No. 17A550

IN THE SUPREME COURT OF THE UNITED STATES

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

v.

STATE OF HAWAII, ET AL.

REPLY IN SUPPORT OF APPLICATION FOR STAY PENDING APPEAL AND PENDING FURTHER PROCEEDINGS IN THIS COURT

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Respondents contend that this Court should deny a stay because the lower courts enjoined the Proclamation on terms that are similar to this Court's order in June 2017 concerning Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) (EO-2). Since then, however, much has changed. Multiple government agencies have conducted a comprehensive, worldwide review of the information shared by foreign governments that is used to screen aliens seeking entry to the United States. Based on that review, the Proclamation adopts tailored entry restrictions to address extensive findings that a handful of particular foreign governments have deficient information-sharing and identity-management practices, or other risk factors. As a result of those developments, respondents' legal claims are now much weaker,

because the Proclamation amply justifies the President's finding that the national interest warrants the exclusion of certain foreign nationals, and conclusively rebuts respondents' claims that the entry restrictions were motivated by animus rather than protecting national security. At the same time, the district court's injunction imposes much more severe harm on the government and the public interest, because it undermines the President's ability to address concrete national-security deficiencies and to conduct foreign policy by motivating foreign governments to adopt more secure practices. For all of those reasons, a complete stay of the district court's injunction is warranted.

I. THE EQUITABLE BALANCE HAS CHANGED AND FAVORS A STAY

Respondents are incorrect (Opp. 35.) that "[t]he same equitable considerations govern" this application as when this Court considered EO-2 in Trump v. IRAP, 137 S. Ct. 2080 (2017) (per curiam). EO-2 was adopted before an assessment of other countries' information-sharing practices and security threats was conducted. Now, however, the Executive has completed a comprehensive, multi-agency review that has identified countries with ongoing deficiencies in their information-sharing and identity-management practices, or other factors that present heightened risks. The Proclamation's tailored restrictions address these deficiencies by simultaneously protecting national security and encouraging foreign governments' cooperation.

The district court's injunction imposes a more severe burden on the government and the public interest than did the injunction this Court partially stayed in IRAP, because this injunction prevents the President from excluding entry of aliens from countries that the President has now affirmatively found, after an extensive review, present specific, current security risks. Procl. § 1(h)(i). The injunction also impedes the President's ability to pressure foreign governments to improve their practices and prevents the Nation from speaking with one voice on this important issue of national security and foreign relations. Ibid. The Ninth Circuit's limitation of the injunction to aliens with a bona fide relationship in the United States does not ameliorate those harms, because most aliens seeking immigrant visas and many seeking nonimmigrant visas will have such a relationship.

Respondents' contention (Opp. 35-37) that the multi-agency review process did not demonstrate a genuine national-security problem is simply incorrect. First, respondents offer their opinion (Opp. 36) that the Proclamation's entry restrictions are a "poor fit" for the problems identified in the review process. But the Proclamation explains why and how the President included and excluded particular countries; respondents' disagreement with the wisdom of the President's policy judgments changes nothing. Second, respondents note (ibid.) that the Proclamation does not exclude travelers on particular types of nonimmigrant visas from

some covered countries. But again, the President explained why he reserved the most severe restrictions for the countries and travelers that pose the greatest challenges. See Procl. § 1(h)(ii). And respondents cannot seriously fault the President for declining to restrict more aliens. Third, respondents contend (Opp. 36) that Congress "has already legislated" to address vetting of visa-applicants to the United States. But Congress has not prohibited the President from instituting further protections after a multi-agency review showed that some countries do not adequately share information to assess the risk that travelers from those countries pose. See Procl. § 1(h)(i).

Finally, respondents emphasize that, whereas EO-2 was a temporary measure to facilitate the review, the Proclamation applies "indefinitely." Opp. 37 (emphasis omitted). But that feature has nothing at all to do with whether this Court should grant a temporary stay of the district court's order pending the expedited appeal to the Ninth Circuit and any further proceedings in this Court. Respondents will suffer no immediate harm during that time with respect to individual aliens abroad who have not yet been denied a visa from a consular officer and a waiver under the Proclamation. And if a visa and waiver were denied during the stay period, any harm would not be irreparable because the visa can be issued and entry allowed if respondents ultimately prevail.

II. THERE IS AT LEAST A FAIR PROSPECT THAT THIS COURT WILL SET ASIDE THE INJUNCTION IN WHOLE OR IN PART

A. Respondents' Statutory Claims Are Not Justiciable

1. As we have shown (Stay Appl. 19-21), respondents' statutory challenges to the Proclamation fail at the outset under the general rule that the political Branches' decisions to exclude aliens abroad are "not subject to judicial review * * * unless Congress says otherwise." Saavedra Bruno v. Albright, 197 F.3d 1153, 1159 (D.C. Cir. 1999). Neither the Administrative Procedure Act (APA) nor equitable principles permit circumvention of that or other limitations on judicial review. Stay Appl. 21-22. To the contrary, the APA incorporates such limitations, see 5 U.S.C. 701(a)(1), 702(1), and the "judge-made remedy" of equitable suits challenging officials' actions does not authorize evasion of "express and implied statutory limitations" on review, Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1384-1385 (2015).

Respondents' efforts (Opp. 10-11) to evade the general nonreviewability rule and its application here lack merit. This Court's decision in United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950), involved an alien detained at Ellis Island, not an alien abroad, and thus Congress had authorized review through habeas corpus proceedings. Id. at 539-540. And Sale v. Haitian Centers Council, Inc., 509 U.S. 155 (1993), did not address reviewability. Moreover, the fact that Congress precluded APA review of removal orders for certain aliens already present in the

United States and of the revocation of visas to aliens who already obtained them (Opp. 11) only makes it more implausible that Congress allowed review for aliens seeking entry from abroad. "There was no reason for Congress to" preclude such review expressly because, "[g]iven the historical background against which it has legislated," it "could safely assume" that such review was unavailable. Saavedra Bruno, 197 F.3d at 1162.

Respondents alternatively argue (Opp. 10-12) that the general nonreviewability rule applies only to individual decisions of consular officers but not to a suspension of entry by the President based on national security and foreign policy. But the foundation for the bar to review is that "'any policy toward aliens is vitally and intricately interwoven with * * * the conduct of foreign relations, the war power, and the maintenance of a republican form of government,'" matters that are "'so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'" Saavedra Bruno, 197 F.3d at 1159 (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 588-589 (1952)). That reasoning applies with greater force to the judgments of the Head of the Executive Branch. Respondents' rejoinder (Opp. 11-12) that the Constitution vests exclusive authority over immigration in Congress is both incorrect and irrelevant. The Constitution's allocation of power among the political Branches does not justify allowing judicial review only

of decisions of the President but not of subordinate executive officers.

2. Respondents offer no way to surmount the array of other barriers to review. Among other problems, they identify no "final agency action," 5 U.S.C. 704 (emphasis added), applying the Proclamation to the aliens whose entry they seek. Although respondents contend (Opp. 9) that their challenges are ripe because the Proclamation "subjects [their] relatives and associates to an immediate ban on entry," the Proclamation does not bar those aliens' entry unless and until it is applied to them, i.e., they are denied a visa and a waiver because of the Proclamation.

Respondents argue (Opp. 13) that other provisions of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 et seq., afford benefits to their relatives and associates, but they fail to show how the provisions they invoke here, 8 U.S.C. 1152(a)(1)(A) and 1182(f), grant respondents any judicially cognizable rights. And respondents cannot evade the APA's prohibition on matters "committed to agency discretion by law," 5 U.S.C. 701(a)(2), because the national-interest determinations at issue here are statutorily committed to the President's discretion.

B. Respondents' Statutory Claims Lack Merit

Even if respondents' challenges to the Proclamation were justiciable, they lack merit. Respondents' interpretations of the

INA would frustrate the statutory text, render unlawful the actions of past Presidents, and raise grave constitutional questions.

1. The Proclamation is consistent with 8 U.S.C. 1182(f) and 8 U.S.C. 1185(a)(1)

The text of Section 1182(f) grants the President broad discretion to suspend "by proclamation" entry of "any" or "all" aliens "as immigrants or nonimmigrants" for such time as he "deem[s] necessary" or to restrict their entry as he "deem[s] to be appropriate," "[w]henever" he "finds" that their entry would be "detrimental to the interests of the United States." Section 1185(a)(1) similarly makes it "unlawful" for an alien to "enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe." The breadth of these provisions reflects the fact that the President's power to suspend entry of aliens abroad derives both from Congress and from the President's inherent constitutional authority.

a. Respondents concede that, even on their view, the President need only "find some rational link between the aliens [to be excluded] and a detriment to the United States." Opp. 19 (brackets and quotation marks omitted). That, however, is not the standard the district court proceeded to apply: it faulted the Proclamation for having an insufficiently precise "fit," and its scrutiny of that "fit" bore no relation to traditional rational-basis review. Addendum 29-36.

b. In any event, the President explicitly "f[ound] that, absent the measures set forth in th[e] [P]roclamation, the * * * entry into the United States of persons described in section 2 of th[e] [P]roclamation would be detrimental to the interests of the United States." Procl. preamble. And the Proclamation explained in detail why the President reached that conclusion in light of the findings of the multi-agency review process. See Procl. § 2. None of respondents' criticisms (Opp. 21-23) comes close to showing that the Proclamation lacked any rational connection to national-security and foreign-policy objectives.

First, respondents say (Opp. 21) that "individualized adjudication" by "immigration officers" should be sufficient to prevent entry of dangerous persons. But individual adjudications would not create pressure on foreign governments to adopt more secure practices. Moreover, the comprehensive review of the conditions in every country enabled the President to reach systemic conclusions about whether the United States has sufficient information to assess the risk posed by nationals traveling with documents issued by particular countries; individual immigration officers are not in position to make those global assessments.

Second, respondents argue (Opp. 21) that the Proclamation's decision not to exclude certain nonimmigrant visa holders from some countries "contradicts [the Proclamation's] stated rationale." It does not. As discussed above, supra at 4, the

Proclamation explains why the President imposed the most severe restrictions on countries and travelers that pose the greatest national-security challenges. Relatedly, respondents argue (Opp. 22) that the Proclamation "fails to adhere to its own criteria." That is not correct. The Proclamation describes the individualized circumstances in each country that led the President to conclude that more severe restrictions (on Somalia), less severe restrictions (on Venezuela), or no restrictions (on Iraq) were appropriate. Those are exactly the sort of tailored, individualized balancing judgments that Sections 1182(f) and 1185(a)(1) reserve to the President's discretion.

Third, respondents argue (Opp. 22) that the Proclamation's restrictions "are substantially overbroad" because it is unlikely that a child is a terrorist. But respondents cannot use outlier examples to show that the Proclamation lacks any rational relationship to its stated goals, and the Proclamation reasonably accounts for outliers by authorizing case-by-case waivers. See Procl. § 3(c)(i)(A)-(C). Applying categorical restrictions on travelers from covered countries also furthers the Proclamation's goal of applying diplomatic pressure on those countries to improve. That is why President Carter's Iran order and President Reagan's Cuba order similarly did not exempt children.

Indeed, respondents seem to acknowledge that the Proclamation's goal of applying diplomatic pressure is a complete

answer to every criticism they raise. For that reason, respondents simply deny (Opp. 23) that Sections 1182(f) and 1185(a)(1) allow the President to pursue that goal at all. But the broad text of the statutes cuts down respondents' argument, as does historical application: multiple past Presidents have concluded that entry of nationals from certain countries would be detrimental because ongoing foreign-policy disputes required "retaliatory diplomatic measures." Hawaii v. Trump, 859 F.3d 741, 772 n.13 (9th Cir. 2017) (per curiam).

c. As a fallback, respondents argue (Opp. 23) that the phrase "detrimental to the interests of the United States" in Section 1182(f) is essentially a term of art with a very limited meaning that applies only in two circumstances: where the excluded aliens "themselves pose a threat to national security," or where they "threaten congressional policy during an exigency in which Congress cannot practicably act." No court has accepted respondents' argument, and with good reason: it is inconsistent with the text, structure, and history of Sections 1182(f) and 1185(a)(1). See Gov't Reply Br. at 17-23, Trump v. IRAP, No. 16-1436 (Oct. 4, 2017). Among other serious problems, respondents' proposal that the President must make findings as to individual excluded aliens is inconsistent with the statute's authorization to the President to suspend entry of "all aliens or any class of aliens." 8 U.S.C. 1182(f). And limiting the President's authority

to an "exigency" where Congress "cannot practicably act" (Opp. 23) has no support in the statutory provisions or their invocation by Presidents Carter and Reagan.

2. The Proclamation is consistent with 8 U.S.C. 1152(a)

As we have shown, Section 1152(a)(1)(A) does not limit the President's authority to suspend or restrict entry under 8 U.S.C. 1182(f) and 1185(a)(1) because it addresses only issuance of visas to aliens otherwise eligible to receive them. Stay Appl. 30-32. Respondents argue (Opp. 15) that this distinction lacks a "textual basis." To the contrary, Sections 1182(f) and 1185(a)(1) give the President express authority to render aliens abroad ineligible to enter. Section 1201(g) then prohibits issuing visas to aliens "ineligible to receive" them "under [S]ection 1182," which includes Section 1182(f). For the remaining aliens who are eligible to enter, Section 1152(a)(1)(A) forbids discriminating in the issuance of immigrant visas on the basis of nationality. Contrary to respondents' contention (Opp. 15), reading Section 1152(a)(1)(A) not to cabin the President's distinct authority over entry would not "gut" that provision. It applies to the vast majority of aliens whose entry has not been restricted under Section 1182(f), Section 1185(a)(1), or another INA provision. Nor does that reading permit revival of a quota system.

Respondents do not dispute that construing Section 1152(a)(1)(A) to preclude the President "from drawing nationality

distinctions" would raise serious constitutional doubts and contradict historical practice. See Opp. 17. They disavow that interpretation, instead asserting that Section 1152(a)(1)(A) implicitly permits nationality distinctions "to address a 'compelling' exigency." Ibid. (citation omitted). But respondents do not provide any legitimate textual basis for that exception, they do not identify any judicially manageable standards for applying it, and neither President Carter's order nor President Reagan's order fits their invented test. The more straightforward way to harmonize Section 1152(a)(1)(A) is to conclude that it does not speak to the President's distinct authority to suspend or restrict entry, and that Sections 1182(f) and 1185(a)(1) supply the standards governing those Executive determinations.

Respondents further fail to show that, if the statutes did conflict, Section 1152(a)(1)(A) should control. They note (Opp. 16) that it was enacted after Section 1182(f), but cite nothing reflecting the requisite "clear and manifest" congressional intent to achieve an implied partial repeal. National Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 664, 662 (2007). Respondents assert that Section 1152(a)(1)(A)'s generic nondiscrimination rule is more specific, but they disregard that Sections 1182(f) and 1185(a)(1) speak to the unique authority of the President over entry. They note (Opp. 16) that those

provisions are not listed among Section 1152(a)(1)(A)'s exceptions, but neither are other statutes that expressly contemplate nationality-based distinctions in issuance of visas, see, e.g., 8 U.S.C. 1253(d). They dismiss the fact that Section 1185(a)(1) was amended after Section 1152(a)(1)(A), arguing (Opp. 16 n.5) that that amendment did not "suggest[] an intent to repeal or limit Section 1152(a)(1)(A)." By the same principle, Section 1152(a)(1)(A) should be read as leaving Section 1182(f) intact.

Finally, Section 1152(a)(1)(A) cannot support the injunction the district court issued. Respondents do not dispute that Section 1152(a)(1)(A), by its plain terms, has no application to immigrant visas. And although the statute speaks only to visa issuance, respondents argue (Opp. 16) that it extends to the President's suspension of entry as well because the "purpose of a visa is to enable entry." But the INA is explicit that a visa alone is never sufficient to entitle an alien to enter. 8 U.S.C. 1201(h). To be sure, it does not make sense to compel the government to issue immigrant visas to aliens abroad who are separately barred from entering the country, but that is yet another reason why Section 1152(a)(1)(A) has never been treated as a limit on the President's suspension authority.*

* The district court in this case never considered respondents' claim under the Establishment Clause (Opp. 33-35), so that claim provides no basis to sustain the injunction pending appeal. In any event, respondents' Establishment Clause challenge is meritless because, as the government has explained, the

III. THE GLOBAL INJUNCTION IS OVERBROAD AND SHOULD BE STAYED TO THE EXTENT IT GRANTS RELIEF BEYOND RESPONDENTS THEMSELVES

Respondents do not attempt to show how the district court's worldwide injunction comports with the requirement that relief must be limited to addressing the plaintiffs' own injuries. They simply assert that the enjoined provisions of the Proclamation are facially invalid, so those provisions must be enjoined in toto. But it is fundamental to Article III and principles of equity that courts may not grant relief to parties not before them. Respondents confuse their legal theory with the permissible scope of relief, contrary to this Court's precedent. Stay Appl. 38.

Respondents also note (Opp. 40) the impossibility of "identify[ing] in advance precisely which individuals" the Proclamation will affect. But the speculative nature of the Proclamation's potential effects on nonparties is the reason why this suit is unripe and all the more reason to withhold injunctive relief, not a reason to enjoin the Proclamation wholesale. At a minimum, the appropriate course here, as in United States Department of Defense v. Meinhold, 510 U.S. 939 (1993), is to stay the overbroad injunction except as to specific, identified aliens whose exclusion causes respondents irreparable injury while the injunction's legality can be properly adjudicated.

Proclamation is based not on animus but on national-security concerns identified in the agencies' review process. See Gov't Appl. for Stay at 28-35, Trump v. IRAP, No. 17A560 (Nov. 21, 2017).

CONCLUSION

The injunction should be stayed pending proceedings in the court of appeals and, if necessary, in this Court.

Respectfully submitted.

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