," and "[e]liminat[ing] bias in the … justice system."[4]

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amicus curiae or its counsel, has made a monetary contribution to its preparation or submission. Petitioners have granted blanket consent to the filing of amicus curiae briefs. Respondents have granted written consent to the filing of this brief.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

[3] *ABA Mission and Goals*, http://www.americanbar.org/about_the_aba/aba-mission-goals.html (last visited Mar. 30, 2017).

[4] *Id.*

Since its founding in 1878, the ABA has worked to protect the rights secured by the Constitution and its system of separation of powers, including the role of the judiciary as a check against arbitrary exercises of executive and legislative power. As the voice of the legal profession, the ABA has a special interest in safeguarding, and responsibility to safeguard, the integrity of our legal system. Preserving and promoting robust judicial review of executive action that encroaches on the Constitution or on important statutory protections is an essential aspect of that responsibility.

On January 27, 2017, the President issued an order ("EO-1") barring entry into the United States by nationals of seven overwhelmingly Muslim countries for 90 days and suspending entry of all refugees for 120 days. Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Feb. 1, 2017). Following entry of EO-1, the ABA adopted Resolution 10C, which expressed the concern that the order raised "legal, procedural, and rule of law issues"[5] and urged the executive "[n]ot [to] use religion or nationality as a basis for barring an otherwise eligible individual from entry to the United States."[6]

On March 6, 2017, the President issued a second order ("EO-2") modifying some of EO-1's provisions but retaining the 90-day bar on entry by nationals of six of the seven countries identified in EO-1 and the 120-day bar on entry by refugees. Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017).

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[5] *Report to ABA Resolution 10C*, at 5 (2017), *available at* http://www.americanbar.org/content/dam/aba/images/abanews/2017%20Midyear%20Meeting%20Resolutions/10c.pdf.

[6] *ABA Resolution 10C*, at 1 (2017), *available at* http://www.americanbar.org/content/dam/aba/images/abanews/2017%20Midyear%20Meeting%20Resolutions/10c.pdf.

On September 24, 2017—the same day EO-2's travel ban expired—the President issued a proclamation (the "Proclamation," also called "EO-3" by the parties), which continues to ban all immigration from six majority-Muslim countries, including five of the same countries covered by EO-1 and EO-2. Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 27, 2017). The Proclamation also bars certain non-immigrant visas for nationals of five of the countries, while imposing token restrictions on two other, non-Muslim countries. The Proclamation raises the same grave concerns as its predecessors—that it is in purpose and effect the "Muslim ban" that the President himself has called it, that it exceeds the President's statutory authority, and that it transgresses fundamental constitutional bounds.

The government contends that this sweeping exercise of authority by the President is simply unreviewable—that this Court can neither examine the Proclamation to determine whether it complies with Congress's dictates nor look beyond the four corners of the Proclamation to consider its Establishment Clause implications. That position cannot be reconciled with this Court's precedent or with the rule of law. The ABA urges this Court to reject the government's argument that the Court should abdicate its role and, instead, to exercise its full power of judicial review to preserve and enforce fundamental constitutional and statutory limits on executive power.

SUMMARY OF ARGUMENT

I. Respondents contend that the Proclamation exceeds the authority Congress granted the President in the Immigration and Nationality Act ("INA"), contravenes the INA's prohibition on national-origin discrimination in immigration, and violates the Establish-

ment Clause. The government's first response is that this Court should not even consider respondents' claims. It contends that the exclusion of aliens is committed entirely to the political branches and that this Court therefore may not review the President's actions to determine whether they are in fact authorized by the INA. And it argues that respondents lack standing to raise their Establishment Clause claims. The government is wrong on both counts.

A. This Court should reject the government's attempts to insulate the Proclamation from review. To be sure, judicial deference to the political branches' judgments regarding immigration may be appropriate in some circumstances. But deference does not justify abdicating the duty of judicial review. Accepting the government's position would eviscerate the most fundamental task of this Court—to say what the law is, even when that law touches on sensitive subjects like foreign relations and national security. This Court has regularly reviewed executive action to ensure that it is within statutory and constitutional bounds, and has invalidated such action where necessary, even in wartime.

The cases on which the government relies articulating the doctrines of plenary power and "consular nonreviewability" are not to the contrary. Even assuming the plenary power cases retain their full force today—and they are difficult to square with this Court's more recent precedent—they do not stand for the proposition that this Court can never address the limits of executive power in the immigration context. And the consular nonreviewability cases articulate a narrow rule governing aliens' individual challenges to their exclusion. Those cases are inapposite here.

B. Respondents have standing to raise their Establishment Clause claim. The Establishment Clause forbids government action that "manifest[s] a purpose to favor one faith over another." *McCreary Cty.* v. *ACLU of Ky.*, 545 U.S. 844, 860 (2005). Because violations of that clause often inflict intangible—yet all too real—harm on those whose religion is disfavored, standing requirements are not onerous in Establishment Clause cases. In this case, however, respondents have shown a concrete injury: The Proclamation separates them from their family members who are denied entry to this country because of their religion. That tangible consequence of the Proclamation easily suffices for standing.

II. The government argues that the Proclamation is authorized by a provision of the INA permitting the President to "suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants" when he finds that it "would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f). It contends that § 1182(f) gives the President the power to bar entry by any class of persons, at any time, for any reason. The Court should view the government's sweeping reading of § 1182(f) skeptically in light of the serious statutory and constitutional questions it raises.

A. The government's interpretation of § 1182(f) as granting the President unilateral and unreviewable authority would nullify other important provisions of the INA. In particular, on the government's reading, § 1182(f) permits the President to override the INA's prohibition on discrimination based on nationality in the issuance of immigrant visas. Basic rules of statutory interpretation, including the canon against reading statutes to create surplusage, counsel against that re-

sult—as does the historic importance of the ban on national-origin discrimination.

B. The government's interpretation of § 1182(f) also raises serious constitutional questions. It would collapse all power over the exclusion of aliens into a single branch of government, contrary to our constitutional structure of divided powers. And it would give the President the power to discriminate—on the basis of race, religion, or sex, as well as national origin—in a way that would be prohibited in any other context and that implicates our most fundamental values as a nation. This Court should interpret § 1182(f) narrowly, and read it to permit judicial review, to avoid those constitutional questions.

III. The Court should also reject the government's contention that, in reviewing respondents' Establishment Clause challenge to the Proclamation, the Court should restrict its inquiry to the four corners of the Proclamation. This Court's Establishment Clause jurisprudence has always looked beyond the bare text of a statute or executive action, examining the history and circumstances surrounding its enactment to discern its purpose. And facial neutrality cannot save a law whose purpose is to favor certain faiths over others. There is no reason for a different inquiry in the immigration context. Where, as here, the President himself and his advisers have repeatedly made clear that the Proclamation is intended as a "Muslim ban," this Court need not and should not ignore those statements in determining the Proclamation's constitutionality.

IV. Finally, the government contends that the injunction entered below was impermissibly broad. It proposes (at 72-73) a rule that injunctive relief may not "go beyond redressing any harm to named plaintiffs"

and may not "regulate a defendant's conduct with respect to nonparties." That rule finds no footing in this Court's precedent, which has long recognized that federal courts have broad equitable discretion to craft a remedy for executive action that transgresses statutory or constitutional limits. When government action is facially invalid, relief has never been limited to the particular plaintiffs before the court. This Court should reject the government's invitation to adopt such a radical new rule now.

ARGUMENT

I. RESPONDENTS' CLAIMS ARE JUSTICIABLE

A. This Court Reviews Executive Action For Compliance With Congress's Dictates Even If National Security Is At Issue

1. The government asserts that this Court may not review the President's actions to determine whether they are consistent with Congress's mandate in the INA. That position contravenes the judiciary's fundamental role—to "say what the law is" and whether it has been complied with. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Where the Court is asked to apply a statute to a particular case, the Court "must of necessity expound and interpret" that statute. *Id.* Such statutory interpretation is "the very essence of judicial duty." *Id.* at 178. And courts cannot avoid that duty merely "because the issues have political implications." *INS* v. *Chadha*, 462 U.S. 919, 943 (1983).

To the contrary, resolving questions of statutory interpretation—and thereby determining whether the executive branch is complying with Congress's directives—is a core judicial responsibility, even where the question implicates sensitive issues of foreign policy or

national security. *See, e.g.*, *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 566 U.S. 189, 196 (2012). There, plaintiff sought to enforce a statute that permitted citizens born in Jerusalem to request that their birthplace be identified as "Israel" rather than "Jerusalem" on their passports, notwithstanding contrary State Department policy. The government argued that the dispute was nonjusticiable because it implicated the President's authority to speak for the nation in international affairs. This Court rejected that argument, explaining that "[t]he federal courts are not being asked to supplant a foreign policy decision of the federal political branches with the courts' own unmoored determination of what United States policy toward Jerusalem should be." *Id.* Rather, because the plaintiff sought to enforce a statutory right, "the Judiciary must decide if [his] interpretation of the statute is correct, and whether the statute is constitutional. This is a familiar judicial exercise." *Id.*

So too here. This Court is not being asked to determine appropriate immigration policy by itself and without standards. Rather, it is being asked to determine whether the Proclamation comports with Congress's mandate in the INA—and thus to perform a quintessential judicial task.

Indeed, this Court has long understood its responsibilities to include restraining exercises of executive power not authorized by Congress, even in wartime and when national security is at issue. In *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), for example, the Court famously struck down President Truman's executive order directing the Secretary of Commerce to seize steel mills, in order to avoid a strike the President believed would cripple the national defense and imperil his ability to prosecute the Korean War. Applying ordinary tools of statutory interpreta-

tion, the Court concluded that Congress had not authorized the seizure; rather, by adopting very different schemes for resolving labor disputes, Congress had implicitly precluded the President from exercising such power. *Id.* at 585-586; *id.* at 602 (Frankfurter, J., concurring). The executive order's finding of a national security crisis neither prevented this Court from reviewing the order's compliance with Congress's dictates nor excused the President from obeying them. *See id.* at 588-589; *see also Dames & Moore* v. *Regan*, 453 U.S. 654, 675-676 (1981) (reviewing scope of President's statutory authority to direct transfer of Iranian assets and suspend pending suits as part of settlement of claims against Iran following Iranian hostage crisis).

Similarly, in a more recent wartime dispute over the scope of executive power, this Court reviewed and held unlawful the procedures of a military commission convened to try an alleged enemy combatant for conspiracy to commit terrorism. *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 567 (2006). The Court first rejected the government's argument that it should abstain from hearing Hamdan's challenge until the military commission proceedings were complete, declining to presume that the proceedings would vindicate Hamdan's constitutional rights. *Id.* at 586-587. Exercising its ordinary function of statutory interpretation, the Court concluded that the military commission did not comply with Congress's mandate in the Uniform Code of Military Justice that its procedures be the same as those applied to formal courts-martial "insofar as practicable." *Id.* at 620-623 (quoting 10 U.S.C. § 836(b)). The President had determined that it was "impracticable" for military commissions to comply with formal court-martial rules, but this Court found that the President had not made the necessary showing of impracticability. *Id.* at 623.

In *Hamdan*, as in *Youngstown*, the government's pleas of exigency were insufficient to prevent the Court either from scrutinizing executive action for compliance with Congress's direction or from examining the sufficiency of the underlying record.

In short, this Court's "precedents, old and new, make clear that concerns of national security and foreign relations do not warrant abdication of the judicial role." *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 34 (2010).

2. There is no constitutional or prudential reason that this Court should have a more limited role in disputes involving the scope of the executive's power over immigration than it does in other cases, such as those discussed above, implicating sensitive questions of foreign policy or national security.

The government relies on two lines of cases in support of its contention that the Proclamation is unreviewable. Neither is applicable here.

a. The government cites (at 18-19) cases articulating what is generally known as the "plenary power" doctrine—which the government characterizes as holding that the political branches' power to exclude aliens is essentially unreviewable by the courts. Even assuming that those cases retain their full validity today, the government reads them too broadly, and they fail to support the notion that the Proclamation is immune from judicial review.

As an initial matter, the government fails to acknowledge the most basic point regarding the plenary power doctrine: Decisions regarding immigration are committed to *Congress*, not the President. *See Galvan* v. *Press*, 347 U.S. 522, 531 (1954) (the formula-

tion of policies "pertaining to the entry of aliens and their right to remain here" is "entrusted exclusively to Congress"); *see also Arizona* v. *United States*, 567 U.S. 387, 409 (2012). This principle is "as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Galvan*, 347 U.S. at 531. The statutory question presented in this case is not the wisdom of the policy Congress articulated—or even the wisdom of the policy the President articulated—but whether the Proclamation is within the power Congress granted the President in the first place. As discussed above, that is the kind of question this Court is uniquely competent to resolve.

The cases on which the government relies are not to the contrary. In *Fiallo* v. *Bell*, 430 U.S. 787 (1977), for example, the Court was not presented with the question whether an executive action comported with Congress's dictates, but with the constitutionality of *Congress's* choice to distinguish between nonmarital children's relationships with their mothers and their relationships with their fathers in granting preferential immigration status. The Court held that such a distinction was reasonable and within Congress's constitutional authority. *Id.* at 799-800. But it nowhere suggested that courts could not determine whether the President had acted within the powers Congress granted him—a suggestion that would fly in the face of long-standing precedent such as *Youngstown* and its progeny.

Similarly, the government relies (at 18) on dicta in *Harisiades* v. *Shaughnessy*, 342 U.S. 580 (1952), which upheld deportations of past members of the Communist Party under the Alien Registration Act, to the effect that "any policy toward aliens is … interwoven with … the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such

matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Id.* at 588-589. But the Court itself did not rely on that language to foreclose judicial review of the deportation orders in question. Rather, it reviewed the deportees' constitutional challenge to the statute, rejecting it on the merits. *See id.* at 583-584. And, again, no challenge to *executive* authority was raised.

Undoubtedly, the plenary power doctrine—along with the McCarthy-era terror of Communism—had a role in driving the substantive constitutional analysis in *Harisiades* and similar cases such as *Galvan*. But the extreme reluctance in those cases to "deny or qualify the Government's power of deportation" by imposing due process limitations on that power, *Harisiades*, 342 U.S. at 591, cannot be squared with this Court's more recent precedent.

The Court has not hesitated in recent years to address challenges to the government's power of deportation and related immigration issues and to uphold those challenges where appropriate. In *Zadvydas* v. *Davis*, 533 U.S. 678, (2001), for example, the Court applied constitutional avoidance principles to construe the INA to impose a "reasonable time" limitation on detention of removable aliens. The Court observed that "the Due Process Clause protects an alien subject to a final order of deportation," and that Congress's plenary power over immigration is "subject to important constitutional limitations." *Id.* at 693-695. Finding that indefinite detention would raise serious due process concerns, and locating no clear statement in the statute that Congress intended to authorize it, the Court held that indefinite detention is not authorized. *Id.* at 699. The Court also rejected the government's argument that the federal

courts must defer to the government's decision that a particular detention is reasonable. Notwithstanding "the greater immigration-related expertise of the Executive Branch," determining whether a particular detention is reasonable and thus authorized by statute is the job of the courts. *Id.* at 699-700. The same logic applies *a fortiori* here, where the issue is not individualized decision-making, but simply the scope of the executive's rulemaking authority.

b. The government also relies (at 18-22) on cases involving the so-called "consular nonreviewability" doctrine. Despite the government's attempt to expand that doctrine into a broad prohibition on review of all immigration-related decisions, those cases articulate a narrow exception to the general principle of reviewability of agency action. Under that exception, "a consular official's decision to issue or withhold a visa" to a specific alien seeking entry to the United States is committed to that officer's discretion and thus not reviewable absent Congress's express authorization. *Saavedra Bruno* v. *Albright*, 197 F.3d 1153, 1159-1160 (D.C. Cir. 1999). Most of the decisions the government cites fall into that category. *See Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953); *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537 (1950); *Nishimura Ekiu* v. *United States*, 142 U.S. 651 (1892). In each case, an alien seeking entry to the United States and detained at the border sought review by habeas corpus of the individual decision to exclude him or her.

Those cases are irrelevant here for two reasons. First, the plaintiffs were aliens outside the United States contesting their own exclusion, not—as in this case—United States citizens, residents, or entities contesting the exclusion of persons they have an interest in seeing admitted. Second, the statutory question here is

not whether a consular official has reasonably exercised the discretion Congress has granted him, but whether the President has acted pursuant to any authority from Congress.

For the same reasons, the government's contention that Congress has precluded judicial review of the Proclamation fails. The government notes (at 19-20) that Congress has expressly declined to create a "private right of action to challenge a decision … to grant or deny a visa." 6 U.S.C. § 236(f). But respondents are not challenging "*a* decision … to deny *a* visa"; they challenge an order preemptively forbidding entry by a group of more than 150 million people defined by their nationality and religion, subject to burdensome case-by-case waiver procedures.

The Proclamation is far from a run-of-the-mill exercise of discretion over entry of an individual alien. It is an extraordinary, unprecedented, and potentially indefinite presumptive bar on immigration by *all* nationals of six majority-Muslim countries, candidly referred to by the President and his advisors as a "Muslim ban." *See* Resp. Br. 6-12. The Court should reject the government's contention that it cannot even consider whether it was Congress's intent to grant the President such sweeping rulemaking authority.

B. Respondents' Separation From Their Families As A Result Of The Proclamation Suffices For Standing Under The Establishment Clause

1. The government also attempts to evade review of respondents' Establishment Clause claim, arguing that they have suffered no cognizable injury under the Establishment Clause and therefore lack standing. That argument fails on several grounds.

As an initial matter, the government's argument rests on the faulty premise that respondents "have not demonstrated a violation of their *own* Establishment Clause rights." Br. 26; *see also id.* at 29 ("[T]he Proclamation says nothing about religion and does not subject respondents to any religious exercise."). That premise conflates two distinct questions—whether the Proclamation has injured respondents, and whether it is an unconstitutional establishment of religion.

As this Court has long cautioned, the question whether a plaintiff has standing to bring a claim must be determined independently of the claim's merits. *See, e.g.*, *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975) ("[S]tanding in no way depends on the merits of the plaintiff's contention that particular conduct is illegal[.]"). In assessing standing, this Court assumes that a claim is meritorious. *Id.* at 502. The Proclamation is therefore presumed at this stage to "denigrate and disadvantage members of the Islamic faith and effect an unconstitutional establishment of religion." J.A. 151. The standing question is simply whether respondents have "suffered an injury in fact," *i.e.*, an injury that is "concrete and particularized" to them. *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1547-1548 (2016). The pleadings make clear that they have.[7]

In some Establishment Clause cases, "the concept of concrete injury" can be "elusive." *Catholic League for Religious & Civil Rights* v. *City & Cty. of San Francisco*, 624 F.3d 1043, 1049 (9th Cir. 2010). Here, however, it is straightforward. Respondents include

[7] Standing also requires the injury to be "fairly traceable" to the challenged conduct and judicially redressable. *Spokeo*, 136 S. Ct. at 1547. The government has not challenged causation or redressability here.

Muslim American citizens and legal residents with relatives whom the Proclamation bars from entering the United States because they are nationals of one of the overwhelmingly Muslim countries targeted for exclusion. *See* J.A. 115-117. The relatives all have pending visa applications to visit respondents in the United States or to immigrate into the United States as an alien relative. *See id.* The Proclamation thus personally harms respondents by separating them from their families—potentially indefinitely.[8]

This Court's precedent does not require more. "Standing in Establishment Clause cases may be shown in various ways." *Arizona Christian Sch. Tuition Org.* v. *Winn*, 563 U.S. 125, 129 (2011). A "direct economic injury" is enough, *McGowan* v. *Maryland*, 366 U.S. 420, 430-431 (1961), but standing may also "be predicated on noneconomic injury," *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 486 (1982). For example, in religious display cases, "unwelcome direct contact" is generally sufficient to show standing. *American Humanist Ass'n* v. *Maryland-Nat'l Capital Park & Planning Comm'n*, 874 F.3d 195, 203 (4th Cir. 2017); *see Van Orden* v. *Perry*, 545 U.S. 677, 694 (2005) (Thomas, J., concurring) (noting that plaintiff's "only injury" was "that he takes offense at seeing the monument as he passes it on his way to the Texas Supreme Court Library"). And this Court has long upheld the standing of parents of public school children who are "directly affected by … laws and practices" involving religious observance. *School Dist.* v. *Schempp*, 374 U.S. 203, 225 n.9 (1963).

[8] The organizational respondents may have standing for similar reasons. It is sufficient, however, that "[a]t least one plaintiff … have standing" for the injunctions at issue. *Town of Chester* v. *Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017).

Indeed, "despite the general rule that taxpayers lack standing to object to expenditures alleged to be unconstitutional," this Court has carved out a "narrow exception" for such standing in Establishment Clause cases. *Winn*, 563 U.S. at 138 (citing *Flast* v. *Cohen*, 392 U.S. 83 (1968)).

To be sure, mere disagreement with a governmental action "is not a permissible substitute for the showing of injury itself." *Valley Forge*, 454 U.S. at 486. Thus, in *Valley Forge*—on which the government relies—the Court rejected standing because the plaintiffs had alleged no "injury of any kind, economic or otherwise." *Id.* (emphasis omitted). But respondents do not rely on mere disagreement with the Proclamation; rather, they allege that the Proclamation separates them from their families. The government offers no reason *that* injury is insufficiently concrete or particularized under this Court's decisions.

2. The government tries to distinguish *Kleindienst* v. *Mandel*, 408 U.S. 753, 762 (1972), and *Kerry* v. *Din*, 135 S. Ct. 2128 (2015)—other cases in which this Court has adjudicated constitutional claims involving immigration policy—on the grounds that respondents' injuries "do not stem from … infringement of their own Establishment Clause rights," and their "foreign relatives and associates have no [such] rights." Br. 27-28. But that distinction does not hold. While this Court did not discuss standing explicitly in *Mandel* and *Din*, the plaintiffs in those cases—just like respondents here—were injured by the allegedly unconstitutional exclusion of an alien who lacked constitutional rights. This case, like those, involves only the constitutional rights of respondents, who are U.S. citizens and legal residents, and the Court may resolve their Establishment Clause claim on the merits for the same reason.

The government contends (at 28) that respondents have suffered no cognizable injury because the Proclamation only "discriminates against their foreign-national relatives." But a plaintiff need only show injury, not discrimination, to have standing under the Establishment Clause. Hence, in *McGowan*, this Court deemed the "economic injury" to store employees sufficient to give them standing to challenge a Sunday closing law as an unconstitutional establishment of religion. 366 U.S. at 430-431. The Court did not require the employees to show that they were discriminated against based on their religious faith. Indeed, although the Court held that the record's silence as to the employees' religious faith was fatal to their free exercise claim, it found the employees' faith (or lack thereof) irrelevant to their standing under the Establishment Clause, given their clear economic injury. *Id.*

That makes sense. In an Establishment Clause claim, unlike a free exercise claim, it is the unconstitutional character of the governmental action that is at issue, not its interference with an individual's own religious practice. *See Lee* v. *Weisman*, 505 U.S. 577, 584-585 (1992) ("[T]o satisfy the Establishment Clause a governmental practice must (1) reflect a clearly secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) avoid excessive government entanglement with religion." (citing *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971))).

While this Court ultimately rejected the claims in *Mandel* and *Din* on the merits, it did not shirk its "unflagging" obligation to decide cases within its jurisdiction. *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014); *see Susan B. Anthony List* v. *Driehaus*, 134 S. Ct. 2334, 2347 (2014). Even leaving aside that respondents share the faith

that the Proclamation denigrates, there is no sound reason to foreclose constitutional review of a "Muslim ban" that separates respondents from their families.

II. THE GOVERNMENT'S READING OF THE INA CLASHES WITH THE STATUTE'S BAR ON NATIONAL-ORIGIN DISCRIMINATION AND RAISES SERIOUS CONSTITUTIONAL QUESTIONS

The government's effort to foreclose review of the Proclamation's compliance with the INA is particularly troubling given the breathtaking scope of the executive authority the government reads the INA to grant. Section 1182(f) permits the President to "suspend the entry of all aliens or any class of aliens" whose entry he finds "would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f). According to the government, that provision grants the President the absolute discretion to exclude any group of persons, for any length of time, and for any reason.

To be sure, the language of § 1182(f) is broad. But as this Court recognized long ago in the immigration context, "[a] restrictive meaning for what appear to be plain words may be indicated by [the INA] as a whole, by the persuasive gloss of legislative history or by the rule … that such a restrictive meaning must be given if a broader meaning would generate constitutional doubts." *United States* v. *Witkovich*, 353 U.S. 194, 199 (1957). Those factors counsel strongly against the government's sweeping construction of § 1182(f).

A. The Government's Interpretation Of Section 1182(f) Conflicts With The INA's Bar On National-Origin Discrimination In Immigration

Section 1152 of the INA provides that "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a)(1)(A); *see* H.R. Rep. No. 89-745, at 8, 12 (1965) (explaining that § 1152 was intended to "eliminat[e] … the national origins system as the basis for the selection of immigrants" and to institute "a new system of selection designed to be fair, rational, humane, and in the national interest"). The Proclamation does what § 1152 prohibits by denying entry to the United States (including entry as an immigrant) solely on the ground of national origin.

The government acknowledges—as it must—that § 1152 prohibits national-origin discrimination in the issuance of immigrant visas. It nevertheless argues (at 48-49) that § 1182(f) empowers the President to ban "entry" on the basis of nationality. It reasons that an alien subject to the Proclamation is denied an immigrant visa because he is "ineligible to receive a visa" as someone barred from entering the country under § 1182(f), not because of national-origin discrimination in the issuance of visas. Br. 49 (quoting 8 U.S.C. § 1201(g)). That argument is specious. Such an alien is "ineligible to receive" an immigrant visa only because he is barred from entering the country based on his nationality. On the government's interpretation, § 1152 is entirely ineffectual, since the President can nullify Congress's ban on racial, nationality, and gender discrimination in the issuance of immigrant visas simply by banning "entry" for the same discriminatory reasons.

That reading contravenes basic principles of statutory construction. *See*, *e.g.*, *Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004) (statutory provisions should not be read so as to render other provisions of the same statute superfluous); *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012) (specific provisions take precedence over general provisions). This Court should pause before concluding that the general power to exclude aliens under § 1182(f) takes precedence over, and thereby negates, § 1152's specific ban on discrimination in immigration.[9]

B. The Government's Reading of Section 1182(f) Raises Grave Constitutional Concerns

The government's reading of § 1182(f) as granting absolute and unreviewable discretion to exclude any class of aliens for any reason and any length of time—including for discriminatory reasons such as race and religion that in other contexts would clearly be forbidden, and that would change the character of our Nation—also raises serious constitutional concerns.

The Constitution confers power over immigration in the first instance on Congress, not the President. U.S. Const. art. I, § 8, cl. 4 (granting Congress the power "[t]o establish [a] uniform Rule of Naturalization"); *Arizona*, 567 U.S. at 409 ("[p]olicies pertaining to the entry of aliens" are the "exclusive[]" province of "Congress"). Congress may, of course, delegate portions of

[9] As respondents explain (at 45-47), the government's reading of § 1182(f) is also in significant tension with other aspects of the statute, including Congress's considered judgment in the Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015 *not* to impose a travel ban on nationals of the countries at issue, but instead to institute more carefully tailored precautions.

that authority to the President, accompanied by some discernible principle to guide its exercise—but the President may not arrogate it all to himself and wield it at his whim. Such an assertion of absolute power must—at the very least—"be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring).

These separation-of-powers concerns are compounded by the government's position that the President's actions are immune from judicial review—an approach that "condense[s] power into a single branch of government," in contravention of our fundamental system of checks and balances. *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 536 (2004) (examining both the statutory authorization for executive detention of enemy combatants and the constitutional limitations on its exercise) (emphasis omitted). "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." *Id.*

The government contends (at 18) that Congress should be presumed to have barred judicial review of the President's actions to determine whether they are authorized, absent an express statement to the contrary. But the presumption runs the other way: Unless it clearly states otherwise, Congress is presumed not to push the envelope of constitutionality. *See Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). And ambiguities are resolved in favor of readings that do not create constitutional concerns—including concerns posed by the preclusion of judicial review. *See, e.g.*, *INS* v. *St.*

Cyr, 533 U.S. 289, 300 (2001) (holding, in the context of habeas review of removal orders, that "[a] construction of the [INA] that would entirely preclude review of a pure question of law [including a statutory question] by any court would give rise to substantial constitutional questions").

While this case, unlike *St. Cyr*, does not raise Suspension Clause concerns, it does raise the serious concerns associated with "condens[ing] power into a single branch of government." *Hamdi*, 542 U.S. at 536. Even more troubling, the reading of the INA the government advocates effectively permits the President to engage in unconstitutional discrimination on the basis of religion, race, or nationality without check by Congress or the courts. Although the government concedes (at 26) that courts have the power to review the constitutionality of the Proclamation, it contends (at 58-64) that courts may not, in doing so, look beyond the four corners of the Proclamation itself—meaning that executive action under § 1182(f) that is facially neutral but has a discriminatory purpose is unchallengeable. *See infra* Part III.

The President's repeated statements that the Proclamation and its predecessors were intended to implement a "Muslim ban" put into stark relief the consequences of accepting the government's assertion that the President's power is unilateral and unreviewable. To avoid such concerns, this Court has in other cases adopted narrowing constructions of language that "if read in isolation and literally, appears to confer upon the [Executive] unbounded authority." *Witkovich*, 353 U.S. at 199; *see id.* at 200-201; *Zadvydas*, 533 U.S. at 689. The Court should likewise construe § 1182(f) to avoid the serious constitutional doubts the government's reading raises.

III. This Court Need Not Limit Its Establishment Clause Inquiry To The Proclamation's Asserted Purpose

Should this Court reach the Establishment Clause question, it should reject the government's argument that its inquiry is limited to examining the four corners of the Proclamation to determine whether it provides a "facially legitimate and bona fide reason" for its terms. *Mandel*, 408 U.S. at 770. The government contends that so long as the Proclamation itself articulates some colorable national security rationale, this Court is precluded from inquiring any further into the underlying motives for and effects of the ban. But it offers no persuasive argument for that position. The record in this case—which consists of public statements by the President and his associates—contains substantial evidence that the Proclamation was motivated by a desire to bar Muslims from entering the country. This Court is not required to, and should not, ignore that evidence.

Mandel certainly imposes no such requirement. There, the question was whether the government had articulated a sufficient basis for burdening the plaintiffs' First Amendment right to hear the speaker who was excluded. In that context, this Court concluded that it would be undesirable for courts to "be required to weigh the strength of the audience's interest" in hearing a speaker "against that of the Government in refusing a waiver to the particular alien applicant" on a case-by-case basis. *Mandel*, 408 U.S. at 769. But those concerns are not implicated in the present case. The Proclamation is a sweeping order presumptively excluding over 150 million people, not an individualized determination to exclude a particular person that incidentally burdens a U.S. citizen's rights.

Equally importantly, *Mandel* involved no evidence of unconstitutional motive like that here. Where a litigant makes a prima facie "affirmative showing of bad faith" and unconstitutional motivation on the part of the government—as respondents have—this Court can and should take that showing into account in determining the validity of the challenged action. *See Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring). The government's position that this Court should deliberately blinker its inquiry and ignore the President's own public statements regarding the motive for the Proclamation defies logic. And it would disable this Court from correcting even the most obvious unconstitutional discrimination in the immigration context, as long as officials couch their actions in facially neutral terms.

The government's proposed rule is particularly inappropriate in the Establishment Clause context (which neither *Mandel* nor *Din* addressed). It squarely contradicts this Court's well-settled Establishment Clause jurisprudence, under which "[f]acial neutrality" cannot save government action motivated by religious animus. *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 534 (1993) (noting that both Establishment Clause and Free Exercise Clause "extend[] beyond facial discrimination"). The Establishment Clause invalidates government action that "[m]anifest[s] a purpose to favor one faith over another." *McCreary Cty.*, 545 U.S. at 860. In conducting that inquiry into purpose, the Court has always looked beyond bare text to consider "readily discoverable fact[s]" regarding the context, history, and background of the act in question. *Id.* at 862 (citing cases).

The government offers no persuasive reason to depart from that precedent and apply only "minimal scrutiny" (Br. 58) here. Respondents' Establishment

Clause claim deserves this Court's serious and full consideration, including examining the Proclamation in the context of the entire record. When the President and his advisors themselves casually acknowledge their intent to implement a "Muslim ban," the threat to our constitutional values requires nothing less.

IV. THE PROPER SCOPE OF INJUNCTIVE RELIEF FOR THE ALLEGED STATUTORY AND CONSTITUTIONAL VIOLATIONS IS A MATTER OF EQUITABLE DISCRETION

Finally, the government challenges (at 72) the "global" scope of the injunction against the Proclamation. It argues (*id.*) that Article III and equitable principles bar relief that "go[es] beyond redressing any harm to named plaintiffs and [that] regulate[s] a defendant's conduct with respect to nonparties." The government's distaste for global injunctions is understandable. But the rule the government invites this Court to adopt has no basis in this Court's precedent, which has long recognized the broad remedial discretion federal courts enjoy in redressing executive actions that transgress statutory or constitutional bounds. This Court has declined the government's invitation once already in its EO-2 stay decision; it should do the same here.

The "power" of federal courts "to enjoin … acts by the government" that exceed its statutory or constitutional authority "is inherent in the Constitution itself." *Hubbard* v. *EPA*, 809 F.2d 1, 11 n.15 (D.C. Cir. 1986) (citing *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803)); *see Youngstown*, 343 U.S. 579; *Fleming* v. *Moberly Milk Prods. Co.*, 160 F.2d 259, 264 (D.C. Cir. 1947) (noting "the inherent power of the courts to restrain executive action in direct violation of a specific direction of the Congress"). As long as there is a

live "case" or "controversy," U.S. Const. art. III, § 2, a court's injunctive power extends to all "parties," including the government, who are properly before the court, Fed. R. Civ. P. 65(d).

The exercise of equitable authority to restrain a defendant's unlawful acts against a nonparty raises no Article III problem. Article III requires only that "[a]t least one plaintiff … have standing to seek [the] form of relief" at issue, *Town of Chester, N.Y.* v. *Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017)—here, an injunction. While the government has challenged respondents' standing as to their Establishment Clause claim, it does not dispute that if respondents have standing to bring their statutory and constitutional claims, they may seek injunctive relief for those claims. Article III does not go beyond that threshold standing requirement to limit the courts' remedial authority to tailor an injunction to the statutory or constitutional violations found.

Nor do "[e]quitable principles" (Br. 72) support the government's rigid rule. To the contrary, this Court's precedent is clear that "breadth and flexibility are inherent in equitable remedies," and that "the nature of the violation determines the scope of the remedy." *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15-16 (1971); *see Brown* v. *Plata*, 563 U.S. 493, 538 (2011) ("Once invoked, the scope of a district court's equitable powers is broad[.]" (internal quotation marks omitted)); *Hills* v. *Gautreaux*, 425 U.S. 284, 293-294, 306 (1976). Thus, where "the arguments and evidence show that [the Proclamation] is unconstitutional on its face, an injunction prohibiting its enforcement is proper." *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 2292, 2307 (2016). This Court has never suggested that a facially invalid law remains valid as to other plaintiffs simply because they have not yet challenged it.

The government argues (at 73) that the injunction improperly equates "the scope of respondents' legal theory (*i.e.*, that the enjoined provisions are invalid on their face) with the scope of relief they personally may obtain." But that argument—that no facial relief may issue on claims brought by individual plaintiffs—is meritless and contradicts this Court's own teachings and practice. As the Court has explained, the distinction between facial and as-applied challenges goes precisely "to the breadth of the remedy" that is "necessary to resolve a claim." *Citizens United* v. *FEC*, 558 U.S. 310, 331 (2010).

The usual remedy where government action is determined to be invalid on its face—*i.e.*, "in all its applications," *Shelby Cty.* v. *Holder*, 570 U.S. 529, 554 (2013)—is an injunction preventing its enforcement. In "most civil-rights cases," plaintiffs seek "injunctive or declaratory relief that will halt a discriminatory … practice" or "strike down … a rule … on the ground that it is constitutionally offensive"—relief that "will benefit … all other persons subject to the practice or the rule" regardless of "whether [the] plaintiff proceeds as an individual or on a class-suit basis." 7A Wright & Miller, *Federal Practice & Procedure* § 1771 (3d ed. 2017). This Court has thus repeatedly upheld facial relief for claims brought by no more than "a handful" (Br. 74) of individual plaintiffs. *See, e.g.*, *Whole Woman's Health*, 136 S. Ct. at 2307 (affirming injunction against state law based on claims by abortion providers); *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2605 (2015) (affirming injunction against state law based on claims brought by same-sex couples); *Kolender* v. *Lawson*, 461 U.S. 352, 353-354 (1983) (affirming injunction against state loitering statute in challenge brought by single individual).

Likewise, under well-settled administrative law principles, the "ordinary result" when an agency policy is facially invalidated is to enjoin it in its entirety, not merely in its application to the plaintiff. *National Mining Ass'n* v. *U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998). Barring broader relief on facial claims would "generate a flood of duplicative litigation." *Id.*

The government's proposed rule that injunctive relief must be limited to "the plaintiffs' own cognizable, irreparable harms" (Br. 74) would have other adverse effects beyond the likely proliferation of identical suits. The government's view presumes that the only purpose of public-law litigation is private dispute resolution. But another—often primary—purpose is obtaining a binding judicial pronouncement on the legality of a contested practice or regulation. Under the government's view, unlawful policies would be left "in place, with individualized exceptions for particular plaintiffs." *Id.* That approach fundamentally erodes "the rule of law." *Wirtz* v. *Baldor Elec. Co.*, 337 F.2d 518, 534 (D.C. Cir. 1963); *see City of Chicago* v. *Sessions*, No. 17 C 5720, 2017 WL 4572208, at *4 (N.D. Ill. Oct. 13, 2017) ("All similarly-situated persons are entitled to similar outcomes under the law, and as a corollary, an injunction that results in unequal treatment of litigants appears arbitrary.").

Of course, broad relief may not follow from a facial statutory or constitutional violation in any particular case. Numerous other factors must weigh in the balance—including the need for uniformity in a particular legal context and the existence of parallel proceedings in other forums. *Cf. China Trade & Dev. Corp.* v. *M.V. Choong Yong*, 837 F.2d 33, 36 (2d Cir. 1987). While the government complains about the court of appeals' reli-

ance on the need for uniformity in immigration, it identifies no countervailing reason to restrain the Proclamation with respect to respondents, but not those similarly situated.

Any concerns about the scope of relief can be adequately addressed by appellate review for abuse of discretion—exactly what has occurred in this case. *See Trump* v. *IRAP*, 137 S. Ct. 2080, 2087 (2017) (per curiam) ("In assessing the lower courts' exercise of equitable discretion, we bring to bear an equitable judgment of our own."); *id.* at 2087-2088 (staying injunctions against EO-2 with respect to "foreign nationals who have [no] credible claim of a bona fide relationship with a person or entity in the United States"); *IRAP* v. *Trump*, 883 F.3d 233, 272-274 (4th Cir. 2018); *Hawaii* v. *Trump*, 878 F.3d 662, 701-702 (9th Cir. 2017). Tellingly, the government alleges no real abuse of discretion here.

Rather, the government urges the Court to adopt a jurisdictional bar that would strip lower courts of the remedial power to issue facial relief in response to claims brought by individual plaintiffs. In so doing, the government reprises arguments it made in seeking a stay of the injunctions against EO-2, *see* Stay Application 37-40, *Trump* v. *Hawaii*, No. 16A1190 (U.S. June 1, 2017)—arguments this Court rejected when it left those injunctions "in place with respect to respondents and those similarly situated," *IRAP*, 137 S. Ct. at 2087. Although three Justices would have stayed the injunctions "in full," they acknowledged that "[r]easonable minds may disagree on where the balance of equities lies as between the Government and respondents in these cases," and that "[i]t would have been reasonable, perhaps, … to have left the injunction in place only as to respondents themselves." *Id.* at 2090 (Thomas, J., concurring in part and dissenting in part). No Justice

endorsed the government's position that such a limitation is a requirement of Article III, rather than a matter of equitable discretion.[10]

This Court should again reject the government's request for a jurisdictional bar limiting the broad remedial power of courts of equity in response to unlawful executive action.

CONCLUSION

This Court should affirm the judgment below.

Respectfully submitted.

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MARCH 2018

[10] The government seeks to minimize the importance of this Court's EO-2 decision, but this Court would not have left the nationwide injunctions against EO-2 partially in place had it "agreed on the merits" (Br. 75 n.20) with the government's jurisdictional arguments here.