No.

# 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.

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

## 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 a preliminary injunction barring enforcement of the Proclamation's entry suspensions worldwide, except as to nationals of two countries. The court of appeals affirmed, except as to 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 Immigration and Nationality Act.

The questions presented are:

1. Whether respondents' challenge to the President's suspension 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 global injunction is impermissibly overbroad.

## PARTIES TO THE PROCEEDING

Petitioners (defendants-appellants below) are Donald J. Trump, in his official capacity as President of the United States; the Department of Homeland Security; Kirstjen M. Nielsen, in her official capacity as Secretary of Homeland Security; the Department of State; Rex W. Tillerson, in his official capacity as Secretary of State; and the United States of America.[*]

Respondents (plaintiffs-appellees below) are the State of Hawaii, Dr. Ismail Elshikh, John Does 1 and 2, and the Muslim Association of Hawaii, Inc.

[*] Former Acting Secretary of Homeland Security Elaine C. Duke was a defendant-appellant in this case. When Kirstjen M. Nielsen became Secretary of Homeland Security on December 6, 2017, Secretary Nielsen was automatically substituted.

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## PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of President Donald J. Trump, et al., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, (App.) 2a-65a) is not yet published in the Federal Reporter but is available at 2017 WL 6554184. The court of appeals' order granting a partial stay (App. 66a-67a) is not published in the Federal Reporter but is available at 2017 WL 5343014. The order of the district court converting its temporary restraining order into a preliminary injunction (App. 68a-69a) is not published. The district court's order granting a temporary restraining order (App. 70a-106a) is reported at 265 F. Supp. 3d 1140.

## JURISDICTION

The judgment of the court of appeals was entered on December 22, 2017. 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 this petition. App. 107a-172a.

## STATEMENT

The Constitution and Acts of Congress confer on the President broad authority to suspend or restrict the entry of aliens outside the United States when he deems it in the Nation's interest. See *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950); 8 U.S.C. 1182(f), 1185(a)(1). Exercising that authority after an extensive, worldwide review by multiple government agencies of whether foreign governments provide sufficient information and have adequate practices to allow the United States to properly screen aliens seeking entry from abroad—and after receiving the recommendation of the Acting Secretary of Homeland Security—the President suspended entry (subject to exceptions and case-by-case waivers) of certain foreign nationals from eight countries. Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 27, 2017), App. 121a-148a. The Proclamation explained that, based on the findings of the review process, these countries do not share adequate information with the United States to assess the risks their nationals pose, or they present other heightened risk factors. Whereas prior orders of the President were designed to facilitate the review, the Proclamation directly responds to the completed review and

its specific findings of deficiencies in particular countries. The district court nevertheless entered a global injunction barring enforcement of the Proclamation, except as to aliens from two countries. App. 68a-69a; 70a-106a. The court of appeals affirmed except as to persons who lack a credible claim of a bona fide relationship with a person or entity in the United States, concluding that the Proclamation likely violates the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq*. App. 1a-65a.

**A. Legal Framework**

"The exclusion of aliens is a fundamental act of sovereignty" that both rests on the "legislative power" and "is inherent in the executive power to control the foreign affairs of the nation." *Knauff*, 338 U.S. at 542; see *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952) (Control of the Nation's borders is "interwoven" with "the conduct of foreign relations" and "the war power"). Congress has addressed entry into the United States primarily in the INA, which accords the President broad discretion to suspend or restrict the entry of aliens abroad.

1. Under the INA, admission into the United States normally requires a valid visa or other valid travel document. See 8 U.S.C. 1181, 1182(a)(7)(A)(i) and (B)(i)(II), 1203. Applying for a visa typically requires an in-person interview and results in a decision by a State Department consular officer. 8 U.S.C. 1201(a)(1), 1202(h), 1204; 22 C.F.R. 41.102, 41.121(a), 42.62, 42.81(a). Although a visa normally is necessary for admission, it does not guarantee admission; the alien still must be found admissible upon arriving at a port of entry. 8 U.S.C. 1201(h), 1225(a).

Congress has enabled nationals of certain countries to seek temporary admission without a visa under the Visa Waiver Program. 8 U.S.C. 1182(a)(7)(B)(iv); 8 U.S.C. 1187 (2012 & Supp. III 2015). The Program is intended to facilitate easier entry for certain low-risk travelers. In 2015, Congress excluded from travel under that Program aliens who are dual nationals of or recent visitors to Iraq or Syria, where "[t]he Islamic State of Iraq and the Levant * * * maintain[s] a formidable force"; as well as nationals of and recent visitors to countries designated by the Secretary of State as state sponsors of terrorism (currently Iran, Sudan, Syria, and North Korea).[1] Congress also authorized the Department of Homeland Security (DHS) to designate additional countries of concern, considering whether a country is a "safe haven for terrorists," "whether a foreign terrorist organization has a significant presence" in the country, and "whether the presence of an alien in the country * * * increases the likelihood that the alien is a credible threat to" U.S. national security. 8 U.S.C. 1187(a)(12)(D)(i) and (ii) (Supp. III 2015). Applying those criteria, in February 2016, DHS excluded recent visitors to Libya, Somalia, and Yemen from travel under the Visa Waiver Program.[2]

2. Various provisions of the INA establish criteria that can render an alien abroad ineligible to receive a visa or otherwise inadmissible to the United States. In addition, Congress has accorded the President broad

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[1] U.S. Dep't of State, *Country Reports on Terrorism 2015*, at 6, 299-302 (June 2016), https://goo.gl/40GmOS; The White House, *Remarks by President Trump Before Cabinet Meeting* (Nov. 20, 2017), https://goo.gl/256ZiY (designating North Korea as state sponsor of terrorism); see 8 U.S.C. 1187(a)(12)(A)(i) and (ii) (Supp. III 2015).

[2] DHS, *DHS Announces Further Travel Restrictions for the Visa Waiver Program* (Feb. 18, 2016), https://goo.gl/OXTqb5.

discretion to suspend or restrict the entry of aliens. Section 1182(f) of Title 8 provides in relevant part:

> 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."

**B. The Second Executive Order And Proclamation**

1. In March 2017, the President issued Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) (EO-2) (App. 148a-172a), which directed the Secretary of Homeland Security to determine whether foreign governments provide adequate information to vet foreign nationals applying for visas before they are permitted to enter the United States. See *Trump* v. *IRAP*, 137 S. Ct. 2080, 2083 (2017) (per curiam) (describing EO-2). To ensure that dangerous individuals did not enter while the government was establishing adequate standards, and to reduce investigative burdens on agencies during the review, EO-2 temporarily suspended the entry (subject to exceptions) of foreign nationals from six countries previously identified by Congress or the Executive as presenting terrorism-related concerns in the context of the Visa Waiver Program. See *id.* at 2083-2084; App. 158a (EO-2 § 2(c)). EO-2 explained that

those six countries had been singled out by Congress or the Executive because each "is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones." App. 152a (EO-2 § 1(d)); see App. 149a-150a (EO-2 § 1(b)(i)).

EO-2 was partially enjoined by district courts in Maryland and Hawaii. *IRAP* v. *Trump*, 241 F. Supp. 3d 539 (D. Md. 2017); *Hawaii* v. *Trump*, 245 F. Supp. 3d 1227 (D. Haw. 2017). The Fourth and Ninth Circuits upheld those injunctions in substantial part. *IRAP* v. *Trump*, 857 F.3d 554 (4th Cir. 2017) (en banc); *Hawaii* v. *Trump*, 859 F.3d 741 (9th Cir. 2017) (per curiam). This Court granted certiorari and partially stayed the injunctions pending review. *IRAP*, 137 S. Ct. at 2086, 2088-2089. The Court allowed EO-2's entry suspension to take effect except as to "foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States." *Id.* at 2088. The Court further stated that "the executive review directed by" EO-2 "may proceed promptly, if it is not already underway." *Ibid.* After EO-2's temporary entry suspension expired, this Court vacated the lower courts' rulings as moot. *Trump* v. *IRAP*, 138 S. Ct. 353 (2017); *Trump* v. *Hawaii*, 138 S. Ct. 377 (2017).[3]

2. On September 24, the President issued Proclamation No. 9645. The Proclamation is the product of

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[3] EO-2 also had provisions addressing the United States Refugee Admissions Program. See *IRAP*, 137 S. Ct. at 2083. When those provisions expired, the President issued an order generally resuming the Program, while noting that some agencies had announced ongoing efforts to improve refugee vetting and, in the interim, that they would temporarily suspend adjudication of certain categories of applications for refugee status. Exec. Order No. 13,815, 82 Fed. Reg. 50,055 (Oct. 27, 2017). That order is not at issue in this appeal.

EO-2's comprehensive, worldwide review of whether foreign governments provide sufficient information and have other practices to allow the United States to properly screen their nationals before entry.

a. DHS, in consultation with the Department of State and the Office of the Director of National Intelligence (ODNI), 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." Procl. § 1(c). DHS, in consultation with the State Department and ODNI, developed a "baseline" for the information required from foreign governments. *Ibid.* That baseline incorporated three components:

> (i) identity-management information, *i.e.*, "information needed to determine whether individuals seeking benefits under the immigration laws are who they claim to be," which turned on criteria such as "whether the country issues electronic passports embedded with data to enable confirmation of identity, reports lost and stolen passports to appropriate entities, and makes available upon request identity-related information not included in its passports";
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> (ii) national-security and public-safety information about whether a person seeking entry poses a risk, which turned on criteria such as "whether the country makes available * * * known or suspected terrorist and criminal-history information upon request," "whether the country impedes the United States Government's receipt of information about passengers and crew traveling to the United States,"

and "whether the country provides passport and national-identity document exemplars"; and

(iii) a national-security and public-safety risk assessment, which turned on criteria such as "whether the country is a known or potential terrorist safe haven, whether it is a participant in the Visa Waiver Program * * * that meets all of [the program's] requirements, and whether it regularly fails to receive its nationals subject to final orders of removal from the United States."

*Ibid.*

DHS, in coordination with the State Department, collected data on, and evaluated, nearly 200 countries. Procl. § 1(d). The agencies measured each country's performance in issuing reliable travel documents and implementing adequate identity-management and information-sharing protocols and procedures. *Ibid.* They also evaluated terrorism-related and public-safety risks associated with each country. *Ibid.* DHS identified 16 countries as having "inadequate" information-sharing practices and risk factors, and another 31 countries as "at risk" of becoming "inadequate." *Id.* § 1(e). The State Department then conducted a 50-day engagement period to encourage all foreign governments to improve their performance, which yielded significant improvements from many countries. *Id.* § 1(f). Multiple countries provided travel-document exemplars to combat fraud, and/or agreed to share information on known or suspected terrorists. *Ibid.*

b. After the review was completed, on September 15, the Acting Secretary of Homeland Security identified seven countries that, even after diplomatic engagement, continue to have inadequate identity-management pro-

tocols or information-sharing practices, or whose nationals present other heightened risk factors: Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen. Procl. § 1(h). The Acting Secretary therefore recommended that the President impose entry restrictions on certain nationals from these countries. The Acting Secretary also recommended entry restrictions for nationals of Somalia, which, although it generally satisfies the information-sharing component of the baseline standards, has identity-management deficiencies, a government that is unable to effectively and consistently cooperate, and a significant terrorist presence. *Id.* § 1(i).[4]

c. The President evaluated the Acting Secretary's recommendations in consultation with multiple Cabinet members and other government officials. Procl. § 1(h)(i) and (ii). The President considered a number of 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." *Id.* § 1(h)(i).

Then, "in accordance with the recommendations," the President imposed entry restrictions on certain nationals from the eight countries. Procl. § 1(h)(i)-(iii). The President tailored "country-specific restrictions

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[4] The Acting Secretary further assessed that Iraq does not meet the information-sharing baseline, but recommended that the President not restrict entry of Iraqi nationals in light of the close cooperative relationship between the United States and the democratically elected government of Iraq, the strong United States diplomatic presence in Iraq, the significant presence of United States forces in Iraq, and Iraq's commitment to combatting the Islamic State of Iraq and Syria (ISIS). Procl. § 1(g).

that would be most likely to encourage cooperation given each country's distinct circumstances, and that would, at the same time, protect the United States until such time as improvements occur." *Id.* § 1(h)(i). The President determined that these particular 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." *Ibid.*

For countries that refuse to cooperate regularly with the United States (Iran, North Korea, and Syria), Section 2 of the Proclamation suspends entry of all nationals, except for Iranians seeking nonimmigrant student (F and M) and exchange-visitor (J) visas. Procl. § 2(b)(ii), (d)(ii), and (e)(ii). For countries that are valuable counter-terrorism partners but have information-sharing deficiencies (Chad, Libya, and Yemen), the Proclamation suspends entry only of nationals seeking immigrant visas and nonimmigrant business, tourist, and business/tourist visas. *Id.* § 2(a)(ii), (c)(ii), and (g)(ii). For Somalia, the Proclamation suspends entry of nationals seeking immigrant visas and requires additional scrutiny of nationals seeking nonimmigrant visas, in light of "special concerns that distinguish it from other countries," including Somalia's "significant identity-management deficiencies," the "persistent terrorist threat" that "emanates from" Somalia, and "the degree to which [Somalia's] government lacks command and control of its territory." *Id.* § 2(h)(i) and (ii). And for Venezuela, which refuses to cooperate in information sharing but for which alternative means are

available to identify its nationals, the Proclamation suspends entry only of government officials "involved in screening and vetting procedures" and "their immediate family members" on nonimmigrant business or tourist visas. *Id.* § 2(f)(i) and (ii).

The Proclamation provides for case-by-case waivers where a foreign national demonstrates that denying entry would cause undue hardship, entry would not pose a threat to the national security or public safety, and entry would be in the national interest. Procl. § 3(c)(i)(A)-(C). And the Proclamation requires reporting to the President every 180 days about whether entry restrictions should be continued, modified, terminated, or supplemented. *Id.* § 4.

**C. Procedural History**

Respondents filed suit in the District of Hawaii challenging the Proclamation under the INA, various other statutes, and the Establishment Clause and Equal Protection component of the Due Process Clause. The three individual plaintiff-respondents are U.S. citizens or lawful permanent residents who have relatives from Syria, Yemen, and Iran seeking immigrant or nonimmigrant visas. App. 82a-85a. The Muslim Association of Hawaii is a non-profit organization that operates mosques in Hawaii. App. 85a-86a. The State of Hawaii is also a plaintiff. App. 79a-81a.

1. After highly expedited briefing and without argument, the district court granted a worldwide temporary restraining order barring enforcement of Section 2 of the Proclamation except as to nationals of Venezuela and North Korea (restrictions that respondents did not challenge), and denied a stay. App. 70a-106a. The court held that respondents' statutory claims are justiciable,

and that the Proclamation likely exceeds the President's authority under 8 U.S.C. 1182(f) and 1185(a)(1) because, in the court's view, entry restrictions are "a poor fit" for the national-security and foreign-relations objectives the Proclamation identified, App. 94a-95a. The court also concluded that the Proclamation's entry restrictions likely violate 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" an alien's "nationality." The court "decline[d] to reach" respondents' other claims. App. 92a. The government then consented to conversion of the TRO into a preliminary injunction. App. 68a-69a.

2. The government appealed the preliminary injunction, requested expedited briefing, and moved for a stay pending appeal. The Ninth Circuit denied a stay except as to "foreign nationals who [do not] have a credible claim of a bona fide relationship with a person or entity in the United States." App. 66a (quoting *IRAP*, 137 S. Ct. at 2088). This Court then stayed the district court's injunction in full, pending disposition of the government's appeal in the court of appeals and proceedings in this Court. *Trump* v. *Hawaii*, No. 17A550, 2017 WL 5987406 (Dec. 4, 2017). Following this Court's stay, the government put the Proclamation into effect.

3. The court of appeals affirmed the district court's preliminary injunction, App. 1a-65a, except as to foreign nationals without a credible claim of a bona fide relationship with a person or entity in the United States, App. 4a. The court addressed only respondents' statutory claims. App. 4a, 64a.

a. The court held that respondents could overcome multiple barriers to justiciability. First, the court found

that respondents' claims are ripe. App. 14a-16a. Second, the court held that the doctrine of consular nonreviewability, which bars review by "any court, unless expressly authorized by law," of "the determination of the political branch of the Government to exclude a given alien," *Knauff*, 338 U.S. at 543, does not apply to a suspension of entry by the President, as opposed to "individual visa denials." App. 16a (citation and emphasis omitted). Third, the court concluded that there has been final agency action under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*; that suspending entry is not committed to the President's "discretion by law," 5 U.S.C. 701(a)(2); and that family members of aliens abroad and universities are within the INA's zone of interests. App. 20a-23a. The court further held that an equitable cause of action was available to review actions by the President that allegedly violate statutory authority. App. 23a-24a.

b. On the merits, the court of appeals held that respondents are likely to succeed on their claim that the Proclamation is inconsistent with 8 U.S.C. 1182(f). The court concluded that, even though Section 1182(f) grants broad authority to the President, it generally does not permit the President to "impose entry suspensions of unlimited and indefinite duration." App. 26a. The court also concluded that the Proclamation's objectives—protecting national security and public safety in light of other countries' deficient information-sharing and identity-management practices—"conflict" with other provisions of the INA that address aliens or countries with connections to terrorism or crime. App. 29a-32a. Furthermore, the court thought it necessary to "read[ ] meaningful limitations into § 1182(f)" to avoid

various separation-of-powers concerns. App. 41a (citations omitted). And despite the Proclamation's detailed findings, the court held that the Proclamation fails to make an adequate finding that entry of the excluded aliens "would be detrimental to the interests of the United States." App. 43a (quoting 8 U.S.C. 1182(f)).

The court of appeals further held that 8 U.S.C. 1152(a)(1)(A)'s prohibition on nationality-based discrimination in the issuance of immigrant visas is a constraint on the President's authority to suspend entry of immigrants and nonimmigrants under Section 1182(f), even though the former deals only with visa-issuance (as opposed to entry into the United States), and is limited to immigrant visas. App. 48a-53a. Although the court acknowledged that President Carter's administration imposed a nationality-based entry suspension during the Iranian hostage crisis, and that President Reagan similarly suspended entry of Cuban immigrants during a diplomatic dispute, the court dismissed those presidential actions as "outliers." App. 53a.

Having held that the President lacked statutory authority to issue the Proclamation, the court of appeals held that the President also lacked constitutional authority for it, concluding that Congress has "exclusive" power over the entry of aliens. App. 54a-56a.

c. Finally, the court of appeals held that an injunction was warranted, because the President's national-security findings that form the basis for the Proclamation are "general" and not "sufficient," App. 58a. And the court held that the injunction should be worldwide, save only "'foreign national[s] who lack[ ] any connection to this country.'" App. 63a (citation omitted).

**D. Related Litigation**

Litigation over the Proclamation has also been filed in other courts. As relevant here, the District Court for the District of Maryland globally enjoined implementation of the Proclamation's entry suspensions, except as to nationals of Venezuela or North Korea or persons without "a credible claim of a bona fide relationship with a person or entity in the United States." *IRAP* v. *Trump*, 2017 WL 4674314, 265 F. Supp. 3d 570 (D. Md. 2017) (quoting *IRAP*, 137 S. Ct. at 2088). The Maryland court rejected an interpretation of Section 1182(f) virtually identical to the one the Ninth Circuit accepted, *id.* at *22-*23, but held (in a reversal of its prior position) that the Proclamation likely violates Section 1152(a)(1)(A), *id.* at *19-*22. The Maryland court also stated that the Proclamation likely violates the Establishment Clause. *Id.* at *27-*37.

The government appealed, requested expedited briefing, and sought a stay pending appeal, which was not acted on by the Fourth Circuit. This Court stayed the Maryland district court's injunction pending appeal and further proceedings in this Court. *Trump* v. *IRAP*, No. 17A560, 2017 WL 5987435 (Dec. 4, 2017). The Fourth Circuit, sitting sua sponte en banc, heard oral argument on December 8, but has not yet ruled.

**REASONS FOR GRANTING THE PETITION**

The court of appeals affirmed a global injunction against a formal national-security directive of the President that was adopted pursuant to his constitutional and statutory authority to protect the Nation and to engage in diplomacy with other nations. Since this Court granted certiorari to review injunctions against EO-2, the need for this Court's review has only increased. Whereas EO-2 was premised on uncertainty about the

adequacy of other governments' information-sharing, which warranted review of their protocols and cooperation, the Proclamation responds to multiple agencies' specific findings that a handful of countries have deficient information-sharing practices or other factors that prevent the government from assessing the risk their nationals pose to the United States. By prohibiting the President from denying entry to those aliens on that basis, and preventing the President from using the entry suspensions to encourage the deficient countries to improve their practices, the courts below have overridden the President's judgments on sensitive matters of national security and foreign relations, and severely restricted the ability of this and future Presidents to protect the Nation.

## I. THE DECISION BELOW IS WRONG

As a threshold matter, respondents' statutory challenges to the Proclamation are not justiciable, and the court of appeals never should have addressed them. On the merits, multiple provisions of the INA confer sweeping authority on the President to restrict the entry of aliens abroad. Yet the court interpreted those provisions to *restrict* the President's authority, even when he explicitly finds that the entry of particular classes of aliens would be detrimental to the interests of the United States. The court also read the INA's prohibition on nationality-based distinctions in immigrant-visa issuance to override the President's entry-suspension authority—a reading that cannot be reconciled with the statute's text, history, or application by past Presidents, and that would raise grave constitutional questions. And the court took an extraordinarily narrow view of the President's constitutional authority to restrict the

entry of aliens abroad in order to protect national security and conduct foreign relations.

**A. Respondents' Statutory Claims Are Not Justiciable**

1. This Court has "long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977). The Court has made clear that "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 543 (1950). Under this well-settled rule, the Executive's decision to exclude or deny a visa to an alien abroad "is not subject to judicial review * * * unless Congress says otherwise." *Saavedra Bruno* v. *Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999).

The nonreviewability rule forecloses respondents' statutory challenges to the Proclamation because Congress has never authorized any judicial review of visa denials—even when requested by the alien affected, see 6 U.S.C. 236(f), much less by third parties like respondents. Indeed, Congress has expressly forbidden "judicial review" of the revocation of a visa even for aliens already in the United States (subject to a narrow exception for aliens in removal proceedings, which is inapplicable to aliens abroad). 8 U.S.C. 1201(i). And on the one occasion when this Court held that aliens physically present in the United States (but not aliens abroad) could seek review of their exclusion orders under the APA, see *Brownell* v. *Tom We Shung*, 352 U.S. 180, 184-186 & nn.3, 5 (1956), Congress intervened to preclude such suits and to permit review only through habeas corpus, which is unavailable to aliens seeking entry

from abroad. Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5(a), 75 Stat. 651-653; see *Saavedra Bruno*, 197 F.3d at 1157-1162 (recounting history).

The court of appeals erred in holding that the general nonreviewability rule does not apply to respondents' statutory challenges. First, the court stated that this Court's precedents permit "narrow judicial review" of decisions to exclude aliens. App. 16a (citation omitted). But in the two decisions on which the court of appeals relied, a U.S. citizen colorably alleged that the refusal of a visa to an alien abroad violated the citizen's *own constitutional* rights. See *Kerry* v. *Din*, 135 S. Ct. 2128, 2131 (2015) (opinion of Scalia, J.); *id.* at 2139 (Kennedy, J., concurring in the judgment); *Kleindienst* v. *Mandel*, 408 U.S. 753, 756-759, 762-770 (1972). Those decisions provide no basis for judicial review of respondents' *statutory* challenges to the Proclamation.

Second, the court of appeals stated that the rule of nonreviewability applies only to "individual visa denials" by consular officers, not to the exercise of the President's authority under 8 U.S.C. 1182(f) and 1185(a)(1) to suspend or restrict entry of aliens. App. 16a. That distinction is fundamentally flawed. The nonreviewability rule rests on the separation-of-powers principle that the exclusion of aliens abroad is a foreign-policy judgment committed to the political Branches. *Saavedra Bruno*, 197 F.3d at 1159, 1163. It would invert the constitutional structure to deny review of decisions by consular officers—subordinate Executive Branch officials—while permitting review of the President's decision to suspend entry of classes of aliens on national-security and foreign-relations grounds.

Third, the court of appeals concluded that *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155 (1993),

"foreclose[s]" application of the nonreviewability rule here. App. 17a; see App. 17a-19a. *Sale*, however, did not address, much less reject, the argument that the aliens' claims were unreviewable, so that decision does not control the reviewability of respondents' claims here. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 91 (1998). Moreover, the aliens in *Sale* claimed a right under a U.S. treaty and implementing statute to not be returned to their home country, whereas the aliens here have made no such claim but rather seek entry into the United States.

2. The court of appeals further erred in determining that respondents' statutory challenges to the Proclamation are reviewable under the APA, 5 U.S.C. 702. App. 19a-23a. The APA does not apply at all where Congress has otherwise "preclude[d] judicial review," 5 U.S.C 701(a)(1), and it is "unmistakable" from history that "the immigration laws 'preclude judicial review' of the consular visa decisions." *Saavedra Bruno*, 197 F.3d at 1160 (citation omitted). Moreover, the APA's cause of action in Section 702 expressly leaves intact other "'limitations on judicial review,'" which include the nonreviewability rule. *Ibid.* (quoting 5 U.S.C. 702(1)).[5]

The APA does not authorize review of respondents' statutory claims for four additional reasons. First, the APA does not permit review of action "committed to

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[5] The court of appeals relied on *Abourezk* v. *Reagan*, 785 F.2d 1043 (D.C. Cir. 1986), aff'd by an equally divided Court, 484 U.S. 1 (1987) (per curiam), which held that the APA did allow review. But as the D.C. Circuit subsequently explained, *Abourezk* "rested in large measure" on an INA provision that was later amended to "make[ ] clear that district courts do not have general jurisdiction over claims arising under the immigration laws." *Saavedra Bruno*, 197 F.3d at 1164. *Abourezk* also did not address Section 702(1).

agency discretion by law." 5 U.S.C. 701(a)(2). The statutes that authorize the Proclamation here, 8 U.S.C. 1182(f) and 1185(a)(1), "exude[ ] deference" to the President and "foreclose the application of any meaningful judicial standard of review." *Webster* v. *Doe*, 486 U.S. 592, 600 (1988). Second, respondents have not plausibly alleged "final agency action." 5 U.S.C. 704. The President's Proclamation is not "agency action" at all, see *Franklin* v. *Massachusetts*, 505 U.S. 788, 799-801 (1992), and the agencies' action with respect to the aliens whose entry respondents seek is not final unless and until those aliens apply for a visa, are found by a consular officer to be otherwise eligible, and are then denied a visa and a waiver under the Proclamation. Third and relatedly, respondents' challenges are not ripe because the Proclamation does not regulate primary conduct but rather announces a rule to be applied in future visa adjudications by consular officers. See *Reno* v. *Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57-59 (1993). Respondents' claimed injuries thus "rest[ ] upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas* v. *United States*, 523 U.S. 296, 300 (1998) (citation omitted). Fourth, the APA's general cause of action exists only for persons to whom Congress intended to accord privately enforceable rights. See *Thompson* v. *North Am. Stainless, LP*, 562 U.S. 170, 177-178 (2011). Here, Sections 1182(f) and 1185(a)(1) confer discretion on the President, not rights on private parties. And Section 1152(a)(1)(A) is addressed to aliens seeking visas, not their relatives or entities in the United States.[6]

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[6] The court of appeals also cited *Legal Assistance for Vietnamese Asylum Seekers* v. *Department of State*, 45 F.3d 469 (D.C. Cir. 1995), vacated on other grounds, 519 U.S. 1 (1996) (per curiam), App.

3. The court of appeals alternatively held that, even if APA review is unavailable, courts may fashion an equitable cause of action to enjoin orders of the President that are implemented by the Executive Branch. App. 23a-24a. But this Court's precedents have made clear that the "judge-made remedy" of equitable relief to enjoin executive action does not permit plaintiffs to sidestep "express and implied statutory limitations" on judicial review of nonconstitutional claims, such as under the APA; "'[c]ourts of equity can no more disregard'" those limitations than may "'courts of law.'" *Armstrong* v. *Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384-1385 (2015) (citation omitted). The APA thus precludes the type of equitable action the court of appeals contemplated.

**B. The Proclamation Is A Lawful Exercise Of The President's Authority To Suspend Entry Of Aliens Abroad**

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

a. Section 1182(f) grants the President exceedingly broad discretion, authorizing him to suspend the entry of "any class" of aliens, 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." 8 U.S.C. 1182(f). The President expressly made that finding in the Proclamation. He stated that, "absent the measures set forth in [the Proclamation], the immigrant and nonimmigrant entry into the United

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21a, but that vacated ruling cannot be reconciled with the D.C. Circuit's subsequent ruling in *Saavedra Bruno*. 45 F.3d at 471-472.

States of persons described in section 2 of [the Proclamation] would be detrimental to the interests of the United States." Procl. Preamble. And even though the President generally need not "disclose" his "reasons for deeming nationals of a particular country a special threat," *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999), the President here explained his reasoning: The multi-agency review process demonstrated deficiencies in the information shared by certain foreign governments that is needed to screen foreign travelers, or other risk factors. Procl. § 1(g) and (i). Entry of the restricted foreign nationals would be detrimental because "the United States Government lacks sufficient information to assess the risks they pose to the United States." *Id.* § 1(h)(i). In addition, the President determined that the entry restrictions are "needed to elicit improved identity-management and information-sharing protocols and practices from foreign governments." *Ibid.*

The court of appeals nevertheless held that the President's findings were insufficient because "[t]he degree of desired improvement is left unstated," "there is no finding that the present vetting procedures are inadequate," and the Proclamation does not say that "nationality alone renders entry of this broad class of individuals a heightened security risk to the United States." App. 44a-45a. As an initial matter, Section 1182(f) has never been thought to require such detailed public explanations. For decades, Presidents have restricted entry pursuant to Sections 1182(f) and 1185(a)(1) without detailed public justifications or findings; some have discussed the President's rationale in one or two sentences

that broadly declare the Nation's interests.[7] Cf. *Webster*, 486 U.S. at 600 (statute foreclosed judicial review by authorizing termination of a CIA employee "whenever the Director 'shall deem such termination necessary or advisable in the interests of the United States'") (emphasis omitted).

In any event, the Proclamation contains all the findings the court of appeals construed Section 1182(f) to require: the deficient countries are expected to improve their practices to meet the baseline criteria that all other countries satisfied. Procl. § 1(c). In the meantime, the information presently received from those governments is inadequate to assess the risk posed by the excluded aliens. *Id.* § 1(h)(i). And nationality is crucial in this context because it is the deficient foreign governments that "manage the identity and travel documents of their nationals." *Id.* § 1(b). The court of appeals deemed the Proclamation insufficient only by selectively ignoring its stated findings and rationales. By basing the Proclamation on a comprehensive, multi-agency review and adopting restrictions tailored country-by-country to the relevant risks and circumstances, the President's suspension order is far more elaborate as a matter of both process and substance than other recent orders issued by past Presidents.

b. The court of appeals, however, read into Section 1182(f) limitations that are not found in the text. See App. 26a. First, the court interpreted Section 1182(f)'s

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[7] See, *e.g.*, Proclamation No. 8693, 76 Fed. Reg. 44,751 (July 27, 2011); Proclamation No. 8342, 74 Fed. Reg. 4093 (Jan. 22, 2009); Proclamation No. 6958, 61 Fed. Reg. 60,007 (Nov. 26, 1996); Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (June 1, 1992); Proclamation No. 5887, 53 Fed. Reg. 43,185 (Oct. 26, 1988); Proclamation No. 5829, 53 Fed. Reg. 22,289 (June 14, 1988).

grant of authority to the President to "*suspend*" entry "for *such period* as he shall deem *necessary*" (emphasis added), to generally prohibit "entry suspensions of unlimited and indefinite duration," App. 26a. But that turns on its head the statutory text, which vests in the *President* the sole power to decide how long the suspension will be necessary. The court did not cite any authority for the notion that Section 1182(f) implicitly requires a Presidential Proclamation to contain a termination date at the outset. Indeed, the court noted that past Presidents' orders invoking Section 1182(f) "did not provide for a set end date." App. 26a n.10. The court reasoned that those orders were "narrower in scope than the Proclamation," *ibid.*, but Section 1182(f) does not confer authority on the President by some sliding scale where the more countries a suspension includes, the shorter in duration it must be, all subject to judicial weighing.

Nor would a temporal limitation typically make sense in the context of Executive action to protect national security and conduct foreign affairs. When the President adopts an entry suspension in response to a diplomatic dispute—such as, for example, President Carter's order suspending entry of Iranian nationals during the Iranian hostage crisis, see Exec. Order No. 12,172, § 1-101, 44 Fed. Reg. 67,947 (Nov. 26, 1979), or President Reagan's order suspending entry by Cuban nationals after Cuba suspended execution of an immigration agreement with the United States, see Proclamation No. 5517, 51 Fed. Reg. 30,470 (Aug. 26, 1986)—the President generally will not know in advance how long that dispute will persist. And where, as here, the President suspends entry in response to other governments' failure to provide information, the President acts

reasonably by continuing to engage with those governments and periodically revisiting whether to maintain the suspensions—which is exactly what the Proclamation does. See Procl. §§ 4 and 5.

Second, the court of appeals held that the Proclamation's aims—excluding aliens who may pose a threat to the United States, and motivating foreign governments to improve their information sharing and address other risk factors—are not permissible uses of Section 1182(f), because other INA provisions address related issues. App. 28a-32a. For instance, Section 1182(a) excludes aliens who have "engaged in a terrorist activity" or committed various crimes. See App. 29a. And the fact that some countries' nationals may not participate in the Visa Waiver Program reflects in part Congress's judgment that "countries vary with respect to information-sharing and identity-management practices, as well as terrorism risk." App. 30a. The Proclamation, however, does not "nullify[ ]" those "specific provisions of the INA," App. 32a; indeed it does not affect them at all. To be sure, it imposes additional limitations beyond the grounds for inadmissibility set forth by Congress in Section 1182(a), but vesting that authority in the President is the very purpose of Section 1182(f). As the D.C. Circuit held in *Abourezk* v. *Reagan*, 785 F.2d 1043, 1049 n.2 (1986) (R.B. Ginsburg, J.), aff'd by an equally divided Court, 484 U.S. 1 (1987) (per curiam), Section 1182 confers a "sweeping proclamation power" to suspend entry of aliens to address "any particular case or class of cases that is not covered by one of the categories in [S]ection 1182(a)." And Congress's limitations for the Visa Waiver Program simply confine that particular Program; they cannot plausibly be understood to prevent the President from adopting additional measures

to protect national security and conduct foreign relations.

Third, the court of appeals reasoned that Section 1182(f)'s use should be limited to what it regarded as the most exigent circumstances, based on legislative debates over the 1952 amendments to the immigration code. App. 32a-35a. But no such "exigency" requirement appears in the statutory text; Congress did not require that courts second-guess the President's national-security judgments. Moreover, as the court acknowledged, the prior statute (the predecessor to 8 U.S.C. 1185(a)(1)) limited the President's authority to suspend immigration to times of war or national emergency, App. 32a, yet Congress in enacting Section 1182(f) *omitted* that limitation, and then later removed the exigency limitation from Section 1185(a)(1). To the extent the legislative history shows anything, it indicates Congress intended the President to be able to suspend "any and all immigration whenever he finds such action to be desirable in the best interests of the country." S. Rep. No. 1515, 81st Cong., 2d Sess. 381, 805-806 (1950). The court also noted that, in opposing an express exigency limitation for Section 1182(f), some Representatives gave examples where it would be difficult or impossible for Congress to act. App. 32a-34a. But other Representatives argued that Section 1182(f) would give the President "very, very broad" authority, "in times of emergency, and in time of nonemergency, to shut off immigration"—and no one suggested otherwise. 98 Cong. Rec. 4304-4305, 4423, 5114 (1952) (statements of Reps. Celler and Multer and Sen. Lehman).[8] In any event, re-

[8] See S. Rep. No. 1137, 82d Cong., 2d Sess. Pt. 2, at 4 (1952) (minority views); H.R. Rep. No. 1365, 82d Cong., 2d Sess. (1952).

marks by a handful of Members of Congress cannot outweigh Section 1182(f)'s plain text and historical practice.

Fourth, the court of appeals concluded that it should read atextual limitations into Section 1182(f), or else the statute would be "void of a requisite 'intelligible principle,'" "an invalid delegation of Congress's 'exclusive[ ]' authority to formulate policies regarding the entry of aliens," or an impermissible authorization to the President to "repeal[ ] or amend[ ] parts of duly enacted [immigration] statutes." App. 39a-40a (citations omitted). None of those constitutional concerns has merit. As this Court explained in *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 322-327 (1936), statutes broadly delegating responsibility to the President on matters affecting foreign affairs are not invalid on nondelegation grounds—they are supported by consistent legislative practice that dates "almost from the inception of the national government." *Id.* at 322. As in *Knauff*, "there is no question of inappropriate delegation of legislative power here," because "[w]hen Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power," but also "implementing an inherent executive power to control the foreign affairs of the nation." 338 U.S. at 542.

c. Because the court of appeals erroneously concluded that the Proclamation is inconsistent with 8 U.S.C. 1182(f), the court went on and further erred by holding that the President also lacks constitutional authority to issue it. App. 54a-56a. There is no need for this Court to address the President's constitutional authority in this case, because the Proclamation fits well within the President's express authority under Sections 1182(f) and 1185(a)(1). But as explained above, the court of appeals

took an improperly narrow view of the Executive's constitutional authority to exclude aliens abroad in order to protect national security and conduct foreign affairs. Indeed, the court's view that the exclusion of aliens belongs "exclusive[ly]" to Congress, App. 54a, is flatly inconsistent with *Knauff*. 338 U.S. at 542. And because Sections 1182(f) and 1185(a)(1) implement not only legislative power but "an inherent executive power," *ibid.*, the court of appeals was wrong to conclude that the President's authority here is at its "lowest ebb." App. 54a (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J. concurring)). Quite to the contrary, the Executive's exclusion of aliens abroad, pursuant to both inherent authority and express statutory grants of authority, is a quintessential example of Presidential power at its peak. See *Youngstown*, 343 U.S. at 635-637.

***2. The Proclamation is consistent with 8 U.S.C. 1152(a)(1)(A)***

Section 1152(a)(1)(A) prohibits "discriminat[ing]" or granting a "preference or priority" in the "issuance of an immigrant visa because of," *inter alia*, an alien's "nationality." 8 U.S.C. 1152(a)(1)(A). That provision addresses the issuance of immigrant visas by State Department consular officers to aliens who are otherwise eligible for visas. It has no effect on aliens who are not permitted to enter the United States because of some provision of the INA, including a Presidential suspension under 8 U.S.C. 1182(f) and 1185(a)(1).

a. The court of appeals read Section 1152(a)(1)(A) to create a conflict with the President's authority in Sections 1185(a)(1) and 1182(f) to "suspend the entry" of "any class of aliens as immigrants or nonimmigrants." That reading cannot be squared with the text of Section

1152(a)(1)(A), which is limited to a single category of visas ("immigrant" visas), and which is limited to visa "issuance" rather than entry. There is no conflict between the provisions, because they operate in different spheres. Visas are issued by consular officers, but a visa may not be issued if the applicant "is ineligible to receive a visa * * * under [S]ection 1182." 8 U.S.C. 1201(g). Section 1182 lists many grounds for ineligibility, including criminal history, terrorist affiliation, or a Presidential determination under Section 1182(f) that the alien's entry would be detrimental to the interests of the United States. In addition, Section 1185(a)(1) allows the President to make "reasonable rules, regulations, and orders" governing entry that also may render aliens ineligible to enter the United States. Section 1152(a)(1)(A) provides that, *within* the universe of aliens who are not disqualified from receiving a visa, consular officers and other government officials are prohibited from discriminating on the basis of nationality in issuing immigrant visas. The 1965 amendment enacting the provision codified at 8 U.S.C. 1152(a)(1)(A) was designed to eliminate the prior, country-based quota system for immigrants, see App. 51a-52a, not to constrain the President's authority to protect the national interest and conduct foreign affairs, or to modify the eligibility criteria for admission or limit preexisting restraints on eligibility such as those in Sections 1182(f) or 1185(a)(1). See H.R. Rep. No. 745, 89th Cong., 1st Sess. 12-13 (1965); S. Rep. No. 748, 89th Cong., 1st Sess. 11, 13 (1965).

Here again, historical practice strongly supports that reading. As discussed, President Reagan suspended immigrant entry of "all Cuban nationals" (with exceptions) during a diplomatic dispute. 51 Fed. Reg.

at 30,470. And in response to the Iranian hostage crisis, President Carter issued an order under Section 1185(a)(1) and announced that the State Department would "invalidate all visas issued to Iranian citizens" and would not issue or reissue visas "except for compelling and proven humanitarian reasons or where the national interest of our own country requires." The American Presidency Project, Jimmy Carter, *Sanctions Against Iran Remarks Announcing U.S. Actions* (Apr. 7, 1980), https://goo.gl/3sYHLB. Those actions would be unlawful under the decision below. The court of appeals did not disagree; it merely noted that "those restrictions were never challenged in court" and dismissed them as "outliers" among Presidential orders excluding aliens abroad. App. 53a.

The court of appeals' interpretation of the INA would raise grave constitutional questions because it would mean that, by statute, the President could not suspend entry of aliens from a specified country even if he were aware of a particular threat from an unidentified national of that country, or the United States were on the brink of war with it. Respondents will not go that far; they concede that the entry restrictions on North Korean nationals are lawful in light of "the current state of relations between the United States and North Korea." D. Ct. Doc. 368-1, at 10 n.4 (Oct. 10, 2017). And the court of appeals declined to decide "whether a President may, under special circumstances and for a limited time, suspend entry of all nationals from a foreign country." App. 53a. There is no textual basis, however, for respondents' and the court's ad hoc exceptions. The text of Section 1152(a)(1)(A) provides no standards that would enable the judiciary to assess whether the situation in North Korea justifies entry restrictions but the

terrorist threats in Somalia, Syria, and Yemen, for example, do not.

b. Even if Section 1152(a)(1)(A) did conflict with Sections 1182(f) and 1185(a)(1), the latter provisions would govern. The court of appeals' contrary view requires reading Section 1152(a)(1)(A) as partially "repeal[ing]" Sections 1182(f) and 1185(a)(1) by "implication," which is improper unless Congress's "intention" is "clear" and "manifest." *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 662, 664 n.8 (2007) (citation omitted). Nothing in Section 1152(a)(1)(A)—which does not mention the President or entry—demonstrates a "clear and manifest" congressional intent to narrow the grants of authority to the President in Sections 1182(f) and 1185(a)(1). *Id.* at 662 (citation omitted). Sections 1182(f) and 1185(a)(1) also control as the more specific statutes because they confer distinct powers on the President to suspend entry when he determines that the national interest requires it in particular circumstances, see *Sale*, 509 U.S. at 171-173, as opposed to Section 1152(a)(1)(A)'s generic prohibition on discrimination in the day-to-day issuance of immigrant visas. Moreover, Section 1185(a)(1) was enacted in its current form in 1978, after Section 1152(a)(1), and thus it prevails as the most recent statute. See Foreign Relations Authorization Act, Fiscal Year 1979, Pub. L. No. 95-426, § 707(a), 92 Stat. 992-993.

c. The court of appeals' interpretation of Section 1152(a)(1)(A) suffers from the additional flaw that it cannot justify an injunction against the Proclamation, because the statute by its terms concerns only the "issuance of * * * immigrant visa[s]." Section 1152(a)(1)(A) has no impact on the Proclamation's suspension of *non-immigrant* visas, as the district court recognized. App.

101a n.20. And even if Section 1152(a)(1)(A) prohibited the government from denying visas to immigrant applicants from particular countries, Section 1152(a)(1)(A) still would not require the government to take the additional step of allowing the *entry* of those aliens to the United States.

### C. The Global Injunction Against The Proclamation Is Vastly Overbroad

The injunction entered in this case continues a deeply troubling trend in the lower courts of entering relief that extends well beyond the parties. Constitutional and equitable principles require that injunctive relief be limited to redressing a plaintiff's own cognizable injuries. Under Article III, "[t]he remedy" sought must "be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Lewis* v. *Casey*, 518 U.S. 343, 357 (1996); see *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101-102 (1983). Equitable principles independently require that injunctions be no broader than "necessary to provide complete relief to the plaintiffs." *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (citation omitted). That must be especially so for a preliminary injunction in the context of national security.

The court of appeals' ruling contravenes this settled rule by sweeping far more broadly than redressing the purported harms of the specific aliens at issue in this case. The injunction applies to any national of the six challenged countries who has a credible claim of a bona fide relationship with a person or entity in the United States. That would cover most individuals seeking immigrant visas, and thus many of the foreign nationals covered by the Proclamation. The court did not explain why that extraordinary relief is necessary to afford complete relief to respondents themselves. The court simply

stated that, "[b]ecause this case implicates immigration policy, a nationwide injunction was necessary to give [respondents] a full expression of their rights." App. 62a. But any statutory claims respondents have would be fully addressed by an injunction limited to specific aliens abroad.

The court of appeals also noted that "Congress has instructed that the immigration laws of the United States should be enforced vigorously and *uniformly*." App. 62a (citation and internal quotation marks omitted). But surely every challenge to executive action in the immigration field should not result in a global injunction. To the contrary, a proper respect for the political Branches and the uniform enforcement of immigration laws by the Executive requires leaving the Proclamation in place, subject to individualized exceptions if necessary for respondents who have established irreparable injury from a violation of their own statutory rights. The Proclamation's severability clause compels the same conclusion.[9] Such tailored relief would have posed far less interference with federal policy than enjoining the President's directive wholesale based on alleged injuries to a handful of individuals and organizations.

**II. THE DECISION BELOW IS IN NEED OF REVIEW**

As when this Court granted certiorari to review EO-2, this case presents exceptionally important questions concerning the President's authority to exclude aliens abroad based on his national-security and foreign-

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[9] App. 147a (Procl. § 8(a)) (If "the application of any provision [of this Proclamation] to any person or circumstance is held to be invalid, the remainder of this proclamation and the application of its other provisions to any other persons or circumstances shall not be affected thereby").

policy judgments. In fact, the need for this Court's review has only increased in recent months, because the Proclamation responds to specific, identified deficiencies in the information-sharing of particular countries, or other risk factors that were assessed in the multi-agency review process. In addition to setting aside a Presidential Proclamation, the lower courts' interpretations of the INA would constrain the ability of this and future Presidents to exclude aliens abroad and to engage in diplomacy in order to protect the Nation. The stakes of this case are indisputably high.

This Court has granted certiorari to address interference with Executive Branch determinations that are of "importance * * * to national security concerns," *Department of the Navy* v. *Egan*, 484 U.S. 518, 520 (1988); see *Winter* v. *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 12 (2008), and to address "important questions" of interference with "federal power" over "the law of immigration and alien status," *Arizona* v. *United States*, 567 U.S. 387, 394 (2012); see *United States* v. *Texas*, 136 S. Ct. 2271 (2016) (per curiam). Both considerations are present here. Moreover, the injunction interferes with the President's "unique responsibility" to conduct the Nation's foreign affairs, *Sale*, 509 U.S. at 188, and threatens to undermine the Executive in interacting with other nations, despite the well-established principle that such matters are "'largely immune from judiciary inquiry or interference.'" *Regan* v. *Wald*, 468 U.S. 222, 242 (1984) (citation omitted).

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 2018

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 17-17168
D.C. No. 1:17-cv-00050-DKW-KSC
District of Hawaii, Honolulu

STATE OF HAWAII; ISMAIL ELSHIKH; JOHN DOES, 1 & 2; MUSLIM ASSOCIATION OF HAWAII, INC., PLAINTIFFS-APPELLEES

*v.*

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; U.S. DEPARTMENT OF HOMELAND SECURITY; KIRSTJEN M. NIELSEN, IN HER OFFICIAL CAPACITY AS SECRETARY OF HOMELAND SECURITY; U.S. DEPARTMENT OF STATE; REX W. TILLERSON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE; UNITED STATES OF AMERICA, DEFENDANTS-APPELLANTS

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[Filed: Dec. 22, 2017]

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**ORDER**

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Before: HAWKINS, GOULD, and PAEZ, Circuit Judges.

The opinion disposition filed on December 22, 2017, is withdrawn and a new opinion disposition is filed concurrently with this order.

**APPENDIX B**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 17-17168
D.C. No. 1:17-cv-00050-DKW-KSC

STATE OF HAWAII; ISMAIL ELSHIKH; JOHN DOES, 1 & 2; MUSLIM ASSOCIATION OF HAWAII, INC., PLAINTIFFS-APPELLEES

*v.*

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; U.S. DEPARTMENT OF HOMELAND SECURITY; KIRSTJEN M. NIELSEN, IN HER OFFICIAL CAPACITY AS SECRETARY OF HOMELAND SECURITY; U.S. DEPARTMENT OF STATE; REX W. TILLERSON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE; UNITED STATES OF AMERICA, DEFENDANTS-APPELLANTS

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Argued and Submitted: Dec. 6, 2017
Seattle, Washington
[Filed: Dec. 22, 2017]

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**OPINION**

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Appeal from the United States District Court
for the District of Hawaii
Derrick Kahala Watson, District Judge, Presiding

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Before: MICHAEL DALY HAWKINS, RONALD M. GOULD, and RICHARD A. PAEZ, Circuit Judges.

PER CURIAM:

For the third time, we are called upon to assess the legality of the President's efforts to bar over 150 million nationals of six designated countries[1] from entering the United States or being issued immigrant visas that they would ordinarily be qualified to receive. To do so, we must consider the statutory and constitutional limits of the President's power to curtail entry of foreign nationals in this appeal of the district court's order preliminarily enjoining portions of § 2 of Proclamation 9645 entitled "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats" (the "Proclamation").

The Proclamation, like its predecessor executive orders, relies on the premise that the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 et seq., vests the President with broad powers to regulate the entry of aliens. Those powers, however, are not without limit. We conclude that the President's issuance of the Proclamation once again exceeds the scope of his delegated authority. The Government's interpretation of 8 U.S.C. § 1182(f) not only upends the carefully crafted immigration scheme Congress has enacted through the

[1] Although Proclamation 9645 imposes varying restrictions on nationals of eight countries—Chad, Iran, Libya, Somalia, Syria, Yemen, North Korea, and Venezuela—Plaintiffs challenge only the restrictions imposed on the nationals of six Muslim-majority countries.

INA, but it deviates from the text of the statute, legislative history, and prior executive practice as well. Further, the President did not satisfy the critical prerequisite Congress attached to his suspension authority: before blocking entry, he must first make a legally sufficient finding that the entry of the specified individuals would be "detrimental to the interests of the United States." 8 U.S.C. § 1182(f). The Proclamation once again conflicts with the INA's prohibition on nationality-based discrimination in the issuance of immigrant visas. Lastly, the President is without a separate source of constitutional authority to issue the Proclamation.

On these statutory bases, we affirm the district court's order enjoining enforcement of the Proclamation's §§ 2(a), (b), (c), (e), (g), and (h). We limit the scope of the preliminary injunction, however, to foreign nationals who have a bona fide relationship with a person or entity in the United States.

## I. Background[2]

### A. Prior Executive Orders and Initial Litigation

On January 27, 2017, one week after his inauguration, President Donald J. Trump signed an Executive Order entitled "Protecting the Nation From Foreign Terrorist Entry into the United States." Exec. Order 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) ("EO-1"). EO-1's stated purpose was to "protect the American people from terrorist attacks by foreign nationals admitted to the United States." *Id.* EO-1 took effect immediately

[2] Portions of the background section have been drawn from the district court's order below. *See Hawai'i v. Trump*, No. CV 17-00050 DKW-KSC, 2017 WL 4639560, at *1-4 (D. Haw. Oct. 17, 2017) ("*Hawai'i TRO*").

and was challenged in several venues shortly after it was issued. On February 3, 2017, a federal district court in the State of Washington enjoined the enforcement of EO-1. *See Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017). The Government filed an emergency motion seeking a stay of the injunction, which we denied. *See Washington v. Trump*, 847 F.3d 1151, 1161-64 (9th Cir. 2017) (per curiam), *reh'g en banc denied*, 853 F.3d 933 (9th Cir. 2017). The Government later voluntarily dismissed its appeal of the EO-1 injunction.

On March 6, 2017, the President issued Executive Order 13,780, which was given the same title as EO-1 and was set to take effect on March 16, 2017. 82 Fed. Reg. 13,209 (Mar. 6, 2017) ("EO-2"). EO-2 directed the Secretary of Homeland Security to conduct a global review to determine whether foreign governments were providing adequate information about their nationals seeking entry into the United States. *See* EO-2 § 2(a). EO-2 also directed the Secretary of Homeland Security to report those findings to the President; following the Secretary's report, nations identified as providing inadequate information were to be given an opportunity to alter their practices before the Secretary would recommend entry restrictions for nationals of noncompliant countries. *Id.* §§ 2(b), (d)-(f).

During this global review, EO-2 imposed a 90-day suspension on the entry of certain foreign nationals from six Muslim-majority countries: Iran, Libya, Somalia, Sudan, Syria, and Yemen. *Id.* § 2(c). That 90-day suspension was challenged in multiple courts and was preliminarily enjoined by federal district courts in Hawai'i and Maryland. *See Hawai'i v. Trump*,

245 F. Supp. 3d 1227 (D. Haw. 2017); *Int'l Refugee Assistance Project* ("*IRAP*") *v. Trump*, 241 F. Supp. 3d 539 (D. Md. 2017). Those injunctions were affirmed by the Ninth and Fourth Circuits, respectively. *See Hawai'i v. Trump* (*Hawai'i I*), 859 F.3d 741 (9th Cir. 2017) (per curiam); *IRAP v. Trump*, 857 F.3d 554 (4th Cir. 2017) (en banc), *as amended* (May 31, 2017). The Supreme Court granted a writ of *certiorari* in both cases and left the injunctions in place pending its review, except as to foreign nationals who lacked a "credible claim of a bona fide relationship with a person or entity in the United States." *Trump v. IRAP*, 137 S. Ct. 2080, 2088 (2017).

On September 24, 2017, the President issued the Proclamation, which indefinitely suspends immigration by nationals of seven countries and imposes restrictions on the issuance of certain nonimmigrant visas for nationals of eight countries. 82 Fed. Reg. 45,161, 45,164-67 (Sept. 24, 2017). The entry restrictions were immediately effective for foreign nationals who 1) were subject to EO-2's restrictions, and 2) lack a credible claim of a bona fide relationship with a person or entity in the United States. *Id.* at 45,171. For all other affected persons, the Proclamation was slated to take effect on October 18, 2017. *Id.* On October 10, 2017, the Supreme Court vacated the Fourth Circuit's opinion in *IRAP v. Trump* as moot. *See Trump v. IRAP*, No. 16-1436, — S. Ct. —, 2017 WL 4518553 (U.S. Oct. 10, 2017). On October 24, 2017, the Supreme Court vacated our opinion in *Hawai'i I* on the same grounds. *See Trump v. Hawai'i*, No. 16-1540, — S. Ct. —, 2017 WL 4782860 (U.S. Oct. 24, 2017). In vacating our prior decision as moot, the Supreme Court explicitly noted that it expressed no view on the merits of the case. *See id.*

### B. Plaintiffs' Third Amended Complaint

On October 10, 2017, Plaintiffs sought to amend their complaint to include allegations related to the Proclamation. The third amended complaint includes statutory claims for violations of the INA, the Religious Freedom Restoration Act, and the Administrative Procedure Act, as well as constitutional claims for violations of the Establishment and Free Exercise Clauses of the First Amendment and the equal protection guarantees of the Fifth Amendment's Due Process Clause. Plaintiffs also moved for a temporary restraining order; after expedited briefing, the district court granted the motion on October 17, 2017. *Hawai'i TRO*, 2017 WL 4639560, at *1. Relying on our now-vacated opinion in *Hawai'i I*, the district court found that the Proclamation suffered from the same deficiencies as EO-2. *Id.* at *1, *9-13. At the parties' request, the district court converted the temporary restraining order into a preliminary injunction on October 20, 2017, rendering it an appealable order. *Hawai'i v. Trump*, No. CV 17-00050 DKW-KSC (D. Haw. Oct. 20, 2017), ECF No. 390 (order entering preliminary injunction).

The Government timely appealed. During the pendency of this appeal, we partially stayed the district court's preliminary injunction "except as to foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States." *Hawai'i v. Trump*, No. 17-17168, 2017 WL 5343014 (9th Cir. Nov. 13, 2017). On December 4, 2017, the Supreme Court granted the Government's request for a complete stay pending review of the district court's preliminary injunction. *Trump v. Hawai'i*, No. 17A550, — S. Ct. — (Dec. 4, 2017).

### C. The Proclamation

The Proclamation derives its purpose from the President's belief that he "must act to protect the security and interests of the United States." 82 Fed. Reg. at 45,161. In furtherance of this goal, the Proclamation imposes indefinite and significant restrictions and limitations on entry of nationals from eight countries whose information-sharing and identity-management protocols have been deemed "inadequate." *Id.* at 45,162-67. The Proclamation notes that screening and vetting protocols and procedures play a critical role in preventing terrorist attacks and other public safety threats by enhancing the Government's ability to "detect foreign nationals who may commit, aid, or support acts of terrorism." *Id.* at 45,162. Thus, the Proclamation concludes, "absent the measures set forth in th[e] proclamation, the immigrant and nonimmigrant entry into the United States of persons described in section 2 of th[e] proclamation [will] be detrimental to the interests of the United States." *Id.* at 45,161-62.

The President selected eight countries for inclusion in the Proclamation based on a "worldwide review" conducted under the orders of EO-2. *Id.* at 45,161, 45,163-64. As part of that review, the Secretary of the Department of Homeland Security established global requirements for information sharing "in support of immigration screening and vetting" that included a comprehensive set of criteria on the information- sharing practices, policies, and capabilities of foreign governments. *Id.* at 45,161-63. The Secretary of State then "engaged with the countries reviewed in an effort to address deficiencies and achieve improvements." *Id.* at 45,161. The Secretary of Homeland Security, after consultation with

the Secretary of State and the Attorney General, ultimately identified 16 countries as "inadequate" based on "an analysis of their identity- management protocols, information-sharing practices, and risk factors." *Id.* at 45,163. An additional 31 countries were deemed "at risk" of becoming "inadequate." *Id.*

Countries were classified as "inadequate" based on whether they met the "baseline" developed by the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence. *Id.* at 45,162. The baseline incorporated three categories of criteria: 1) identity-management information; 2) national security and public-safety information; and 3) national security and public-safety risk assessment. *Id.* Identity-management information ensures that foreign nationals seeking to enter the United States are who they claim to be. *Id.* This category "focuses on the integrity of documents required for travel to the United States," including whether the country issues passports with embedded data to confirm identity, reports lost and stolen passports, and provides additional identity-related information when requested. *Id.* National security and public-safety information includes whether the country "makes available, directly or indirectly, known or suspected terrorist and criminal-history information upon request," whether it provides identity document exemplars, and whether the country "impedes the United States Government's receipt of information about passengers and crew traveling to the United States." *Id.* Finally, national security and public-safety risk assessment focuses on whether the country is "a known or potential terrorist safe haven," whether the country participates in the Visa Waiver

Program, and whether the country "regularly fails to receive its nationals" following their removal from the United States. *Id.* at 45,162-63.

After a "50-day engagement period to encourage all foreign governments . . . to improve their performance," the Secretary of Homeland Security ultimately determined that Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen continued to be "inadequate" based on their identity-management protocols, information-sharing practices, and risk factors.[3] *Id.* at 45,163. The Secretary of Homeland Security also determined that Iraq did not meet the baseline requirements, but concluded that entry restrictions and limitations were not warranted because of the "close cooperative relationship between the United States and the democratically elected government of Iraq, the strong United States diplomatic presence in Iraq, the significant presence of United States forces in Iraq, and Iraq's commitment to combating the Islamic State of Iraq and Syria (ISIS)." *Id.*

On September 15, 2017, the Secretary of Homeland Security submitted a report to the President recommending entry restrictions for nationals from seven countries "determined to be 'inadequate' in providing such [requested] information and in light of the other

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[3] The Proclamation does not include the other thirty-nine countries deemed either "inadequate" or "at risk" of becoming "inadequate." *See* 82 Fed. Reg. at 45,163. As the district court noted, "the explanation for how the Administration settled on the list of eight countries is obscured." *Hawai'i TRO*, 2017 WL 4639560, at *11 n.16. This is due, in large part, to the fact that no court has been able to consider—or even view—the DHS report in question.

factors discussed in the report." *Id.* After consultation with "appropriate Assistants to the President and members of the Cabinet, including the Secretaries of State, Defense, and Homeland Security, and the Attorney General" and "accounting for the foreign policy, national security, and counterterrorism objectives of the United States," the President decided to "restrict and limit the entry of nationals of 7 countries found to be 'inadequate'": Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen. *Id.* at 45,164. And although Somalia "generally satisfies" the information- sharing requirements of the baseline, the President also imposed entry restrictions and limitations on Somalia nationals because of "its government's inability to effectively and consistently cooperate, combined with the terrorist threat that emanates from its territory." *Id.* The President restricted entry of all immigrants from seven of the eight countries, and adopted "a more tailored approach" to the entry of nonimmigrants. *Id.* at 45,164-65.

Section 2's challenged country restrictions and proffered rationales are as follows:

Chadian nationals may not enter as immigrants or nonimmigrants on business, tourist, or business/tourist visas because, although Chad is "an important and valuable counterterrorism partner of the United States, and .... has shown a clear willingness to improve," it "does not adequately share public-safety and terrorism-related information," and several terrorist groups are active within Chad or the surrounding region. *Id.* at 45,165.

Iranian nationals may not enter as immigrants or nonimmigrants except under valid student and exchange visitor visas, and such visas are subject to "enhanced screening and vetting." *Id.* The Proclamation notes that "Iran regularly fails to cooperate with the United States Government in identifying security risks, fails to satisfy at least one key risk criterion, is the source of significant terrorist threats, and fails to receive its nationals" following final orders of removal from the United States. *Id.*

The entry of Libyan nationals as immigrants and as nonimmigrants on business, tourist, or business/tourist visas is suspended because, although Libya "is an important and valuable counterterrorism partner," it "faces significant challenges in sharing several types of information, including public-safety and terrorism- related information," "has significant deficiencies in its identity-management protocols," does not "satisfy at least one key risk criterion," has not been "fully cooperative" in receiving its nationals after their removal from the United States, and has a "substantial terrorist presence" within its territory. *Id.* at 45,165-66.

The entry of all Syrian nationals—on immigrant and non-immigrant visas alike—is suspended because "Syria regularly fails to cooperate with the United States Government in identifying security risks, is the source of significant terrorist threats, and has been designated by the Department of State as a state sponsor of terrorism." *Id.* at 45,166. Syria also has "significant inadequacies in identity-management protocols, fails to share public-safety and terrorism information, and fails to satisfy at least one key risk criterion." *Id.*

Yemeni nationals may not enter the United States as immigrants or nonimmigrants on business, tourist, or business/tourist visas because despite being "an important and valuable counterterrorism partner," Yemen "faces significant identity-management challenges, which are amplified by the notable terrorist presence within its territory." *Id.* at 45,166-67.

Somali nationals may not enter the United States as immigrants, and all nonimmigrant visa adjudications and entry decisions for Somali nationals are subject to "additional scrutiny." *Id.* at 45,167. Although Somalia satisfies information-sharing requirements, it "has significant identity-management deficiencies" and a "persistent terrorist threat also emanates from Somalia's territory." *Id.*

These restrictions apply to foreign nationals of the affected countries outside the United States who do not hold valid visas as of the effective date and who do not qualify for a visa under § 6(d)[4] of the Proclamation. *Id.* Suspension of entry does not apply to lawful permanent residents of the United States; foreign nationals who are admitted, paroled, or have a non-visa document permitting them to travel to the United States and seek entry valid or issued on or after the effective date of the Proclamation; any dual national traveling on a passport issued by a non-designated country; any foreign national on a diplomatic visa; any refugee already admitted to the United States; or any individual granted asylum,

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[4] Section 6(d) of the Proclamation permits individuals whose visas were marked revoked or canceled as a result of EO-1 to obtain "a travel document confirming that the individual is permitted to travel to the United States and seek entry under the terms" of the revoked or canceled visa. 82 Fed. Reg. at 45,171.

withholding of removal, advance parole, or Convention Against Torture protection. *Id.* at 45,167-68. Further, a consular officer, the Commissioner of U.S. Customs and Border Protection, or the Commissioner's designee "may, in their discretion, grant waivers on a case-by-case basis to permit the entry of foreign nationals for whom entry is otherwise suspended or limited if such foreign nationals demonstrate that waivers would be appropriate and consistent" with certain specified guidelines. *Id.* at 45,168.

## II. Justiciability

We first address several of the same justiciability arguments that we found unpersuasive in *Washington v. Trump* and *Hawai'i I*. Once more, we reject the Government's contentions. The Proclamation cannot properly evade judicial review.

### A. Ripeness

The Government argues that Plaintiffs' claims are speculative and not ripe for adjudication until a specific applicant is denied a visa.[5] We reject this argument. We conclude that the issues in this case are "fit for review," and that significant hardship to Plaintiffs would result from "withholding court consideration" at this point. *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808, 812 (2003).

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[5] The Government does not challenge Plaintiffs' Article III standing on appeal. Nonetheless, we "have an obligation to consider Article III standing independently, as we lack jurisdiction when there is no standing." *Day v. Apoliona*, 496 F.3d 1027, 1029 n.2 (9th Cir. 2007). For the reasons set forth in the district court's order, we conclude that Plaintiffs have Article III standing. *See Hawai'i TRO*, 2017 WL 4639560, at *4-7.

"Ripeness is peculiarly a question of timing, designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1122 (9th Cir. 2009) (alteration and internal quotation marks omitted) (quoting *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000)). This case does not concern mere abstract disagreements. Instead, Plaintiffs challenge the Proclamation as implemented by the Department of State and the Department of Homeland Security. That is permissible. Under the traditional "pragmatic" approach to finality, an order may be immediately reviewable even if no "particular action [has been] brought against a particular [entity]." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 150 (1967)).

Moreover, contrary to the Government's position, the Proclamation's waiver provisions are not a "sufficient safety valve" and do not mitigate the substantial hardships Plaintiffs have already suffered and will continue to suffer due to the Proclamation. *Washington*, 847 F.3d at 1168-69. Plaintiff Muslim Association of Hawaii, for example, has already lost members as a result of the Proclamation and its predecessors, and expects to lose more. The mere possibility of a discretionary waiver does not render Plaintiffs' injuries "contingent [on] future events that may not occur." *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotation marks omitted) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985)). "[W]ithholding court consideration" at this juncture would undoubtedly result in further hardship to Plaintiffs. *See Nat'l Park Hosp. Ass'n*, 538 U.S. at 808.

We therefore conclude that Plaintiffs' claims are ripe for review.

### B. Doctrine of Consular Nonreviewability

As in the litigation over EO-1 and EO-2, the Government contends that we are precluded from reviewing the Proclamation by the consular nonreviewability doctrine. Under that doctrine, "the consular official's decision to issue or withhold a visa is not subject either to administrative or judicial review." *Li Hing of Hong Kong, Inc. v. Levin*, 800 F.2d 970, 971 (9th Cir. 1986). In other words, "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a *given* alien." *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (emphasis added). Although the political branches' power to exclude aliens is "largely immune from judicial control," it is not *entirely* immune; such decisions are still subject to "narrow judicial review." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (citations omitted). Moreover, this case is not about individual visa denials, but instead concerns "the President's *promulgation* of sweeping immigration policy." *Washington*, 847 F.3d at 1162. Reviewing the latter "is a familiar judicial exercise," *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012); courts do not hesitate to reach "challenges to the substance and implementation of immigration policy." *Washington*, 847 F.3d at 1163. Although "[t]he Executive has broad discretion over the admission and exclusion of aliens, [] that discretion is not boundless. It extends only as far as the statutory authority conferred by Congress and may not transgress constitutional limitations. It is the duty of the courts, in cases properly before them, to say where

those statutory and constitutional boundaries lie." *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986), *aff'd by an equally divided court*, 484 U.S. 1 (1987).

The Government's arguments to the contrary are foreclosed by *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187-88 (1993). In *Sale*, the Supreme Court reviewed on the merits whether the President had violated the INA and the United States' treaty obligations by invoking his authority under 8 U.S.C. § 1182(f) to "suspend[] the entry of undocumented aliens from the high seas." *Id.* at 160. By reaching the merits, *Sale* necessarily first decided that the Court had jurisdiction to review whether the President's orders under the color of § 1182(f) were *ultra vires*. *See id.* at 187-88. As in *Sale*, here we determine whether the Proclamation goes beyond the limits of the President's power to restrict alien entry.

Because *Sale* did not address the Court's jurisdiction explicitly, the Government speculates that the Supreme Court "could have decided it was unnecessary to" reach this issue, "given that the Court agreed with the government on the merits." We disagree. Instead, the argument "that a court may decide [questions on the merits] before resolving Article III jurisdiction" is "readily refuted." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998). "Without jurisdiction the court cannot proceed at all in any cause." *Id.* at 94 (quoting *Ex parte McCardle*, 7 Wall. 506, 514 (1868)). "On every writ of error or appeal, the first and fundamental question is that of jurisdiction . . . ." *Id.* (quoting *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900)). While it is true that "drive-by jurisdictional rulings

. . . have no precedential effect," *Sale* was not a case where jurisdiction "had been assumed by the parties" and so went unaddressed. *Id.* at 91. To the contrary, as the Government concedes, the parties in *Sale* thoroughly briefed and debated this issue. *See* U.S. Br. 13-18 (No. 92-344); Resp. Br. 50-58 (No. 92-344); Reply Br. 1-4 (No. 92-344).

Judicial review of the legality of the Proclamation respects our constitutional structure and the limits on presidential power. The consular nonreviewability doctrine arose to honor Congress's choices in setting immigration policy—not the President's. *See Sing v. United States*, 158 U.S. 538, 547 (1895). This doctrine shields from judicial review only the enforcement "through executive officers" of Congress's "declared [immigration] policy," *id.*, not the President's rival attempt to set policy. The notion that the Proclamation is unreviewable "runs contrary to the fundamental structure of our constitutional democracy."[6] *Washington*, 847 F.3d at 1161. We have jurisdiction to review such an action, and we do so here.

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[6] The Government argues that the President, at any time and under any circumstances, could bar entry of all aliens from any country, and intensifies the consequences of its position by saying that no federal court—not a federal district court, nor our court of appeals, nor even the Supreme Court itself—would have Article III jurisdiction to review that matter because of the consular nonreviewability doctrine. United States Court of Appeals for the Ninth Circuit, *17-17168 State of Hawaii v. Donald Trump*, YouTube (Dec. 7, 2017) at 13:01-17:33, https://www.youtube.com/watch?v=9Q0p_B40Pa8. Particularly in the absence of an explicit jurisdiction-stripping provision, we doubt whether the Government's position could be adopted without running roughshod over the principles of separation of powers enshrined in our Constitution.

### C. Cause of Action and Statutory Standing

The Government also contends that Plaintiffs' statutory claims are unreviewable for lack of a cause of action and lack of statutory standing. We disagree.

#### 1. APA Cause of Action

We begin first by examining whether Plaintiffs' claims are reviewable under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq. Although the President's actions fall outside the scope of direct review, *see Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992), "[r]eview of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive," *id.* at 828 (Scalia, J., concurring); *see also Chamber of Commerce v. Reich*, 74 F.3d 1322, 1324, 1328 (D.C. Cir. 1996) (holding that the court could review whether an executive order conflicted with a federal statute where plaintiffs had sought to enjoin executive branch officials implementing the order). Here, Plaintiffs bring suit not just against the President, but also against the entities charged with carrying out his instructions: the Department of State and the Department of Homeland Security. Further, because these agencies have "consummat[ed]" their implementation of the Proclamation, from which "legal consequences will flow," their actions are "final" and therefore reviewable under the APA.[7] *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citation and internal quotation marks omitted).

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[7] The Government contends that there is no "final" agency action here because Plaintiffs' claims are unripe. For the reasons discussed previously, we reject this argument.

Finally, the Government argues that the APA precludes review of actions committed to "agency discretion by law," 5 U.S.C. § 701(a)(2), and that the Proclamation is such an action. Plaintiffs counter that the Proclamation is not an unreviewable discretionary action, but rather is cabined by discernible constitutional and statutory limits. We are not persuaded by the Government's characterization of the Proclamation as an action committed to the Executive's discretion. This exception to the presumption of judicial review is "very narrow," applying only where "statutes are drawn in such broad terms that . . . there is no law to apply." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971)). It does not apply where, as here, a court is tasked with reviewing whether an executive action has exceeded statutory authority. *See Assiniboine & Sioux Tribes v. Bd. of Oil & Gas Conservation*, 792 F.2d 782, 791-92 (9th Cir. 1986) (collecting cases).

**2. Zone of Interests**

The Government additionally argues that even if an APA cause of action exists, Plaintiffs cannot avail themselves of it because they do not fall within the INA's zone of interests. Once again, we are tasked with determining whether Plaintiffs' interests "fall within the zone of interests protected by the law invoked." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

We conclude that Dr. Elshikh's challenge to the Proclamation falls within the INA's zone of interests. He asserts that the Proclamation prevents his brothers- in-

law from reuniting with his family. *See Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State*, 45 F.3d 469, 471-72 (D.C. Cir. 1995) ("The INA authorizes the immigration of family members of United States citizens and permanent resident aliens. In originally enacting the INA, Congress implemented the underlying intention of our immigration laws regarding the preservation of the family unit. Given the nature and purpose of the statute, the resident appellants fall well within the zone of interest Congress intended to protect." (internal citations and alterations omitted)), *vacated on other grounds*, 519 U.S. 1 (1996). John Does 1 and 2 fall within the same zone of interest, alleging that they will be separated from family members—a son-in-law and a mother, respectively.

The Government maintains that these interests are inadequate because a relative of an alien seeking admission has no right to participate in visa proceedings. Yet the Supreme Court has reviewed the merits of cases brought by U.S. residents with a specific interest in the entry of a foreigner, as have we. *See, e.g.*, *Kerry v. Din*, 135 S. Ct. 2128, 2131 (2015) (involving a challenge by U.S. citizen to denial of her husband's visa); *Kleindienst v. Mandel*, 408 U.S. 753, 756-60 (1972) (arising from a challenge by American professors to denial of visa to journalist invited to speak at academic events); *Cardenas v. United States*, 826 F.3d 1164, 1167 (9th Cir. 2016) (addressing a U.S. citizen's challenge to denial of husband's visa). In a case similar to the one before us, *Legal Assistance for Vietnamese Asylum Seekers v. Department of State*, the D.C. Circuit found that visa sponsors had standing to sue when they alleged that the State Department's refusal to process visa applications resulted in an injury to the sponsors. 45 F.3d at 471-73.

Likewise, Hawai'i's "efforts to enroll students and hire faculty members who are nationals from the six designated countries fall within the zone of interests of the INA." *Hawai'i I*, 859 F.3d at 766. The INA clearly provides for the admission of nonimmigrant students into the United States. *See* 8 U.S.C. § 1101(a)(15)(F) (identifying students qualified to pursue a full course of study); 8 C.F.R. § 214.2(f) (providing the requirements for nonimmigrant students, including those in colleges and universities). The INA also provides that nonimmigrant scholars and teachers may be admitted into the United States. *See, e.g.*, 8 U.S.C. § 1101(a)(15)(J) (identifying students, scholars, trainees, and professors in fields of specialized knowledge or skill, among others); *id.* § 1101(a)(15)(H) (identifying aliens working in specialty occupations); *id.* § 1101(a)(15)(O) (identifying aliens with extraordinary abilities in the sciences, arts, education, business, or athletics). As we have said before, "[t]he INA leaves no doubt" that Hawai'i's interests in "student- and employment-based visa petitions for its students and faculty are related to the basic purposes of the INA." *Hawai'i I*, 859 F.3d at 766.

Further, the Muslim Association of Hawai'i (the "Association") alleges that its members will suffer harms such as separation from their families, and that the Association itself will suffer the loss of its members if it is not granted a preliminary injunction.

Once again, we conclude that "Plaintiffs' claims of injury as a result of the alleged statutory violations are, at the least, '*arguably* within the zone of interests' that the INA protects" and therefore judicially reviewable. *Id.* at 767 (quoting *Bank of Am. Corp. v. City of Miami*, —

U.S. —, 137 S. Ct. 1296, 1303 (2017) (citation omitted) (emphasis added).

### 3. Equitable Cause of Action

Even if there were no "final agency action" review under the APA, courts have also permitted judicial review of presidential orders implemented through the actions of other federal officials.[8] This cause of action, which exists outside of the APA, allows courts to review *ultra vires* actions by the President that go beyond the scope of the President's statutory authority. *See Reich*, 74 F.3d at 1327-28 (citing *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108, 110 (1902) and *Leedom v. Kyne*, 358 U.S. 184, 188-89 (1958)) (permitting challenge to an Executive Order promulgated by the president and implemented by the Secretary of Labor, despite the lack of a final agency action under the APA); *see also Duncan v. Muzyn*, 833 F.3d 567, 577-79 (6th Cir. 2016); *R.I. Dep't Envtl. Mgmt. v. United States*, 304 F.3d 31, 40-43 (1st Cir. 2002); *cf. Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015) (citing *McAnnulty* for the proposition that federal courts may enjoin "violations of federal law by federal officials"). When, as here, Plaintiffs challenge the President's statutory authority to issue the Proclamation, we are provided with an additional avenue by which to review these claims.

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[8] The Supreme Court has decided the merits of such claims, including the specific claim that an action exceeded the authority granted under § 1182(f). *See Sale*, 509 U.S. at 187-88; *see also Dames & Moore v. Regan*, 453 U.S. 654 (1981).

Having concluded that Plaintiffs' claims are justiciable, we now turn to the district court's preliminary injunction.

## III. The Preliminary Injunction

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). "A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Id.* at 20. We may affirm the district court's entry of the preliminary injunction "on any ground supported by the record." *Enyart v. Nat'l Conference of Bar Exam'rs, Inc.*, 630 F.3d 1153, 1159 (9th Cir. 2011).

### A. Likelihood of Success on the Merits

We consider first whether Plaintiffs are likely to succeed on the merits. In so doing, we consider four arguments[9] advanced by Plaintiffs: (1) the President has exceeded his congressionally delegated authority under 8 U.S.C. § 1182(f); (2) the President has failed to satisfy § 1182(f)'s requirement that prior to suspending entry, the President must find that entry of the affected aliens would be detrimental to the interests of the United States; (3) the Proclamation's ban on immigration from the designated countries violates 8 U.S.C. § 1152(a)(1)(A)'s prohibition on nationality-based discrimination; and (4) the President lacks the authority to

[9] As we explain below, we decline to reach Plaintiffs' arguments other than those listed here.

issue the Proclamation in the absence of a statutory grant. We address each in turn.

**1. Scope of Authority under § 1182(f)**

In determining whether the President has the statutory authority to issue the Proclamation under 8 U.S.C. § 1182(f), we begin with the text. *See Sale*, 509 U.S. at 171; *Haig v. Agee*, 453 U.S. 280, 289-90 (1981). But our inquiry does not end there. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000); *see also United States* v. *Witkovich*, 353 U.S. 194, 199 (1957) (declining to "read in isolation and literally" an immigration statute that "appear[ed] to confer upon the Attorney General unbounded authority"). In *Brown & Williamson*, the Court looked beyond the "particular statutory provision in isolation," and interpreted the statute to create a "symmetrical and coherent regulatory scheme." 529 U.S. at 132-33. The Court thus undertook a holistic review, which entailed examining the statute's legislative history, *see id.* at 146-47, "congressional policy," *id.* at 139, and "common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude," *id.* at 133.

Taking guidance from the Court's instructions in *Brown & Williamson* to look beyond the challenged "provision in isolation," *id.* at 132, we conclude that the Proclamation is inconsistent not just with the text of § 1182(f), but with the statutory framework as a whole, legislative history, and prior executive practice. Although no single factor may be dispositive, these four factors taken together strongly suggest that Plaintiffs are likely to succeed on their claim that the President has exceeded his delegated authority under section 1182(f). We discuss each factor in greater detail below.

**a. Statutory Text**

We turn first to the text of § 1182(f). The INA grants the President the power to "*suspend* the entry of . . . any class of aliens" "for *such period* as he shall deem *necessary*." 8 U.S.C. § 1182(f) (emphasis added). We note at the outset that broad though the provision may be, the text does not grant the President an unlimited exclusion power.

Congress's choice of words is suggestive, at least, of its hesitation in permitting the President to impose entry suspensions of unlimited and indefinite duration. "The word 'suspend' connotes a temporary deferral." *Hoffman ex rel. N.L.R.B. v. Beer Drivers & Salesmen's Local Union No. 888*, 536 F.2d 1268, 1277 (9th Cir. 1976) (citing Webster's Third New International Dictionary (1966) and Bouvier's Law Dictionary (3d ed. 1914)). "[T]he word 'period,'" in turn, "connotes a stated interval of time commonly thought of in terms of years, months, and days." *United States v. Updike*, 281 U.S. 489, 495 (1930). This construction of the term "period" is reinforced by the requirement that it be "necessary."[10] § 1182(f).

At argument, the Government contended that the indefinite duration of the Proclamation's entry restrictions is consistent with the text of § 1182(f). United States Court of Appeals for the Ninth Circuit, *17-17168 State of Hawaii v. Donald Trump*, YouTube (Dec. 7,

[10] As we discuss later, although prior executive orders or proclamations invoking § 1182(f) did not provide for a set end date, they were noticeably narrower in scope than the Proclamation. At the very least, Congress in adopting § 1182(f) likely did not contemplate that an executive order of the Proclamation's sweeping breadth would last for an indefinite duration.

2017) at 22:45-23:15. Citing to § 4 of the Proclamation, which provides for a review of the restrictions every 180 days, the Government argued that because the suspensions will be "revisited" twice a year, the Proclamation is less indefinite than President Reagan's and President Carter's orders regarding Cubans and Iranians,[11] respectively. *Id.* at 23:04-23:14. This argument is unpersuasive.

The Government has repeatedly emphasized that the travel restrictions are necessary to incentivize and pressure foreign governments into improving their information-sharing and identity-management practices. This creates a peculiar situation where the restrictions may persist ad infinitum. To paraphrase a well-known adage, the Proclamation's review process mandates that the restrictions will continue until practices improve. The Proclamation's duration can be considered definite only to the extent one presumes that the restrictions will, indeed, incentivize countries to improve their practices. Where, as here, there is little evidence to support such an assumption, the Proclamation risks producing a virtually perpetual restriction—a result that the plain text of § 1182(f) heavily disfavors for such a far-reaching order.[12]

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[11] Proclamation 5517, 51 Fed. Reg. 30,470 (Aug. 22, 1986) (Cuba order); Exec. Order 12172, 44 Fed. Reg. 67,947 (Nov. 26, 1979) (Iran order), *amended by* Exec. Order 12206, 45 Fed. Reg. 24,101 (Apr. 7, 1980).

[12] Because issuing indefinite entry restrictions under these circumstances violates § 1182(f), we further view § 1182(f) as prohibiting a series of temporary bans when it appears such serial bans are issued to circumvent the bar on indefinite entry restrictions. *See also* Brief of T.A., a U.S. Resident of Yemeni Descent, as Amicus

**b. Statutory Framework**

We next examine the statutory framework of the INA. *Brown & Williamson*, 529 U.S. at 133. We first note that the Constitution gives Congress the primary, if not exclusive, authority to set immigration policy. *See Arizona v. United States*, 567 U.S. 387, 409 (2012) (citing *Galvan v. Press*, 347 U.S. 522, 531 (1954)); *see also Fiallo*, 430 U.S. at 792 ("[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." (citation and internal quotation marks omitted)); *Oceanic Steam Nav. Co. v. Stranahan*, 214 U.S. 320, 340 (1909) ("[T]he authority of Congress over the right to bring aliens into the United States embraces every conceivable aspect of that subject . . . ."). Congress has delegated substantial power in this area to the Executive Branch, but the Executive may not exercise that power in a manner that conflicts with the INA's finely reticulated regulatory scheme governing the admission of foreign nationals.

In line with this principle, the D.C. Circuit has held that the Executive cannot use general exclusionary powers conferred by Congress to circumvent a specific INA provision without showing a threat to public interest, welfare, safety or security that was independent of the specific provision. *Abourezk*, 785 F.2d at 1057-58. The *Abourezk* court reasoned that the Executive's use of the general exclusionary provision to deny entry to members of groups proscribed in the specific provision

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Curiae, Dkt. No. 41 at 7-8 (arguing that § 1182(f)'s use of the singular as it relates to "proclamation" and "period" is meaningful and precludes the use of serial bans to bypass the bar on indefinite suspensions, and noting that other provisions in § 1182 specifically use plural nouns to authorize multiple actions by the executive branch).

would "rob [the general provision] of its independent scope and meaning," render the specific provision superfluous, and conflict with limits that Congress imposed on the use of the specific provision. *Id.* at 1057. We agree with the D.C. Circuit's approach and apply it to § 1182(f).

We conclude that the Proclamation conflicts with the statutory framework of the INA by indefinitely nullifying Congress's considered judgments on matters of immigration. The Proclamation's stated purposes are to prevent entry of terrorists and persons posing a threat to public safety, as well as to enhance vetting capabilities and processes to achieve that goal. *See* 82 Fed. Reg. at 45,161. Yet Congress has already acted to effectuate these purposes.

As for the prevention of entry of terrorists and persons likely to pose public-safety threats, Congress has considered these concerns, and enacted legislation to restrict entry of persons on those specific grounds. Under 8 U.S.C. § 1182(a)(3)(B), any alien who has "engaged in a terrorist activity" is inadmissible,[13] unless the Secretary of State determines in his unreviewable discretion that the alien qualifies for a waiver. *See id.* § 1182(d)(3)(B). With regard to public safety, Congress has created numerous inadmissibility grounds, including an array of crime-related grounds. *See, e.g.*, *id.*

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[13] The term "engaged in a terrorist activity" is comprehensive. For example, "terrorist activity" includes any unlawful use of a weapon or dangerous device "other than for mere personal monetary gain," and "[e]ngag[ing] in terrorist activity" includes providing "material support" for any "terrorist activity" or terrorist organization. *See* 8 U.S.C. § 1182(a)(3)(B)(iii)(V)(bb), (a)(3)(B)(iv).

§ 1182(a)(2)(A) (crime of moral turpitude or drug offense); § 1182(a)(2)(B) (two or more offenses for which the aggregate sentences were five years or more); § 1182(a)(2)(C) (drug trafficking or benefitting from a relative who recently trafficked drugs); § 1182(a)(2)(D) (prostitution or "commercialized vice"); § 1182(a)(2)(H) (human trafficking); § 1182(a)(2)(I) (money laundering); § 1182(a)(3) ("Security and related grounds").

With respect to the enhancement of vetting capabilities and processes, we likewise conclude that Congress has considered the reality that foreign countries vary with respect to information-sharing and identity- management practices, as well as terrorism risk. In fact, Congress addressed those concerns in a neighboring section, 8 U.S.C. § 1187 (the Visa Waiver Program or "VWP"), which was amended as recently as 2015 to address the heightened risk of terrorism in certain countries. *See* Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015, Pub. L. No. 114-113, § 203, 129 Stat. 2242, 2989-91. Significantly, many of the criteria used to determine whether a foreign national's country of origin qualifies for VWP treatment are replicated in the Proclamation's list of baseline criteria. This includes that the countries use electronic passports, § 1187(a)(3)(B), report lost or stolen passports, § 1187(c)(2)(D), and not provide safe haven for terrorists, § 1187(a)(12)(D)(iii). *See* 82 Fed. Reg. 45,162. The Proclamation even makes participation in the Visa Waiver Program part of its criteria for evaluating countries. *Id.* at 45,162-63.

The Government argues that the Visa Waiver Program is irrelevant because its "specific purpose" is the

"facilitation of travel," and therefore it does not foreclose the President from addressing the "separate issue of what to do about a country that fails so many criteria that its information-sharing practices and other risk factors are collectively inadequate." This argument falls short. The Visa Waiver Program's travel facilitation purpose is notable, but not for the reason advanced by the Government. As we explained above, the Visa Waiver Program utilizes many of the same criteria relied upon by the Proclamation. Congress thus expressly considered the reality that countries vary with respect to information-sharing and identity-management practices, as well as terrorism risk. In response to that reality, Congress could have enacted measures restricting travel from countries with inadequate risk factors, taken no action, or enacted provisions facilitating travel from low-risk countries. In creating the Visa Waiver Program, Congress chose the third approach. In so doing, Congress necessarily determined that the interests of the United States would be better served by facilitating *more* travel, not less. By heavily restricting travel from the affected countries, the Proclamation thus conflicts with the purpose of the Visa Waiver Program.

More broadly, the Government contends that Plaintiffs' reliance on the statutory framework is misplaced because § 1182(f) empowers the President to issue "*supplemental*" admission restrictions when he finds that the national interest so warrants. Although true, this merely begs the question of whether the restrictions at issue here are "supplemental." We conclude that the indefinite suspension of entry of all nationals from multiple countries, absent wartime or exigent circum-

stances, nullifies rather than "supplement[s]" the existing statutory scheme. The President is not foreclosed from acting to enhance vetting capabilities and other practices in order to strengthen existing immigration law, but must do so in a manner consistent with Congress's intent. Put another way, the President cannot effectively abrogate existing immigration law while purporting to merely strengthen it; the cure cannot be worse than the disease. Here, the President has used his § 1182(f) and § 1185(a) powers to nullify numerous specific provisions of the INA indefinitely with regard to all nationals of six countries, and has overridden Congress's legislative responses to the same concerns the Proclamation aims to address. The Executive cannot without assent of Congress supplant its statutory scheme with one stroke of a presidential pen.

**c. Legislative History**

The legislative history suggests further limitations on § 1182(f)'s broad grant of authority. Prior to passing the INA, which included § 1182(f), the House of Representatives debated an amendment that would have continued to restrict the President's authority to suspend immigration only "[w]hen the United States is at war or during the existence of a national emergency proclaimed by the President." 98 Cong. Rec. 4423 (statement of Rep. Multer).[14] Speaking in opposition to the

[14] Section 1182(f)'s 1941 predecessor limited the president's authority to suspend entry of aliens only to times of war or national emergency. *See* Act of June 21, 1941, 55 Stat. 252, 252-53. In anticipation of future immigration reform, the Senate Committee on the Judiciary published a comprehensive report in 1950 on the state of immigration laws in the country. *See* S. Rep. No. 81-1515, at 1-2

ultimately unsuccessful amendment, the sponsor of the bill urged that § 1182(f)'s broad language was "absolutely essential," because

> [W]hen there is an outbreak of an epidemic in some country, whence these people are coming, it is *impossible* for Congress to act. People might conceivably in large numbers come to the United States and bring all sorts of communicable diseases with them. More than that, suppose we have a period of great unemployment? In the judgment of the committee, it is advisable at such times to permit the President to say that for a certain time we are not going to aggravate that situation.

*Id.* (statement of Rep. Walter) (emphasis added).

Although Representative Walter and the bill's supporters did not "intend[] [their] list of examples to be exhaustive," *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 649 (1990), "it is significant that the example[s] Congress did give" all share the common trait of exigency. *Moran v. London Records, Ltd.*, 827 F.2d 180, 183 (7th Cir. 1987). Proponents of § 1182(f) deliberately pinned the provision to examples where it would be difficult, if not impossible, for Congress to re-

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(1950). Although the report states that the committee was considering a provision that would "permit the President to suspend any and all immigration whenever he finds such action to be desirable in the best interests of the country," it is unclear whether the report's brief statement was in reference to what would eventually become § 1182(f) two years later. *Id.* at 381. More importantly, as Plaintiffs point out, none of the bill's supporters affirmatively voiced such a broad interpretation of § 1182(f) when pressed on the matter by members of the opposition.

act in a timely manner, thus necessitating swift presidential action.[15] The legislative history, then, suggests that despite § 1182(f)'s facially broad grant of power,[16]

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[15] We note that hearings in 1970 and 1977 produced testimony from the Department of State that § 1182(f) (or § 212(f) of the INA) could be traced to "health prohibitions" even though the text does not explicitly limit executive use to exigencies, health or otherwise. *See, e.g., United States-South African Relations: South Africa's Visa Policy: Hearing Before the Subcomm. on Africa & Int'l Org. of the Comm. on Int'l Relations H. Rep.*, 95th Cong. 10-11 (1977) (statement of Hon. Barbara M. Watson, Administrator, Bureau of Security and Consular Affairs, Dep't of State). Considering the strength of legislative history supporting use of § 1182(f) to restrict entry during epidemics, it is noteworthy that a 2014 Congressional Research Service report cautioned that the provision could only "potentially" be used to prevent entry of "foreign nationals traveling from a particular country or region from which there has been an Ebola outbreak." *See* Sarah A. Lister, *Preventing the Introduction and Spread of Ebola in the United States: Frequently Asked Questions*, Cong. Res. Serv. 3 (Dec. 5, 2014). The report noted that § 1182(f) had "never been employed so broadly" before. *Id.*

[16] Several congressmen did express concerns prior to enactment that § 1182(f) would give the President "an untrammeled right, an uninhibited right to suspend immigration entirely." 98 Cong. Rec. 4423 (statement of Rep. Celler). Their "fears and doubts," however, "are no authoritative guide to the construction of legislation[,] [because] [i]n their zeal to defeat a bill, [opponents to a bill] understandably tend to overstate its reach." *Bryan v. United States*, 524 U.S. 184, 196 (1998) (internal citations and quotation marks omitted).

Moreover, there is some evidence that supporters of § 1182(f) and its predecessor provision believed the opposition's concerns unreasonably presumed executive abuse of power. *See* 87 Cong. Rec. 5049 (1941) (statement of Rep. Bloom) (dismissing a representative's concerns because "the gentleman is figuring on something that the President would not do"); *see also* 98 Cong. Rec. 4424 (statement of Rep. Halleck) ("I take it that the gentleman would not be concerned [about section 1182(f)] if he were sure he would always have a President that could not do any wrong").

the Proclamation—which cites to no exigencies, national or otherwise, and does not respond to a situation Congress would be ill-equipped to address —falls outside of the boundaries Congress set.

**d. Prior Executive Practice**

Notwithstanding the aforementioned factors, the Government argues that "[h]istorical practice confirms the breadth of, and deference owed to, the President's exercise of authority under Sections 1182(f) and 1185(a)(1)." We pass no judgment on the legality or appropriateness of the Executive's past practice, but we consider such practice to the extent it bears on congressional acquiescence. *See Abourezk*, 785 F.2d at 1055 ("[E]vidence of congressional acquiescence (or the lack thereof) in an administrative construction of the statutory language during the thirty-four years since the current act was passed could be telling."); *see also Zemel v. Rusk*, 381 U.S. 1, 17-18 (1965) ("We have held . . . and reaffirm today, that the 1926 [Passport] Act must take its content from history: it authorizes only those passport refusals and restrictions 'which it could fairly be argued were adopted by Congress in light of prior administrative practice.'" (quoting *Kent v. Dulles*, 357 U.S. 116, 128 (1958))).

The Government is correct that presidents have suspended the entry of foreign nationals in various foreign policy and national security settings, but we nevertheless conclude that the Proclamation and its immediate predecessors, EO-1 and EO-2, stand apart in crucial respects. First, out of the forty-three proclamations or orders issued under § 1182(f) prior to EO-1, forty- two targeted only government officials or aliens who en-

gaged in specific conduct and their associates or relatives. *See* Kate M. Manuel, Cong. Research Serv., R44743, *Executive Authority to Exclude Aliens: In Brief* 6-10, (2017) (listing prior § 1182(f) proclamations and orders).

Only one § 1182(f) proclamation suspended entry of all nationals of a foreign country. Proclamation 5517, issued in 1986, suspended entry of Cuban nationals as immigrants in response to the Cuba government's own suspension of "all types of procedures regarding the execution" of an immigration agreement between the United States and Cuba. 51 Fed. Reg. 30,470 (Aug. 22, 1986). In addition, President Carter delegated authority under § 1185(a) to the Secretary of State and the Attorney General to prescribe limitations governing the entry of Iranian nationals, but did not ban Iranian immigrants outright. *See* Exec. Order 12172, 44 Fed. Reg. 67,947 (Nov. 26, 1979), *amended by* Exec. Order 12206, 45 Fed. Reg. 24,101 (Apr. 7, 1980). These isolated instances, which applied to a single country each and were never passed on by a court, cannot sustain the weight placed on them by the Government. *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169 (2001) ("Although we have recognized congressional acquiescence to administrative interpretations of a statute in some situations, we have done so with extreme care.").

Moreover, unlike the Proclamation, the Cuba and Iran orders were intended to address specific foreign policy concerns distinct from general immigration concerns already addressed by Congress. The same holds true for the vast majority of prior § 1182(f) suspensions. *See, e.g.*, Executive Order 13606, 77 Fed. Reg. 24,571

(Apr. 22, 2012) (suspending entry of persons who facilitated cyber-attacks and human rights abuses by the Syrian or Iranian governments); Proclamation 6925, 61 Fed. Reg. 52,233 (Oct. 3, 1996) (suspending entry of persons "who formulate, implement, or benefit from policies that impede Burma's transition to democracy, and the immediate family members of such persons"); Proclamation 6569, 58 Fed. Reg. 31,897 (June 3, 1993) (suspending entry of persons "who formulate, implement, or benefit from policies that impede the progress of the negotiations designed to restore constitutional government to Haiti, and the immediate family members of such persons").

The only prior entry suspension lacking a foreign policy or national security purpose distinct from general immigration concerns is found in President Reagan's High Seas Interdiction Proclamation and its implementing executive orders. That Proclamation suspended "entry of undocumented aliens from the high seas" and ordered that such entry "be prevented by the interdiction of certain vessels carrying such aliens." Proclamation 4865, 46 Fed. Reg. 48,107 (Sep. 29, 1981). Consequently, Proclamation 4865 and its implementing executive orders, unlike the present Proclamation, applied by their terms almost entirely to aliens who were already statutorily inadmissible.[17] *See id.*; Exec. Order

[17] Under 8 U.S.C. § 1182(a)(7)(A)(i)(I), an alien who does not possess "a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document" is inadmissible. The High Seas Interdiction suspensions did, however, affect some aliens who could have become admissible insofar as the suspensions prevented refugees fleeing persecution from reaching United States territorial waters. *See Sale*, 509 U.S. at 187-88 (holding that barring the entry of refugees outside the territorial waters

12324, 46 Fed. Reg. 48,109 (Sep. 29, 1981); Exec. Order 12807, 57 Fed. Reg. 23,133 (May 24, 1992).

We recognize that presidents ordinarily may use—and have used—§ 1182(f) to suspend the entry of aliens who might otherwise be admissible under the INA. But when, as here, a presidential proclamation addresses only matters of immigration already passed upon by Congress, the President's § 1182(f) authority is at its nadir.

The High Seas Interdiction suspensions are consistent with this principle because they apply predominantly to otherwise inadmissible aliens. In contrast, by suspending entry of a class of 150 million potentially admissible aliens, the Proclamation sweeps broader than any past entry suspension and indefinitely nullifies existing immigration law as to multiple countries. The Proclamation does so in the name of addressing general public-safety and terrorism threats, and what it deems to be foreign countries' inadequate immigration- related practices—concerns that Congress has already addressed.

We conclude that the Executive's past practice does not support the Government's position. Instead, such practice merely confirms that the Proclamation, like EO-2, "is unprecedented in its scope, purpose, and breadth." *Hawai'i I*, 859 F.3d at 779.

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of the United States did not violate the INA or the United Nations Convention Relating to the Status of Refugees).

**e. Constitutional Avoidance and Separation of Powers**

Principles of separation of powers further compel our conclusion that the Proclamation exceeds the scope of authority delegated to the President under § 1182(f). It is a bedrock principle of statutory interpretation that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also INS v. St. Cyr*, 553 U.S. 289, 300 (2001) ("[W]e are obligated to construe the statute to avoid [serious constitutional] problems."). Here, a conclusion that the Proclamation does not exceed the President's delegated authority under § 1182(f) would raise "serious constitutional problems" and should thus be avoided. *See DeBartolo*, 485 U.S. at 575. Reading § 1182(f) to permit the Proclamation's sweeping exercise of authority would effectively render the statute void of a requisite "intelligible principle" delineating the "general policy" to be applied and "the boundaries of th[e] delegated authority," *Mistretta v. United States*, 488 U.S. 361, 372-73 (1989). Without any meaningful limiting principles,[18] the statute would constitute an invalid delegation of Congress's "exclusive[]" authority, *Galvan*, 347 U.S. at 531, to formulate policies regarding the entry of aliens.

As discussed above, the Proclamation functions as an executive override of broad swaths of immigration laws

[18] These limiting principles are primarily found in the text of the statute, but also include the surrounding statutory framework, the legislative history, and prior executive practice.

that Congress has used its considered judgment to enact. If the Proclamation is—as the Government contends—authorized under § 1182(f), then § 1182(f) upends the normal functioning of separation of powers. Even Congress is prohibited from enabling "unilateral Presidential action that either repeals or amends parts of duly enacted statutes." *Clinton v. City of New York*, 524 U.S. 417, 439 (1998). This is true even when the executive actions respond to issues of "first importance," issues that potentially place the country's "Constitution and its survival in peril." *Id.* at 449 (Kennedy, J., concurring). In addressing such critical issues, the political branches still do not "have a somewhat free hand to reallocate their own authority," as the "Constitution's structure requires a stability which transcends the convenience of the moment" and was crafted in recognition that "[c]oncentration of power in the hands of a single branch is a threat to liberty." *Id.* at 449-50.

And the Proclamation's sweeping assertion of authority is fundamentally legislative in nature. Where an action "ha[s] the purpose and effect of altering the legal rights, duties and relations of persons, including the Attorney General, Executive Branch officials and [an alien], all outside the legislative branch," the Supreme Court has held that the action is "essentially legislative in purpose and effect" and thus cannot bypass the "single, finely wrought and exhaustively considered, procedure" for enacting legislation.[19] *INS v. Chadha*,

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[19] Although the Government has not explained why the President has thus far failed to ask Congress to enact the Proclamation's policies by legislation, potential congressional inaction cannot sustain the President's authority to issue the Proclamation, as "[f]ailure of

462 U.S. 919, 951-52 (1983). Here, the Proclamation does not merely alter the "legal rights, duties and relations" of a single alien, *id.* at 952, but rather affects the rights, duties and relations of countless American citizens and lawful permanent residents whose ability to be reunified with, and receive visits from, their family members is inhibited by the Proclamation; the Proclamation also significantly affects numerous officials within the Department of Homeland Security and Department of State. Whereas the House's action in *Chadha* "operated . . . to overrule the Attorney General," *id.*, here the Proclamation would operate to overrule Congress's "extensive and complex" scheme of immigration laws, *Arizona*, 567 U.S. at 395, as they pertain to the eight affected countries and the over 150 million affected individuals.

Decades of Supreme Court precedent support reading meaningful limitations into § 1182(f) in order to avoid striking down the statute itself as an unconstitutional delegation. For example, in *Zemel v. Rusk*, the Court opted to read in limiting principles despite statutory language that, on its face, appeared to grant the Executive complete discretion: "The Secretary of State may grant and issue passports under such rules as the President shall designate and prescribe for and on behalf of the United States." 381 U.S. at 7-8, 17. By so doing, the Court saved the statute from constituting "an invalid delegation." *Id.* at 18. The Court noted that principles of separation of powers still apply even

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political will does not justify unconstitutional remedies" like violating the Constitution's separation of powers. *Clinton v. City of New York*, 524 U.S. at 499 (Kennedy, J., concurring).

in the field of foreign relations, holding that "simply because a statute deals with foreign relations" does not mean that the statute "can grant the Executive totally unrestricted freedom of choice." *Id.* at 17. Similarly, in *United States v. Witkovich*, the Court—faced with statutory language that "if read in isolation and literally, appears to confer upon the Attorney General unbounded authority"—nonetheless adopted a more "restrictive meaning" in order to avoid the "constitutional doubts" implicated by a "broader meaning." 353 U.S. at 199.

To avoid the inescapable constitutional concerns raised by the broad interpretation the Government urges us to adopt, we interpret § 1182(f) as containing meaningful limitations—limitations that the Proclamation, in effectively rewriting the immigration laws as they pertain to the affected countries, exceeds. After all, "whether the realm is foreign or domestic, it is still the Legislative Branch, not the Executive Branch, that makes the law." *Zivotofsky ex rel. Zivotofsky v. Kerry,* 135 S. Ct. 2076, 2090 (2015).

**2. Compliance with § 1182(f)**

We next turn to whether, even assuming the President did not exceed the scope of his delegated authority under § 1182(f), the Proclamation meets § 1182(f)'s requirement that the President find that the entry of certain persons "would be detrimental to the interests of the United States" prior to suspending their entry. 8 U.S.C. § 1182(f).

Although we considered this question in *Hawai'i I* and ultimately answered it in the negative, 859 F.3d at 770-74, the Proclamation differs from EO-2 in several

ways. As we discussed above, the Proclamation's suspensions of entry apply indefinitely, rather than for only 90 days. Unlike EO-2, the Proclamation developed as a result of a multi-agency review. The justifications for the Proclamation are different, too. The Proclamation puts forth a national security interest in information sharing between other countries and the United States, explains that it imposes its restrictions as an incentive for other countries to meet the United States' information-sharing protocols, and identifies "tailored" restrictions for each designated country. And the list of affected countries differs from EO-2's: the Proclamation adds Chad, removes Sudan, and includes two non-majority Muslim countries, North Korea and Venezuela.

Although there are some differences between EO-2 and the Proclamation, these differences do not mitigate the need for the President to satisfy § 1182(f)'s findings requirement. Despite our clear command in *Hawai'i I*, the Proclamation—like EO-2—fails to "provide a rationale explaining why permitting entry of nationals from the six designated countries under current protocols would be detrimental to the interests of the United States." *Id.* at 773. In assessing the scope of the President's statutory authority, we begin with the text. The relevant portion of § 1182(f) states:

> 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.

8 U.S.C. § 1182(f).

While § 1182(f) gives the President broad authority to suspend or place restrictions on the entry of aliens or classes of aliens, this authority is not unlimited. Section 1182(f) expressly requires that the President *find* that the entry of a class of aliens would be *detrimental* to the interests of the United States before the aliens in a class are excluded. The use of the word "find" was deliberate.

Congress used "find" rather than "deem" in the immediate predecessor to § 1182(f) so that the President would be required to "base his [decision] on some fact," not on mere "opinion" or "guesses." 87 Cong. Rec. 5051 (1941) (statements of Rep. Jonkman and Rep. Jenkins).

By contrast, the Proclamation summarily concludes: "[A]bsent the measures set forth in this proclamation, the immigrant and nonimmigrant entry into the United States of persons described in section 2 of this proclamation would be detrimental to the interests of the United States." 82 Fed. Reg. 45,161-62. The Proclamation points out that screening and vetting protocols enhance the Government's ability to "detect foreign nationals who may commit, aid, or support acts of terrorism and other public-safety threats." *Id.* at 45,162. It then asserts that the travel restrictions will encourage the targeted foreign governments to improve their information-sharing and identity-management protocols and practices. The degree of desired improvement is left unstated; there is no finding that the present vetting procedures are inadequate or that there will be harm to our national interests absent the Proclamation's issuance.

In assessing the merits of Plaintiffs' motion for a preliminary injunction, the district court considered whether the Government had made the requisite findings for the President to suspend the entry of aliens under § 1182(f). Relying on our decision in *Hawai'i I*, the district court concluded that the Government had not. *Hawai'i TRO*, 2017 WL 4639560, at *9-10. Although our prior decision in *Hawai'i I* has since been vacated as moot, the Supreme Court "express[ed] no view on the merits" in ordering vacatur. *Trump*, 2017 WL 4782860, at *1. We therefore adopt once more the position we articulated in *Hawai'i I* that § 1182(f) requires entry suspensions to be predicated on a finding of detriment to the United States. 859 F.3d at 773.

The Government argues that the "detailed findings" in the Proclamation satisfy the standard we set forth in *Hawai'i I*. Plaintiffs respond that the findings were inadequate because § 1182(f) expressly requires (1) "'find-[ings]' that support the conclusion that admission of the excluded aliens would be 'detrimental,'" and (2) "the harm the President identifies must amount to a 'detriment to the interests of the United States.'" We agree with Plaintiffs.

The Proclamation makes no finding whatsoever that foreign nationals' nationality alone renders entry of this broad class of individuals a heightened security risk to the United States.[20] Nor does it contain a finding that the nationality of the covered individuals alone renders their entry into the United States on certain forms of

[20] Rather, a declaration from former national security advisors—quoting a study from the Department of Homeland Security—states: "country of citizenship is unlikely to be a reliable indicator of potential terrorist activity."

visas detrimental to the interests of the United States. As such, there is no stated connection between the scope of the restriction imposed and a finding of detriment that the Government seeks to alleviate. While the district court may have imprecisely stated that the Proclamation was "unsupported by verifiable evidence," *Hawai'i TRO*, 2017 WL 4639560, at *11, it was correct in concluding that the stated findings do not satisfy § 1182(f)'s prerequisites.

To be sure, the Proclamation does attempt to rectify EO-2's lack of a meaningful connection between listed countries and terrorist organizations. For instance, it cites to the fact that "several terrorist groups are active" in Chad. 82 Fed. Reg. at 45,165. But the Proclamation does not tie the nationals of the designated countries to terrorist organizations. For the second time, the Proclamation makes no finding that nationality alone renders entry of this broad class of individuals a heightened security risk or that current screening processes are inadequate.[21]

National security is not a "talismanic incantation" that, once invoked, can support any and all exercise of executive power under § 1182(f). *United States v. Robel*, 389 U.S. 258, 263-64 (1967). Section 1182(f) requires that the President make a finding that the entry of an alien or class of aliens *would be* detrimental to the interests of the United States. That requirement has not been met.

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[21] As the statistics provided by the Cato Institute demonstrate, no national from any of the countries selected has caused any of the terrorism-related deaths in the United States since 1975. *See* Brief of the Cato Institute as Amicus Curiae, Dkt. No. 84 at 26-28.

The Government argues that the district court erred by imposing a higher standard than that set forth in *Hawai'i I* by objecting to the President's stated reasons for the ban, by identifying internal inconsistencies, and by requiring verifiable evidence. We need not address the Government's argument because, as discussed above, the Proclamation has failed to make the critical finding that § 1182(f) requires. We therefore hold that Plaintiffs have shown a likelihood of success on the merits of their § 1182(f) claim that the President has failed to make an adequate finding of detriment.

**3. Section 1185(a)**

In addition to relying on § 1182(f), the Proclamation also grounds its authority in 8 U.S.C. § 1185(a), which states:

> Unless otherwise ordered by the President, it shall be unlawful [] for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe.

8 U.S.C. § 1185(a)(1).

The Government does not argue that § 1185(a) provides an independent basis to suspend entry. Instead, the Government contends that § 1185(a) permits the President to skirt the requirements of § 1182(f) because § 1185(a) does not require a predicate finding before the President prescribes reasonable rules, regulations, and orders governing alien entry and departure. The Government also argues that there is no meaningful standard for review because these matters are committed to

the President's judgment and discretion. Plaintiffs respond that the Government cannot use the general authority in § 1185(a) to avoid the preconditions of § 1182(f).

We conclude that the Government cannot justify the Proclamation under § 1182(f) by using § 1185(a) as a backdoor. General grants in a statute are limited by more specific statutory provisions, and § 1182(f) has a specific requirement that there be a finding of detriment before entry may be suspended or otherwise restricted. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) ("It is a commonplace of statutory construction that the specific governs the general." (internal quotation marks and alterations omitted)). Section 1185(a) does not serve as a ground for reversal of the district court's conclusion on Plaintiffs' likelihood of success.

#### 4. Section 1152(a)(1)(A)'s Prohibition on National Origin Discrimination

Next, we consider the impact of 8 U.S.C. § 1152(a)(1)(A) on the President's authority to issue the Proclamation. Section 1152(a) states:

> [N]o 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) (emphasis added).

The Government argues that the district court erred by reading § 1152(a)(1)(A) to limit the President's authority under § 1182(f), and that § 1152(a)(1)(A) has never been used as a constraint on the President's authority under § 1182(f). In making this argument, the

Government once again urges us to conclude that § 1152(a)(1)(A) operates in a separate sphere from § 1182(f). This we decline to do.

Congress enacted § 1152(a)(1)(A) of the INA contemporaneously with the Civil Rights Act of 1964 and the Voting Rights Act of 1965 to eliminate the "national origins system as the basis for the selection of immigrants to the United States." H.R. Rep. No. 89-745, at 8 (1965). In so doing, Congress manifested its intent to repudiate a history of nationality and race- based discrimination in United States immigration policy.[22] *See* 110 Cong. Rec. 1057 (1964) (statement of Sen. Hart) ("[A]n immigration policy with different standards of admissibility for different racial and ethnic groups, in short, a policy with build-in bias, is contrary to our moral

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[22] The discriminatory roots of the national origins system may be traced back to 1875, when xenophobia towards Chinese immigrants produced Congress's first race-based immigration laws. *See* Brief of the National Asian Pacific American Bar Association as Amicus Curiae, Dkt. No. 126, at 5. The Page Law, passed in 1875, banned immigration of women—primarily Asian women—who were presumed, simply by virtue of their ethnicity and nationality, to be prostitutes. *Id.* at 5. The Page Law was followed in quick succession by the Chinese Exclusion Act in 1882 and the Scott Act in 1888. *Id.* at 6. These laws were justified on security grounds. *See Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889) (declining to overturn the Scott Act because "the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security."). This underlying xenophobia eventually produced the national origins system, which clearly signaled that "people of some nations [were] more welcome to America than others," and created "token quotas" based on "implications of race superiority." 110 Cong. Rec. 1057 (statement of Sen. Hart).

and ethical policy."). Recognizing that "[a]rbitrary ethnic and racial barriers [had become] the basis of American immigration policy," Senator Hart, the bill's sponsor, declared that § 1152(a)(1)(A) was necessary "[t]o restore equality and fairplay in our selecting of immigrants." *Id.*

The Government argues that § 1152(a)(1)(A)'s prohibition of discrimination in the issuance of visas does not cabin the President's authority to regulate entry under § 1182(f). We disagree. As the Government concedes, the Proclamation restricts the entry of affected aliens *by precluding consular officers from issuing visas* to nationals from the designated countries. *See* 82 Fed. Reg. at 45,168. Put another way, the Proclamation effectuates its restrictions by withholding immigrant visas on the basis of nationality. This directly contravenes Congress's "unambiguous[] direct[ions] that no nationality-based discrimination . . . occur." *Legal Assistance for Vietnamese Asylum Seekers*, 45 F.3d at 473.

We are bound to give effect to "all parts of a statute, if at all possible." *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633 (1973). The Government's position that § 1152(a)(1)(A) and § 1182(f) operate in different spheres—the former in issuance of immigrant visas, the latter in entry—would strip § 1152(a)(1)(A) of much of its power. It is difficult to imagine that Congress would have celebrated the passing of the bill as "one of the most important measures treated by the Senate . . . [for its] restate[ment] [of] this country's devotion to equality and freedom" had it thought the President could simply use § 1182(f) to bar

Asian immigrants with valid immigrant visas from entering the country. 111 Cong. Rec. 24785 (1965) (statement of Sen. Mansfield); *see also* Lyndon B. Johnson, *Remarks at the Signing of the Immigration Bill, Liberty Island, New York*, The Am. Presidency Project (Oct. 3, 1965), http://www.presidency.ucsb.edu/ ws/index.php?pid=27292 (concluding that the discriminatory national origins quota system "will never again shadow the gate to the American Nation with the twin barriers of prejudice and privilege").

We do not think Congress intended § 1152(a)(1)(A) to be so easily circumvented. We therefore read § 1152(a)(1)(A) as prohibiting discrimination on the basis of nationality *throughout* the immigration visa process, including visa issuance and entry.[23]

To the extent that § 1152(a)(1)(A) conflicts with the broader grant of authority in § 1182(f) and § 1185(a), the

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[23] Even if we assume for the sake of argument that Congress intended § 1182(f) and § 1152(a)(1)(A) to operate in entirely separate spheres, as is argued by the Government, the result would be the same. This is so because both at oral argument and in the Proclamation's text, the Government has conceded that if its entry ban were upheld, all embassy actions in issuing visas for nationals of the precluded countries would cease. 82 Fed. Reg. at 45,168 (noting that waiver by consular officers will be effective "both for *the issuance of a visa and for any subsequent entry on that visa*" (emphasis added)); United States Court of Appeals for the Ninth Circuit, *17-17168 State of Hawaii v. Donald Trump*, YouTube (Dec. 7, 2017) at 9:55-11:33; 11:59-12:12. Enforcement of the entry ban under § 1182(f) would inescapably violate § 1152(a)(1)(A)'s prohibition on nationality-based discrimination in the issuance of immigrant visas, because the Proclamation effectively bars nationals of the designated countries from receiving immigrant visas.

Government asks us to give the latter two provisions superseding effect. The Government argues that as the more recently amended and "more specific" provision, § 1185(a) ought to control over § 1152(a)(1)(A). We are unpersuaded by this argument for several reasons.

First, when two statutory provisions are in irreconcilable conflict, a later-enacted, more specific provision is treated as an exception to an earlier-enacted, general provision. *See, e.g.*, *Perez-Guzman v. Lynch*, 835 F.3d 1066, 1075 (9th Cir. 2016); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 183-87 (2012). Section 1152(a)(1)(A) was enacted over a decade after § 1182(f). Section 1152(a)(1)(A) also operates at a greater level of specificity than either § 1182(f) or § 1185(a)—it eliminates nationality-based discrimination for the issuance of immigrant visas. Because the "specific provision is construed as an exception to the general one," we agree with Plaintiffs that § 1152(a)(1)(A) provides a specific anti-discrimination bar to the President's general § 1182(f) powers. *RadLAX*, 566 U.S. at 645.

Second, § 1152(a)(1)(A) clearly provides for exceptions in a number of circumstances. *See* 8 U.S.C. §§ 1101(a)(27), 1151(b)(2)(A)(i), and 1153. Neither § 1182(f) nor § 1185(a) is included in the list of enumerated exceptions. We presume that Congress's inclusion of specified items and exclusion of others is intentional. *See United States v. Vance Crooked Arm*, 788 F.3d 1065, 1075 (9th Cir. 2015) ("Under the longstanding canon *expressio unius est exclusio alterius*, we presume that the exclusion of . . . phrases" by Congress was intentional). The conspicuous absence of § 1182(f) and

§ 1185(a) from the listed exceptions vitiates the Government's position that both provisions fall outside § 1152(a)(1)(A)'s purview.

Lastly, the Government's reliance on prior Executive practice is misplaced. The Government again points to President Reagan's Proclamation 5517 suspending immigration from Cuba in response to Cuba's own suspension of immigration practices, and President Carter's Executive Order 12172 and the accompanying visa issuance regulations as to Iranian nationals during the Iran hostage crisis. As we explained above, *supra* at § III.A.1.d, those restrictions were never challenged in court and we do not pass on their legality now. Moreover, both orders are outliers among the forty-plus presidential executive orders restricting entry, and therefore cannot support a showing of congressional acquiescence. *See Solid Waste Agency*, 531 U.S. at 169. Finally, we need not decide whether a President may, under special circumstances and for a limited time, suspend entry of all nationals from a foreign country. *See IRAP v. Trump*, No. TDC-17-0361, 2017 WL 4674314, at *21 (D. Md. Oct. 17, 2017). Such circumstances, if they exist, have not been argued here.

For the reasons stated above, the Proclamation's indefinite entry suspensions constitute nationality discrimination in the issuance of immigrant visas. We therefore conclude that Plaintiffs have shown a likelihood of success on the merits of their claim that the Proclamation runs afoul of § 1152(a)(1)(A)'s prohibition on nationality-based discrimination.

### 5. Alternative Authority

Having concluded that the Proclamation violates the INA and exceeds the scope of the President's delegated authority under § 1182(f), we view the Proclamation as falling into Justice Jackson's third category from *Youngstown Sheet & Tube Co. v. Sawyer*: "[w]hen the President [has] take[n] measures incompatible with the expressed or implied will of Congress." 343 U.S. 579, 637 (1952) (Jackson, J., concurring). Under *Youngstown*'s tripartite framework, presidential actions that are contrary to congressional will leave the President's "power [] at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id.* We therefore must determine whether the President has constitutional authority to issue the Proclamation, independent of any statutory grant—for if he has such power, it may be immaterial that the Proclamation violates the INA. But when a President's action falls into "this third category, the President's asserted power must be both 'exclusive' and 'conclusive' on the issue" in order to succeed. *Zivotofsky ex rel. Zivotofsky*, 135 S. Ct. at 2084.

We conclude that the President lacks independent constitutional authority to issue the Proclamation, as control over the entry of aliens is a power within the exclusive province of Congress.[24] *See Galvan*, 347 U.S. at

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[24] In *Hawai'i I*, we opted not to decide the question of "whether and in what circumstances the President may suspend entry under his inherent powers as commander-in-chief or in a time of national emergency." 859 F.3d 741, 782 n.21 (9th Cir. 2017). In holding today that the President lacked independent constitutional authority to issue the Proclamation, we again need not, and do not, decide

531 ("[T]he formulation of these [immigration] policies is entrusted exclusively to Congress"); *see also Arizona*, 567 U.S. at 407 (citing *Galvan*, 347 U.S. at 531). While the Supreme Court's earlier jurisprudence contained some ambiguities on the division of power between Congress and the Executive on immigration,[25] the Court has more recently repeatedly recognized congressional control over immigration policies. *See, e.g.*, *Chadha*, 462 U.S. at 940 ("The plenary authority of Congress over aliens under Art. I, § 8, cl. 4 is not open to question"); *Fiallo*, 430 U.S. at 793 (recognizing "the need for special judicial deference to congressional policy choices in the immigration context"); *Galvan*, 347 U.S. at 531-32 ("[T]hat the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government . . . . [we] must therefore under our constitutional system recognize congressional power in dealing with aliens.").

Exclusive congressional authority over immigration policy also finds support in the Declaration of Independence itself, which listed "obstructing the Laws for Naturalization of Foreigners" and "refusing to pass [laws] to encourage their migrations hither" as among the acts

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whether the President may be able to suspend entry pursuant to his constitutional authority under *any* circumstances (such as in times of war or national emergency), as the Proclamation was issued under no such exceptional circumstances.

[25] *See* Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 Yale L.J. 458, 467-482 (2009) (examining the Supreme Court's shift from viewing authority over immigration as ambiguously belonging to the political branches—without specifying the allocation of power between the two—to increasingly identifying control over immigration as the province of Congress).

of "absolute Tyranny" of "the present King of Great Britain." The Declaration of Independence para. 2 (U.S. 1776). As Justice Jackson noted in *Youngstown*, "The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image." 343 U.S. at 641 (Jackson, J., concurring). This is perhaps why the Constitution vested Congress with the power to "establish an uniform Rule of Naturalization": the Framers knew of the evils that could result when the Executive exerts authority over the entry of aliens, and so sought to avoid those same evils by granting such powers to the legislative branch instead. *See* U.S. Const. art. I, § 8, cl. 4.

### B. Remaining Preliminary Injunction Factors

The three remaining preliminary injunction factors also lead us to affirm the preliminary injunction. Plaintiffs have successfully shown that they are likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in their favor, and that the preliminary injunction is in the public interest. *Winter*, 555 U.S. at 20.

#### 1. Irreparable Harm

The Government argues that Plaintiffs will suffer "no cognizable harm" absent the injunction because the Proclamation may only "delay" their relatives, students and faculty, and members from entering the United States. Indefinite delay, however, can rise to the level of irreparable harm. *See, e.g.*, *CBS, Inc. v. Davis*, 510 U.S. 1315, 1318 (1994) (Blackmun, J., in chambers)

(granting emergency stay from preliminary injunction because the "indefinite delay" of a broadcast would cause "irreparable harm to the news media"). This is one such instance.

Plaintiffs have presented evidence that the Proclamation will result in "prolonged separation from family members, constraints to recruiting and retaining students and faculty members to foster diversity and quality within the University community, and the diminished membership of the Association," the last of which "impacts the vibrancy of [the Association's] religious practices and instills fear among its members." *Hawai'i TRO*, 2017 WL 4639560, at *13. As we have said before, "[m]any of these harms are not compensable with monetary damages and therefore weigh in favor of finding irreparable harm." *Hawai'i I*, 859 F.3d at 782-83; *see also Washington*, 847 F.3d at 1168-69 ("[T]he States contend that the travel prohibitions harmed the States' university employees and students, separated families, and stranded the States' residents abroad."); *Hernandez v. Sessions*, 872 F.3d 976, 995 (9th Cir. 2017) (characterizing the "collateral harms to children of detainees whose parents are detained" as an irreparable harm); *Regents of Univ. of Cal. v. Am. Broad. Cos., Inc.*, 747 F.2d 511, 520 (9th Cir. 1984) (crediting intangible harms such as the "impairment of their ongoing recruitment programs [and] the dissipation of alumni and community goodwill and support garnered over the years"); *cf. Moore v. East Cleveland*, 431 U.S. 494, 503-04 (1977) (explaining that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition").

We therefore conclude that Plaintiffs are likely to suffer irreparable harm in the absence of the preliminary injunction.

### 2. Balance of Equities

We next conclude that the district court correctly balanced the equities in this case. When considering the equities of a preliminary injunction, we must weigh the "competing claims of injury" and "consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24 (citation omitted). In contrast to Plaintiffs' concrete allegations of harm, the Government cites to general national security concerns.[26] National security is undoubtedly a paramount public interest, *see Haig*, 453 U.S. at 307 ("[N]o governmental interest is more compelling than the security of the Nation."), but it cannot be used as a "talisman . . . to ward off inconvenient claims." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017); *cf. New York Times Co. v. United States*, 403 U.S. 713, 719 (1971) (Black, J., concurring) (describing "security" as a "broad, vague generality whose contours should not be invoked to abrogate" the law). When, as here, the President has failed to make sufficient findings that the "entry of certain classes of aliens would be detrimental to the national interest," "we cannot conclude that national security interests outweigh the harms to Plaintiffs." *Hawai'i I*, 859 F.3d at 783.

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[26] The Government additionally argues that "[t]he injunction . . . causes irreparable injury by invalidating an action taken at the height of the President's authority." Not so. For the reasons discussed earlier, by acting in a manner incompatible with Congress's will, the President's power here is "at its lowest ebb." *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring).

The injunction here would only preserve the status quo as it existed prior to the Proclamation while the merits of the case are being decided. We think it significant that the Government has been able to successfully screen and vet foreign nationals from the countries designated in the Proclamation under current law for years. *See* Brief of the Cato Institute as Amicus Curiae, Dkt. No. 84 at 26-27 (explaining that, from 1975 through 2017, "no one has been killed in a terrorist attack on U.S. soil by nationals from any of the eight Designated Countries"); *id.* at 29 (showing that the U.S. incarceration rate for persons born in the designated countries is lower than the U.S. incarceration rates for persons born in the U.S. or other non-U.S. countries). Accordingly, the balance of equities tips in Plaintiffs' favor.

**3. Public Interest**

Lastly, we consider whether Plaintiffs have successfully shown that "an injunction is in the public interest." *Winter*, 555 U.S. at 20. We conclude that they have.

It is axiomatic that the President must exercise his executive powers lawfully. When there are serious concerns that the President has not done so, the public interest is best served by "curtailing unlawful executive action." *Texas v. United States*, 809 F.3d 134, 187 (5th Cir. 2015), *aff'd by an equally divided court* 136 S. Ct. 2271 (2016). Amici provide further insight into the public interests that would be served by sustaining the district court's injunction. They have furnished us with a plethora of examples, of which we highlight a few.

Amici persuasively cite to increased violence directed at persons of the Muslim faith as one of the Proclamation's consequences. *See* Brief of Civil Rights Organizations as Amici Curiae, Dkt. No. 52 at 19-23; Brief of Members of the Clergy et al. as Amici Curiae, Dkt. No. 97 at 29-32. Amici also explain that by singling out nationals from primarily Muslim-majority nations, the Proclamation has caused Muslims across the country to suffer from psychological harm and distress, including growing anxiety, fear, and terror. Brief of Muslim Justice League et al. as Amici Curiae, Dkt. No. 68 at 21-23.

In assessing the public interest, we are reminded of Justice Murphy's wise words: "All residents of this nation are kin in some way by blood or culture to a foreign land." *Korematsu v. United States*, 323 U.S. 214, 242 (Murphy, J., dissenting). It cannot be in the public interest that a portion of this country be made to live in fear.

We note, too, that the cited harms are extensive and extend beyond the community. As Amici point out, the Proclamation, like its predecessors, "continues to disrupt the provision of medical care" and inhibits "the free exchange of information, ideas, and talent between the designated countries and [various] [s]tates, causing long-term economic and reputational damage." Brief of New York et al. as Amici Curiae, Dkt. No. 71 at 4. Moreover, because the Proclamation bans the entry of potential entrepreneurs, inventers, and innovators, the public's interest in innovation is thwarted at both the state and corporate levels. *See* Brief of Technology Companies as Amici Curiae, Dkt. No. 99 at 5-7. The Proclamation further limits technology companies' abilities to hire to full capacity by barring nationals of the

designed countries from filling vacant positions. *See* Brief of Massachusetts Technology Leadership Council as Amicus Curiae, Dkt. No. 120 at 8-16 (explaining that "the technology industry is growing too rapidly to be staffed through domestic labor alone").

The Proclamation also risks denying lesbian, gay, bisexual, transgender, and queer ("LGBTQ") individuals in the United States the opportunity to reunite with their partners from the affected nations. *See* Brief of Immigration Equality et al. as Amici Curiae, Dkt. No. 101 at 17-20. The Proclamation allows that it "may be appropriate" to grant waivers to foreign nationals seeking to reside with close family members in the United States. 82 Fed. Reg. at 45,168-69. But many of the affected nations criminalize homosexual conduct, and LGBTQ aliens will face heightened danger should they choose to apply for a visa from local consular officials on the basis of their same-sex relationships. Brief of Immigration Equality at 4. The public interest is not served by denying LGBTQ persons in the United States the ability to safely bring their partners home to them.

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For the foregoing reasons, we conclude that the district court did not abuse its discretion in granting an injunction.

### C. Scope of the Preliminary Injunction

The Government argues that the injunction is overbroad because it is not limited to redressing the Plaintiffs' "own cognizable injuries." Plaintiffs argue that the nationwide scope of the injunction is appropriate particularly in the immigration context because piece-

meal relief would fragment immigration policy. Plaintiffs further argue that it would be impracticable or impossible for them to name all those who would apply to the University of Hawai'i or the Association, but who have been chilled or prevented by the Proclamation from doing so.

We review the scope of a preliminary injunction for abuse of discretion. *McCormack v. Hiedeman*, 694 F.3d 1004, 1010 (9th Cir. 2012). Although the district court has "considerable discretion in fashioning suitable relief and defining the terms of an injunction," *Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991), there are limitations on this discretion. Injunctive relief must be "tailored to remedy the specific harm[s]" shown by the plaintiffs. *Id.*

Because this case implicates immigration policy, a nationwide injunction was necessary to give Plaintiffs a full expression of their rights. *See Bresgal v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1987) ("[A]n injunction is not necessarily made over-broad by extending benefit or protection to persons other than prevailing parties in the lawsuit—even if it is not a class action—*if such breadth is necessary to give prevailing parties the relief to which they are entitled.*"). "[T]he Constitution requires 'an *uniform* Rule of Naturalization'; Congress has instructed that 'the immigration laws of the United States should be enforced vigorously and *uniformly*'; and the Supreme Court has described immigration policy as 'a comprehensive and *unified* system.'" *Texas*, 809 F.3d at 187-88 (citations omitted). Any application of § 2 of the Proclamation would exceed the scope of

§ 1182(f), violate § 1152(a)(1)(A), and harm Plaintiffs' interests. Accordingly, the district court did not abuse its discretion by granting a nationwide injunction.

Although a nationwide injunction is permissible, a worldwide injunction as to all nationals of the affected countries extends too broadly. As the Supreme Court observed in *IRAP*: "The equities relied on by the lower courts do not balance the same way in that context." 137 S. Ct. at 2088. "[W]hatever burdens may result from enforcement of § 2(c) against a foreign national who lacks any connection to this country, they are, at a minimum, a good deal less concrete than the hardships identified [previously]." *Id.* "At the same time, the Government's interest in enforcing § 2(c), and the Executive's authority to do so, are undoubtedly at their peak when there is no tie between the foreign national and the United States." *Id.*

We therefore narrow the scope of the preliminary injunction, as we did in our November 13, 2017 order on the Government's motion for emergency stay. *See Hawai'i v. Trump*, 2017 WL 5343014, at *1. We then wrote:

> The preliminary injunction is stayed except as to "foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States," as set out below.
>
> The injunction remains in force as to foreign nationals who have a "close familial relationship" with a person in the United States. Such persons include grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins.

> "As for entities, the relationship must be formal, documented, and formed in the ordinary course, rather than for the purpose of evading [Proclamation 9645]."

*Id.* (internal citations omitted).

We again limit the scope of the district court's injunction to those persons who have a credible bona fide relationship with a person or entity in the United States. The injunction remains in force as to foreign nationals who have a "close familial relationship" with a person in the United States, including grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins. As for entities, the relationship must be formal, documented, and formed in the ordinary course of business, rather than for the purpose of evading the Proclamation.

## IV. Establishment Clause Claim

Plaintiffs argue that the Proclamation also violates the Establishment Clause of the United States Constitution. They urge us to adopt the view taken by the *en banc* Fourth Circuit in its review of EO-2 that "the reasonable observer would likely conclude that EO-2's primary purpose [was] to exclude persons from the United States on the basis of their religious beliefs." *IRAP*, 857 F.3d at 601.

Because we conclude that the district court did not abuse its discretion in granting the preliminary injunction relying on Plaintiffs' statutory claims, we need not and do not consider this alternate constitutional ground. *See Am. Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153, 161 (1989) ("Particularly where, as here, a case impli-

cates the fundamental relationship between the Branches, courts should be extremely careful not to issue unnecessary constitutional rulings.").

## V. Conclusion

For all of these reasons, we affirm in part and vacate in part the district court's preliminary injunction order. We narrow the scope of the injunction to give relief only to those with a credible bona fide relationship with the United States, pursuant to the Supreme Court's decision in *IRAP*, 137 S. Ct. at 2088. In light of the Supreme Court's order staying this injunction pending "disposition of the Government's petition for a writ of certiorari, if such writ is sought," we stay our decision today pending Supreme Court review. *Trump v. Hawai'i*, No. 17A550, — S. Ct. —, 2017 WL 5987406 (Dec. 4, 2017). Because we conclude that Plaintiffs have shown a likelihood of success on their statutory claims, we need not reach their constitutional claims.

**AFFIRMED IN PART, VACATED IN PART.**

**APPENDIX C**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-17168
D.C. No. 1:17-cv-00050-DKW-KSC
District of Hawaii, Honolulu

STATE OF HAWAII; ET AL., PLAINTIFFS-APPELLEES

STATE OF CALIFORNIA; ET AL., INTERVENORS-PENDING

*v.*

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; ET AL., DEFENDANTS-APPELLANTS

[Filed: Nov. 13, 2017]

**ORDER**

Before: HAWKINS, GOULD, and PAEZ, Circuit Judges.

The Government's motion for an emergency stay of the district court's preliminary injunction pending hearing and resolution of the expedited appeal is granted in part and denied in part. The preliminary injunction is stayed except as to "foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States," as set out below. *Trump v. Int'l Refugee Assistance Project* ("*IRAP*"), 137 S. Ct. 2080, 2088 (2017); *see also Nken v. Holder*, 556 U.S. 418, 434-35 (2009).

The injunction remains in force as to foreign nationals who have a "close familial relationship" with a person in the United States. *IRAP*, 137 S. Ct. at 2088. Such persons include grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins. *See Hawaii v. Trump*, 871 F.3d 646, 658 (9th Cir. 2017). "As for entities, the relationship must be formal, documented, and formed in the ordinary course, rather than for the purpose of evading [Proclamation 9645]." *IRAP*, 137 S. Ct. at 2088.

MOTION GRANTED IN PART; DENIED IN PART.

**APPENDIX D**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

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Civil No. 17-00050 DKW-KSC

STATE OF HAWAII, ISMAIL ELSHIKH, JOHN DOES 1 & 2, AND MUSLIM ASSOCIATION OF HAWAII, INC., PLAINTIFFS

*v.*

DONALD J. TRUMP, ET AL., DEFENDANTS

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[Filed: Oct. 20, 2017]

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**PRELIMINARY INJUNCTION**

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The Court enters the following Preliminary Injunction pursuant to the Joint Stipulation to Convert Temporary Restraining Order to Preliminary Injunction, entered October 20, 2017:

**PRELIMINARY INJUNCTION**

It is hereby ADJUDGED, ORDERED, and DECREED that:

Defendant ELAINE DUKE, in her official capacity as Acting Secretary of Homeland Security; REX W. TILLERSON, in his official capacity as Secretary of State; and all their respective officers, agents, servants, employees, and attorneys, and persons in active concert or participation with them who receive actual notice of this Order, hereby are enjoined fully from enforcing or implementing Sections 2(a), (b), (c), (e), (g), and (h) of

the Proclamation issued on September 24, 2017, entitled "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats" across the Nation. Enforcement of these provisions in all places, including the United States, at all United States borders and ports of entry, and in the issuance of visas is prohibited, pending further orders from this Court.

No security bond is required under Federal Rule of Civil Procedure 65(c).

The Court declines to stay this ruling or hold it in abeyance should an appeal of this order be filed.

IT IS SO ORDERED.

Dated: Oct. 20, 2017 at Honolulu, Hawai'i.

/s/ DERRICK K. WATSON
DERRICK K. WATSON
United States District Judge

**APPENDIX E**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

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Civil No. 17-00050 DKW-KSC

STATE OF HAWAII, ISMAIL ELSHIKH, JOHN DOES 1 & 2, AND MUSLIM ASSOCIATION OF HAWAII, INC., PLAINTIFFS

*v.*

DONALD J. TRUMP, ET AL., DEFENDANTS

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Filed: Oct. 17, 2017

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**ORDER GRANTING MOTION FOR TEMPORARY RESTRAINING ORDER**

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**INTRODUCTION**

Professional athletes mirror the federal government in this respect: they operate within a set of rules, and when one among them forsakes those rules in favor of his own, problems ensue. And so it goes with EO-3.

On June 12, 2017, the Ninth Circuit affirmed this Court's injunction of Sections 2 and 6 of Executive Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017), entitled "Protecting the Nation from Foreign Terrorist Entry into the United States" ("EO-2"). *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017). The Ninth Circuit did so because "the President, in issuing the Executive Order, exceeded the scope of the authority dele-

gated to him by Congress" in 8 U.S.C. § 1182(f). *Hawaii*, 859 F.3d at 755. It further did so because EO-2 "runs afoul of other provisions of the [Immigration and Nationality Act ('INA'), specifically 8 U.S.C. § 1152,] that prohibit nationality-based discrimination." *Hawaii*, 859 F.3d at 756.

Enter EO-3.[1] Ignoring the guidance afforded by the Ninth Circuit that at least this Court is obligated to follow, EO-3 suffers from precisely the same maladies as its predecessor: it lacks sufficient findings that the entry of more than 150 million nationals from six specified countries[2] would be "detrimental to the interests of the United States," a precondition that the Ninth Circuit determined must be satisfied before the Executive may properly invoke Section 1182(f). *Hawaii*, 859 F.3d at 774. And EO-3 plainly discriminates based on nationality in the manner that the Ninth Circuit has found antithetical to both Section 1152(a) and the founding principles of this Nation. *Hawaii*, 859 F.3d at 776-79.

Accordingly, based on the record before it, the Court concludes that Plaintiffs have met their burden of establishing a strong likelihood of success on the merits of their statutory claims, that irreparable injury is likely if the requested relief is not issued, and that the balance of the equities and public interest counsel in favor of granting the requested relief. Plaintiffs' Motion for a

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[1] Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017) [hereinafter EO-3].

[2] EO-3 § 2 actually bars the nationals of *more than* six countries, and does so indefinitely, but only the nationals from six of these countries are at issue here.

Temporary Restraining Order (ECF No. 368) is GRANTED.

## BACKGROUND

### I. The President's Executive Orders

On September 24, 2017, the President signed Proclamation No. 9645, entitled "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public- Safety Threats." Like its two previously enjoined predecessors, EO-3 restricts the entry of foreign nationals from specified countries, but this time, it does so indefinitely. Plaintiffs State of Hawai'i ("State"), Ismail Elshikh, Ph.D., John Doe 1, John Doe 2, and the Muslim Association of Hawaii, Inc., seek a nationwide temporary restraining order ("TRO") that would prohibit Defendants[3] from enforcing and implementing Sections 2(a), (b), (c), (e), (g), and (h) before EO-3 takes effect. Pls.' Mot. for TRO 1, ECF No. 368.[4] The Court briefly recounts the history of the Executive Orders and related litigation.

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[3] Defendants in the instant action are: Donald J. Trump, in his official capacity as President of the United States; the United States Department of Homeland Security ("DHS"); Elaine Duke, in her official capacity as Acting Secretary of DHS; the United States Department of State; Rex Tillerson, in his official capacity as Secretary of State; and the United States of America.

[4] On October 14, 2017, the Court granted Plaintiffs' unopposed Motion for Leave to File Third Amended Complaint (ECF. No. 367), and, on October 15, 2017, Plaintiffs filed their Third Amended Complaint ("TAC"; ECF No. 381).

**A. The Executive Orders and Related Litigation**

On January 27, 2017, the President signed an Executive Order entitled "Protecting the Nation From Foreign Terrorist Entry into the United States." Exec. Order 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) [hereinafter EO-1]. EO-1's stated purpose was to "protect the American people from terrorist attacks by foreign nationals admitted to the United States." *Id.* EO-1 took immediate effect and was challenged in several venues shortly after it issued. On February 3, 2017, a federal district court granted a nationwide TRO enjoining EO-1. *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017). On February 9, 2017, the Ninth Circuit denied the Government's emergency motion for a stay of that injunction. *Washington v. Trump*, 847 F.3d 1151, 1161-64 (9th Cir. 2017) (per curiam), *reconsideration en banc denied*, 853 F.3d 933 (9th Cir. 2017). As described by a subsequent Ninth Circuit panel, "[r]ather than continue with the litigation, the Government filed an unopposed motion to voluntarily dismiss the underlying appeal [of EO-1] after the President signed EO2. On March 8, 2017, this court granted that motion, which substantially ended the story of EO1." *Hawaii*, 859 F.3d at 757.

On March 6, 2017, the President issued EO-2, which was designed to take effect on March 16, 2017. 82 Fed. Reg. 13209 (Mar. 6, 2017). Among other things, EO-2 directed the Secretary of Homeland Security to conduct a global review to determine whether foreign governments provide adequate information about their nationals seeking entry into the United States. *See* EO-2 § 2(a). EO-2 directed the Secretary to report those findings to the President, after which nations identified

as "deficient" would have an opportunity to alter their practices, prior to the Secretary recommending entry restrictions. *Id.* §§ 2(d)-(f).

During this global review, EO-2 contemplated a temporary, 90-day suspension on the entry of certain foreign nationals from six countries—Iran, Libya, Somalia, Sudan, Syria, and Yemen. *Id.* § 2(c). That 90-day suspension was challenged in multiple courts and was preliminarily enjoined by this Court and by a federal district court in Maryland. *See Hawaii v. Trump*, 245 F. Supp. 3d 1227 (D. Haw. 2017)[5]; *Int'l Refugee Assistance Project* ("*IRAP*") *v. Trump*, 241 F. Supp. 3d 539 (D. Md. 2017). Those injunctions were affirmed in relevant part by the respective courts of appeals. *See Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017) (per curiam); *IRAP v. Trump*, 857 F.3d 554 (4th Cir. 2017) (en banc), *as amended* (May 31, 2017). The Supreme Court granted certiorari in both cases and left the injunctions in place pending its review, except as to persons who lacked a "credible claim of a bona fide relationship with a person or entity in the United States." *Trump v. IRAP*, 137 S. Ct. 2080, 2088 (2017).[6]

**B. EO-3**

The President signed EO-3 on September 24, 2017. EO-3's stated policy is to protect United States "citizens from terrorist attacks and other public-safety threats," by preventing "foreign nationals who may . . . pose a

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[5] This Court also enjoined the 120-day suspension on refugee entry under Section 6. *Hawaii v. Trump*, 245 F. Supp. 3d at 1238.

[6] After EO-2's 90-day entry suspension expired, the Supreme Court vacated the *IRAP* injunction as moot. *See Trump v. IRAP*, No. 16-1436, --- S. Ct. ---, 2017 WL 4518553 (Oct. 10, 2017).

safety threat . . . from entering the United States."[7] EO-3 pmbl. EO-3 declares that "[s]creening and vetting protocols and procedures associated with visa adjudications and other immigration processes play a critical role in implementing that policy." EO-3 § 1(a). Further, because "[g]overnments manage the identity and travel documents of their nationals and residents," it is "the policy of the United States to take all necessary and appropriate steps to encourage foreign governments to improve their information-sharing and identity-management protocols and practices and to regularly share identity and threat information with our immigration screening and vetting systems." *Id.* § 1(b).

As a result of the global reviews undertaken by the Secretary of Homeland Security in consultation with the Secretary of State and the Director of National Intelligence, and following a 50-day "engagement period" conducted by the Department of State, the Acting Secretary of Homeland Security submitted a September 15, 2017 report to the President recommending restrictions on the entry of nationals from specified countries. *Id.* § 1(c)-(h). The President found that, "absent the measures set forth in [EO-3], the immigrant and nonimmigrant entry in the United States of persons described in section 2 of [EO-3] would be detrimental to the interests of the United States, and that their entry should be subject to certain restrictions, limitations, and exceptions." EO-3 pmbl.

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[7] EO-3 is founded in Section 2 of EO-2. *See* EO-2 § 2(e) (directing that the Secretary of Homeland Security "shall submit to the President a list of countries recommended for inclusion in a Presidential proclamation that would prohibit the entry of appropriate categories of foreign nationals of [specified] countries").

Section 2 of EO-3 indefinitely bans immigration into the United States by nationals of seven countries: Iran, Libya, Syria, Yemen, Somalia, Chad, and North Korea. EO-3 also imposes restrictions on the issuance of certain nonimmigrant visas to nationals of six of those countries. It bans the issuance of all nonimmigrant visas except student (F and M) and exchange (J) visas to nationals of Iran, and it bans the issuance of business (B-1), tourist (B-2), and business/tourist (B-1/B-2) visas to nationals of Chad, Libya, and Yemen. EO-3 §§ 2(a)(ii), (c)(ii), (g)(ii). EO-3 suspends the issuance of business, tourist, and business-tourist visas to specific Venezuelan government officials and their families, and bars the receipt of nonimmigrant visas by nationals of North Korea and Syria. *Id.* §§ 2(d)(ii), (e)(ii), (f)(ii).

EO-3, like its predecessor, provides for discretionary case-by-case waivers. *Id.* § 3(c). The restrictions on entry became effective immediately for foreign nationals previously restricted under EO-2 and the Supreme Court's stay order, but for all other covered persons, the restrictions become effective on October 18, 2017 at 12:01 a.m. eastern daylight time. EO-3 §§ 7(a), (b).

## II. Plaintiffs' Motion For TRO

Plaintiffs' Third Amended Complaint (ECF No. 381) and Motion for TRO (ECF No. 368) contend that portions of the newest entry ban suffer from the same infirmities as the enjoined provisions of EO-2 § 2.[8] They

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[8] Plaintiffs assert the following causes of action in the TAC: (1) violation of 8 U.S.C. § 1152(a)(1)(a) (Count I); (2) violation of 8 U.S.C. §§ 1182(f) and 1185(a) (Count II); (3) violation of 8 U.S.C. § 1157(a) (Count III); (4) violation of the Establishment Clause of the First Amendment (Count IV); (5) violation of the Free Exercise

note that the President "has never renounced or repudiated his calls for a ban on Muslim immigration." TAC ¶ 88. Plaintiffs observe that, in the time since this Court examined EO-2, the record has only gotten worse. *See* Pls.' Mem. in Supp. 31, ECF. No. 368-1; TAC ¶¶ 84-88.[9]

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Clause of the First Amendment (Count V); (6) violation of the equal protection guarantees of the Fifth Amendment's Due Process Clause on the basis of religion, national origin, nationality, or alienage (Count VI); (7) substantially burdening the exercise of religion in violation of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 200bb-1(a) (Count VII); (8) substantive violation of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 706(2)(A)-(C), through violations of the Constitution, INA, and RFRA (Count VIII); and (9) procedural violation of the APA, 5 U.S.C. § 706(2)(D) (Count IX).

[9] For example, on June 5, 2017, "the President endorsed the 'original Travel Ban' in a series of tweets in which he complained about how the Justice Department had submitted a 'watered down, politically correct version'" to the Supreme Court. TAC ¶ 86 (quoting Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017, 3:29 AM EDT) https://goo.gl/dPiDBu). He further tweeted: "People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!" TAC ¶ 86 (quoting Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017, 3:25 AM EDT), https://goo.gl/9fsD9K). He later added: "That's right, we need a TRAVEL BAN for certain DANGEROUS countries, not some politically correct term that won't help us protect our people!" TAC ¶ 86 (quoting Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017, 6:20 PM EDT), https://goo.gl/VGaJ7z). Plaintiffs also point to "remarks made on the day that EO-3 was released, [in which] the President stated: 'The travel ban: The tougher, the better.'" TAC ¶ 94 (quoting The White House, Office of the Press Sec'y, *Press Gaggle by President Trump, Morristown Municipal Airport, 9/24/2017* (Sept. 24, 2017), https://goo.gl/R8DnJq).

The State asserts that EO-3 inflicts statutory and constitutional injuries upon its residents, employers, and educational institutions, while Dr. Elshikh alleges injuries on behalf of himself, his family, and members of his Mosque. TAC ¶¶ 14-32. Additional Plaintiffs John Doe 1 and John Doe 2 have family members who will not be able to travel to the United States. TAC ¶¶ 33-41. The Muslim Association of Hawaii is a non-profit entity that operates mosques on three islands in the State of Hawai‘i and includes members from Syria, Somalia, Iran, Yemen, and Libya who are naturalized United States citizens or lawful permanent residents. TAC ¶¶ 42-45.

Plaintiffs ask the Court to temporarily enjoin on a nationwide basis the implementation and enforcement of EO-3 Sections 2(a), (b), (c), (e), (g), and (h) before EO-3 takes effect.[10] For the reasons that follow, the Court orders exactly that.

## DISCUSSION

### I. Plaintiffs Satisfy Standing and Justiciability

#### A. Article III Standing

Article III, Section 2 of the Constitution permits federal courts to consider only "cases" and "controversies." *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007). "[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly

[10] Plaintiffs do not seek to enjoin the entry ban with respect to North Korean or Venezuelan nationals. *See* Mem. in Supp. 10 n.4; ECF. No. 368-1.

traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

"At this very preliminary stage of the litigation, the [Plaintiffs] may rely on the allegations in their Complaint and whatever other evidence they submitted in support of their TRO motion to meet their burden." *Washington*, 847 F.3d at 1159 (citing *Lujan*, 504 U.S. at 561).

**1. The State Has Standing**

The State alleges standing based upon injuries to its proprietary and quasi-sovereign interests, *i.e.*, in its role as *parens patriae*. Just as the Ninth Circuit previously concluded in reviewing this Court's order enjoining EO-2, 859 F.3d 741, and a different Ninth Circuit panel found on a similar record in *Washington*, 847 F.3d 1151, the Court finds that the alleged harms to the State's proprietary interests are sufficient to support standing.[11]

The State, as the operator of the University of Hawai'i system, will suffer proprietary injuries stemming

[11] The Court does not reach the State's alternative standing theory based on the protection of the interests of its citizens as *parens patriae*. *See Washington*, 847 F.3d at 1168 n.5 ("The States have asserted other proprietary interests and also presented an alternative standing theory based on their ability to advance the interests of their citizens as *parens patriae*. Because we conclude that the States' proprietary interests as operators of their public universities are sufficient to support standing, we need not reach those arguments.").

from EO-3.[12] The University is an arm of the State. *See* Haw. Const. art. 10, §§ 5, 6; Haw. Rev. Stat. ("HRS") § 304A-103. Plaintiffs allege that EO-3 will hinder the University from recruiting and retaining a world-class faculty and student body. TAC ¶¶ 99-102; Decl. of Donald O. Straney ¶¶ 8-15, ECF. No. 370-6. The University has 20 students from the eight countries designated in EO-3, and has already received five new graduate applications from students in those countries for the Spring 2018 Term. Straney Decl. ¶ 13. It also has multiple faculty members and scholars from the designated countries and uncertainty regarding the entry ban "threatens the University's recruitment, educational programming, and educational mission." Straney Decl. ¶ 8. Indeed, in September 2017, a Syrian journalist scheduled to speak at the University was denied a visa and did not attend a planned lecture, another lecture series planned for November 2017 involving a Syrian national can no longer go forward, and another Syrian journalist offered a scholarship will not likely be able to attend the University if EO-3 is implemented. Decl. of Nandita Sharma ¶¶ 4-9, ECF No. 370-8.

These types of injuries are nearly indistinguishable from those found to support standing in the Ninth Circuit's controlling decisions in *Hawaii* and *Washington*.

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[12] The State has asserted other proprietary interests including the loss of tourism revenue, a leading economic driver in the State. The Court does not reach this alternative argument because it concludes that the State's proprietary interests, as an operator of the University of Hawai'i, are sufficient to confer standing. *See Hawaii*, 859 F.3d at 766 n.6 (concluding that the interests, as an operator of the University of Hawai'i, and its sovereign interests in carrying out its refugee programs and policies, are sufficient to confer standing (citing *Washington*, 847 F.3d at 1161 n.5)).

*See Hawaii*, 859 F.3d at 765 ("The State's standing can thus be grounded in its proprietary interests as an operator of the University. EO2 harms the State's interests because (1) students and faculty suspended from entry are deterred from studying or teaching at the University; and (2) students who are unable to attend the University will not pay tuition or contribute to a diverse student body."); *Washington*, 847 F.3d at 1161 ("The necessary connection can be drawn in at most two logical steps: (1) the Executive Order prevents nationals of seven countries from entering Washington and Minnesota; (2) as a result, some of these people will not enter state universities, some will not join those universities as faculty, some will be prevented from performing research, and some will not be permitted to return if they leave.").

As before, the Court "ha[s] no difficulty concluding that the [Plaintiffs'] injuries would be redressed if they could obtain the relief they ask for: a declaration that the Executive Order violates the [law] and an injunction barring its enforcement." *Washington*, 847 F.3d at 1161. For purposes of the instant Motion for TRO, the State has preliminarily demonstrated that: (1) its universities will suffer monetary damages and intangible harms; (2) such harms can be sufficiently linked to EO-3; and (3) the State would not suffer the harms to its proprietary interests in the absence of implementation of EO-3. Accordingly, at this early stage of the litigation, the State has satisfied the requirements of Article III standing.

**2. The Individual Plaintiffs Have Standing**

The Court next turns to the three individual Plaintiffs and concludes that they too have standing with respect to the INA-based statutory claims.

**a. Dr. Elshikh**

Dr. Elshikh is an American citizen of Egyptian descent and has been a resident of Hawai'i for over a decade. Decl. of Ismail Elshikh ¶ 1, ECF No. 370-9. He is the Imam of the Muslim Association of Hawaii and a leader within the State's Islamic community. Elshikh Decl. ¶ 2. Dr. Elshikh's wife is of Syrian descent, and their young children are American citizens. Dr. Elshikh and his family are Muslim. Elshikh Decl. ¶¶ 1, 3. His Syrian mother-in-law recently received an immigrant visa and, in August 2017, came to Hawai'i to live with his family. Elshikh Decl. ¶ 5. His wife's four brothers are Syrian nationals, currently living in Syria, with plans to visit his family in Hawai'i in March 2018 to celebrate the birthdays of Dr. Elshikh's three sons. Elshikh Decl. ¶ 6. On October 5, 2017, one of his brothers-in-law filed an application for a nonimmigrant visitor visa. Elshikh Decl. ¶ 6. Dr. Elshikh attests that as a result of EO-3, his family will be denied the company of close relatives solely because of their nationality and religion, which denigrates their faith and makes them feel they are second-class citizens in their own country. Elshikh Decl. ¶ 7.

Dr. Elshikh seeks to reunite his family members.

> By suspending the entry of nationals from the [eight] designated countries, including Syria, [EO-3] operates to delay or prevent the issuance

> of visas to nationals from those countries, including Dr. Elshikh's [brother]-in-law. Dr. Elshikh has alleged a concrete harm because [EO-3] . . . is a barrier to reunification with his [brother]-in-law.

*Hawaii*, 859 F.3d at 763. It is also clear that Dr. Elshikh has established causation and redressability. His injuries are fairly traceable to EO-3, satisfying causation, and enjoining EO-3 will remove a barrier to reunification, satisfying redressability. Dr. Elshikh has standing to assert his claims, including statutory INA violations.

**b. <u>John Doe 1</u>**

John Doe 1 is a naturalized United States citizen who was born in Yemen and has lived in Hawai'i for almost 30 years. Decl. of John Doe 1 ¶ 1, ECF No. 370-1. His wife and four children, also United States citizens, are Muslim and members of Dr. Elshikh's mosque. Doe 1 Decl. ¶¶ 2-3. One of his daughters, who presently lives in Hawai'i along with her own child, is married to a Yemeni national who fled the civil war in Yemen and is currently living in Malaysia. Doe 1 Decl. ¶¶ 4-6. In September 2015, his daughter filed a petition to allow Doe 1's son-in-law to immigrate to the United States as the spouse of a United States citizen, and in late June 2017, she learned that her petition had successfully passed through the clearance stage. Doe 1 Decl. ¶¶ 7-9. She has filed a visa application with the National Visa Center and estimates that, under normal visa processing procedures, he would receive a visa within the next three to twelve months. However, in light of EO-3, the issuance of immigrant visas to nationals of Yemen will be effectively barred, which creates uncertainty for the family.

Doe 1 Decl. ¶¶ 9-10. Doe 1's family misses the son-in law and wants him to be able to live in Hawai'i with Doe 1's daughter and grandchild. Doe 1 Decl. ¶¶ 11, 12 ("By singling our family out for special burdens, [EO-3] denigrates us because of our faith and sends a message that Muslims are outsiders and are not welcome in this country.").

Doe 1 alleges a sufficient injury-in-fact. He and his family seek to reunite with his son-in-law and avoid a prolonged separation from him. *See Hawaii*, 859 F.3d at 763 (finding standing sufficient where "Dr. Elshikh seeks to reunite his mother-in-law with his family and similarly experiences prolonged separation from her"); *see also id.* ("This court and the Supreme Court have reviewed the merits of cases brought by U.S. residents with a specific interest in the entry of a foreigner." (collecting authority)). Likewise, Doe 1 satisfies the requirements of causation and redressability. His injuries are fairly traceable to EO-3, and enjoining its implementation will remove a barrier to reunification and redress that injury.

**c. <u>John Doe 2</u>**

John Doe 2 is a lawful permanent resident of the United States, born in Iran, currently living in Hawai'i and working as a professor at the University of Hawai'i. Decl. of John Doe 2 ¶¶ 1-3, ECF. No. 370-2. His mother is an Iranian national with a pending application for a tourist visa, filed several months ago. Doe 2 Decl. ¶ 4. Several other close relatives—also Iranian nationals living in Iran—similarly submitted applications for tourist visas a few months ago and recently had interviews in connection with their applications. They in-

tend to visit Doe 2 in Hawai'i as soon as their applications are approved. Doe 2 Decl. ¶ 5. If implemented, EO-3 will block the issuance of tourist visas from Iran and separate Doe 2 from his close relatives. If EO-3 persists, Doe 2 is less likely to remain in the United States because he will be indefinitely deprived of the company of his family. Doe 2 Decl. ¶ 8. Because his family cannot visit him in the United States, Doe 2's life has been more difficult, and he feels like an outcast in his own country. Doe 2 Decl. ¶ 8.

Like Dr. Elshikh and Doe 1, Doe 2 sufficiently alleges a concrete harm because EO-3 is a barrier to visitation or reunification with his mother and other close relatives. It prolongs his separation from his family members due to their nationality. The final two aspects of Article III standing—causation and redressability— are also satisfied. Doe 2's injuries are traceable to EO-3, and if Plaintiffs prevail, a decision enjoining portions of EO-3 would redress that injury.

**3. The Muslim Association of Hawaii Has Standing**

The Muslim Association of Hawaii is the only formal Muslim organization in Hawai'i and serves 5,000 Muslims statewide. Decl. of Hakim Ouansafi ¶¶ 4-5, ECF. No. 370-1. The Association draws upon new arrivals to Hawai'i to add to its membership and "community of worshippers, including persons immigrating as lawful permanent residents and shorter-term visitors coming to Hawaii for business, professional training, university studies, and tourism." Ouansafi Decl. ¶ 11. Current members of the Association include "foreign-born individuals from Syria, Somalia, Iran, Yemen, and Libya

who are now naturalized U.S. citizens or lawful permanent residents." Ouansafi Decl. ¶ 12. EO-3 will decrease the Association's future membership from the affected countries and deter current members from remaining in Hawai'i. Ouansafi Decl. ¶¶ 13, 18; *see also id.* at ¶ 14 ("EO-3 will deter our current members from remaining . . . because they cannot receive visits from their family members and friends from the affected countries if they do. I personally know of at least one family who made that difficult choice and left Hawaii and I know others who have talked about doing the same.").

According to the Association's Chairman, EO-3 will likely result in a decrease in the Association's membership and in visitors to its mosques, which in turn, will directly harm the Association's finances. Ouansafi Decl. ¶¶ 18-19. Members of the Association have experienced fear and feelings of national-origin discrimination because of the prior and current entry bans. Ouansafi Decl. ¶¶ 21-22 ("That fear has led to, by way of example, children wanting to change their Muslim names and parents wanting their children not to wear head coverings to avoid being victims of violence. Some of our young people have said they want to change their names because they are afraid to be Muslims. There is real fear within our community especially among our children and American Muslims who were born outside the United States."); *id.* ¶ 23 ("Especially because it is permanent, EO-3 has—even more so than its predecessor bans—caused tremendous fear, anxiety, and grief for our members.").

The Association, by its Chairman Hakim Oaunsafi, has sufficiently demonstrated standing in its own right,

at this stage. *See Warth v. Seldin*, 422 U.S. 490, 511 (1975) ("[A]n association may have standing [to sue] "in its own right . . . to vindicate whatever rights and immunities the association itself may enjoy[, and in doing so,] [m]ay assert the rights of its members, at least so long as the challenged infractions adversely affect its members' associational ties." (citations omitted)). In order to establish organizational standing, the Association must "meet the same standing test that applies to individuals." *Envtl. Prot. Info. Ctr. v. Pac. Lumber Co.*, 469 F. Supp. 2d 803, 813 (N.D. Cal. 2007) (citation omitted). The Association satisfies the injury-in-fact requirement. It alleges a "concrete and demonstrable injury to the organization's activities— with a consequent drain on the organization's resources—constituting more than simply a setback to the organization's abstract social interests." *Envtl. Prot. Info. Ctr.*, 469 F. Supp. 2d at 813 (quoting *Common Cause v. Fed. Election Comm'n*, 108 F.3d 413, 417 (D.C. Cir. 1997)). The Association further satisfies the causation and redressability prongs. *See* Ouansafi Decl. ¶¶ 18-22.

Having determined that Plaintiffs each satisfy Article III's standing requirements, the Court turns to whether Plaintiffs are within the "zone of interests" protected by the INA.

**B. Statutory Standing**

Because Plaintiffs allege statutory claims based on the INA, the Court examines whether they meet the requirement of having stakes that "fall within the zone of interests protected by the law invoked." *Hawaii*, 859 F.3d at 766 (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014)).

Like the Ninth Circuit, this Court has little trouble determining that Dr. Elshikh, Doe 1 and Doe 2 do so. *Hawaii*, 859 F.3d at 766. Each sufficiently asserts that EO-3 prevents them from reuniting with close family members. *See Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State, Bureau of Consular Affairs*, 45 F.3d 469, 471-72 (D.C. Cir. 1995) ("In originally enacting the INA, Congress implemented the underlying intention of our immigration laws regarding the preservation of the family unit. Given the nature and purpose of the statute, the resident appellants fall well within the zone of interest Congress intended to protect." (citations, alterations, and internal quotation marks omitted)), *vacated on other grounds*, 519 U.S. 1 (1996). Similarly, the Association and its members are "at least *arguably* with in the zone of interests that the INA protects." *See Hawaii*, 859 F.3d at 767 (quoting *Bank of Am. Corp. v. City of Miami, Fla.*, 137 S. Ct. 1296, 1303 (2017)). The Association's interest in facilitating the religious practices of its members "to visit each other to connect [and] for the upholding of kinship ties," which are negatively impacted by EO-3, Ouansafi Decl. ¶ 10, and its interest in preventing harm to members who "cannot receive visits from family members from the affected countries," Ouansafi Decl. ¶ 15, fall within the same zone of interests.

Equally important, "the State's efforts to enroll students and hire faculty members who are nationals from [the list of] designated countries fall within the zone of interests of the INA." *Hawaii*, 859 F.3d at 766 (citing relevant INA provisions relating to nonimmigrant students, teachers, scholars, and aliens with extraordinary abilities). Thus, the "INA leaves no doubt that the State's interests in student- and employment-based visa

petitions for its students and faculty are related to the basic purposes of the INA." *Hawaii*, 859 F.3d at 766.

In sum, Plaintiffs fall within the zone of interests and have standing to challenge EO-3 based on their INA claims.

**C. Ripeness**

Plaintiffs' claims are also ripe for review. "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985)). The Government advances that assertion here because none of the aliens abroad identified by Plaintiffs has yet been refused a visa based on EO-3. Mem. in Opp'n 14-15, ECF No. 378.

The Government's premise is not true. Plaintiffs allege current, concrete injuries to themselves and their close family members, injuries that have already occurred and that will continue to occur once EO-3 is fully implemented and enforced.[13] Moreover, the Ninth Circuit has previously rejected materially identical ripeness contentions asserted by the Government. *Hawaii*, 859 F.3d at 767-68 ("declin[ing] the Government's invitation to wait until Plaintiffs identify a visa applicant who was denied a discretionary waiver," and instead, "conclud[ing] that the claim is ripe for review").

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[13] *See, e.g.*, Sharma Decl. ¶¶ 4-9, ECF No. 370-8 (describing denial of visa to Syrian journalist and cancellation of University lecture since signing of EO-3).

Plaintiffs' INA-based statutory claims are therefore ripe for review on the merits.

**D. Justiciability**

Notwithstanding the Ninth Circuit's recent rulings to the contrary, the Government persists in its contention that Plaintiffs' statutory claims are not reviewable. "[C]ourts may not second-guess the political branches' decisions to exclude aliens abroad where Congress has not authorized review, which it has not done here." Mem. in Opp'n 4. In doing so, the Government again invokes the doctrine of consular nonreviewability in an effort to circumvent judicial review of seemingly any Executive action denying entry to an alien abroad. *See* Mem. in Opp'n 12-13 (citing *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950); *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999)).

The Government's contentions are troubling. Not only do they ask this Court to overlook binding precedent issued in the specific context of the various executive immigration orders authored since the beginning of 2017, but they ask this Court to ignore its fundamental responsibility to ensure the legality and constitutionality of EO-3. Following the Ninth Circuit's lead, this Court declined such an invitation before and does so again. *See Washington*, 847 F.3d at 1163 (explaining that courts are empowered to review statutory and constitutional "challenges to the substance and implementation of immigration policy" (quoting *Alperin v. Vatican Bank*, 410 F.3d 532, 559 n.17 (9th Cir. 2005)); *Hawaii*, 859 F.3d 768-69 ("We reject the Government's argument that [EO-2] is not subject to judicial review. Although '[t]he Executive has broad discretion over the admission and exclusion of aliens, [] that discretion is

not boundless. It extends only as far as the statutory authority conferred by Congress and may not transgress constitutional limitations. It is the duty of the courts, in cases properly before them, to say where those statutory and constitutional boundaries lie.'" (quoting *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987)).

Because Plaintiffs have standing and present a justiciable controversy, the Court turns to the merits of the Motion for TRO.

## II. Legal Standard: Preliminary Injunctive Relief

The underlying purpose of a TRO is to preserve the status quo and prevent irreparable harm before a preliminary injunction hearing is held. *Granny Goose Foods*, 415 U.S. 423, 439 (1974); *see also Reno Air Racing Ass'n v. McCord*, 452 F.3d 1126, 1130-31 (9th Cir. 2006).

The standard for issuing a temporary restraining order is substantially identical to the standard for issuing a preliminary injunction. *See Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). A "plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (citation omitted).

For the reasons that follow, Plaintiffs have met this burden here.

## III. Analysis of TRO Factors: Likelihood of Success on the Merits

Following the Ninth Circuit's direction, the Court begins with Plaintiffs' statutory claims. *Hawaii*, 859 F.3d at 761. Finding that Plaintiffs are likely to prevail on the merits because EO-3 violates multiple provisions of the INA, the Court declines to reach the constitutional claims alternatively relied on by Plaintiffs.

### A. Plaintiffs Are Likely to Succeed on the Merits of Their Section 1182(f) and 1185(a) Claims

EO-3 indefinitely suspends the entry of nationals from countries the President and Acting Secretary of Homeland Security identified as having "inadequate identity-management protocols, information sharing practices, and risk factors." EO-3 § 1(g). As discussed herein, because EO-3's findings are inconsistent with and do not fit the restrictions that the order actually imposes, and because EO-3 improperly uses nationality as a proxy for risk, Plaintiffs are likely to prevail on the merits of their statutory claims.

Section 1182(f) provides, in relevant part—

> 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.

8 U.S.C. § 1182(f). Section 1185(a)(1) similarly provides that "[u]nless otherwise ordered by the President,

it shall be unlawful for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe." 8 U.S.C. § 1185(a)(1).

Under the law of this Circuit, these provisions do not afford the President unbridled discretion to do as he pleases. An Executive Order promulgated pursuant to INA Sections 1182(f) and 1185(a) "requires that the President *find* that the entry of a class of aliens into the United States *would be detrimental* to the interests of the United States." *Hawaii*, 859 F.3d at 770. Further, the INA "*requires* that the President's *findings support the conclusion* that entry of all nationals from the [list of] designated countries . . . would be harmful to the national interest."[14] *Id.* (emphasis added) (footnote omitted); *see also id.* at 783 ("the President must exercise his authority under § 1182(f) lawfully by

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[14] The Government insists that, consistent with historical practice, the President may "restrict[] entry pursuant to §§ 1182(f) and 1185(a)(1) without detailed public justifications or findings," citing to prior Executive Orders that "have discussed the President's rationale in one or two sentences." Mem. in Opp'n 20-21 (citing Exec. Order No. 12,807, pmbl. pt. 4, 57 Fed. Reg. 23133 (May 24, 1992); Exec. Order No. 12,172, § 1-101, 44 Fed. Reg. 67947 (Nov. 26, 1979)). Its argument is misplaced. The Government both ignores the plain language of Section 1182 and infers the absence of a prerequisite from historical orders that were not evidently challenged on that basis. Its examples therefore have little force. By contrast, plainly aware of these historical orders, *see Hawaii*, 859 F.3d at 779, the Ninth Circuit has held otherwise, *e.g.*, *id.* at 772-73 (explaining that Section 1182(f) requires the President to "provide a rationale explaining why permitting entry of nationals from the six designated countries . . . would be detrimental to the interests of the United States").

making sufficient findings justifying that entry of certain classes of aliens would be detrimental to the national interest"); *id.* at 770 n.11 (defining "detrimental" as "causing loss or damage, harmful, injurious, hurtful"). While EO-3 certainly contains findings, they fall short of the Ninth Circuit's articulated standards for several reasons.

First, EO-3, like its predecessor, makes "no finding that nationality *alone* renders entry of this broad class of individuals a heightened security risk to the United States." *Hawaii*, 859 F.3d at 772 (emphasis added) (citation omitted). EO-3 "does not tie these nationals in any way to terrorist organizations within the six designated countries," find them "responsible for insecure country conditions," or provide "any link between an individual's nationality and their propensity to commit terrorism or their inherent dangerousness."[15] *Id.* at 772.

The generalized findings regarding each country's performance, *see* EO-3 §§ 1(d)-(f), do not support the vast scope of EO-3—in other words, the categorical restrictions on entire populations of men, women, and children, based upon nationality, are a poor fit for the issues regarding the sharing of "public-safety and terrorism-

[15] In fact, "the only concrete evidence to emerge from the Administration on this point to date has shown just the opposite—that country-based bans are ineffective. A leaked DHS Office of Intelligence and Analysis memorandum analyzing the ban in EO-1 found that 'country of citizenship is unlikely to be a reliable indicator of potential terrorist activity.'" Joint Decl. of Former Nat'l Sec. Officials ¶ 10, ECF. 383-1 (quoting *Citizenship Likely an Unreliable Indicator of Terrorist Threat to the United States*, *available at* https://assets.documentcloud.org/documents/3474730/DHS- intelligence-document-on-President-Donald.pdf).

related information" that the President identifies. *See* EO-3 §§ 2(a)(i), (c)(i), (e)(i), (g)(i). Indeed, as the Ninth Circuit already explained with respect to EO-2 in words that are no less applicable here, the Government's "use of nationality as the sole basis for suspending entry means that nationals without significant ties to the six designated countries, such as those who left as children or those whose nationality is based on parentage alone," are suspended from entry. *Hawaii*, 859 F.3d at 773. "Yet, nationals of *other* countries who do have meaningful ties to the six designated countries—[and whom the designated countries may or may not have useful threat information about]—fall outside the scope of [the entry restrictions]." *Id.* (emphasis added). This leads to absurd results. EO-3 is simultaneously overbroad *and* underinclusive. *See id.*

Second, EO-3 does not reveal why existing law is insufficient to address the President's described concerns. As the Ninth Circuit previously explained with respect to EO-2, "[a]s the law stands, a visa applicant bears the burden of showing that the applicant is eligible to receive a visa . . . and is not inadmissible." *Hawaii,* 859 F.3d at 773 (citing 8 U.S.C. § 1361). "The Government already can exclude individuals who do not meet that burden" on the basis of many criteria, including safety and security. Because EO-2 did not find that such "current screening processes are inadequate," the Ninth Circuit determined that the President's findings offered an insufficient basis to conclude that the "individualized adjudication process is flawed such that permitting entry of an entire class of nationals is injurious to the interests of the United States." *Id.* at 773. The Ninth Circuit's analysis applies no less to EO-3, where the "findings" cited in Section 1(h) and (i) similarly omit

any explanation of the inadequacy of individual vetting sufficient to justify the categorical, nationality-based ban chosen by the Executive.

Third, EO-3 contains internal incoherencies that markedly undermine its stated "national security" rationale.[16] Numerous countries fail to meet one or more of the global baseline criteria described in EO-3, yet are not included in the ban. For example, the President finds that Iraq fails the "baseline" security assessment but then omits Iraq from the ban for policy reasons. EO-3 § 1(g) (subjecting Iraq to "additional scrutiny" in lieu of the ban, citing diplomatic ties, positive working relationship, and "Iraq's commitment to combating the Islamic State"). Similarly, after failing to meet the information-sharing baseline, Venezuela also received a pass, other than with respect to certain Venezuelan government officials. EO-3 § 2(f). On the other end, despite meeting the information-sharing baseline that Venezuela failed, Somalia and its nationals were rewarded by being included in the ban. EO-3 § 2(h).

Moreover, EO-3's individualized country findings make no effort to explain why some *types* of visitors from a particular country are banned, while others are not. *See, e.g.*, EO-3 §§ 2(c) (describing Libya as having

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[16] As an initial matter, the explanation for how the Administration settled on the list of eight countries is obscured. For example, Section 1 describes 47 countries that Administration officials identified as having an "inadequate" or "at risk" baseline performance, EO-3 §§ 1(e)-(f), but does not detail how the President settled on the eight countries actually subject to the ban in Section 2—the majority of which carried over from EO-2. While the September 15, 2017 DHS report cited in EO-3 might offer some insight, the Government objected (ECF. No. 376) to the Court's consideration or even viewing of that classified report, making it impossible to know.

"significant inadequacies in its identity-management protocols" and therefore deserving of a ban on all tourist and business visitors, but without discussing why student visitors did not meet the same fate); *id.* § 2(g) (describing the same for Yemen); *cf. id.* § 2(b) (describing Iran as "a state sponsor of terrorism," which "regularly fails to cooperate with the United States Government in identifying security risks [and] is the source of significant terrorist threats," yet allowing "entry by [Iranian] nationals under valid student (F and M) and exchange visitor (J) visas").[17] The nature and scope of these types of inconsistencies and unexplained findings cannot lawfully justify an exercise of Section 1182(f) authority, particularly one of indefinite duration. *See Hawaii*, 859 F.3d at 772-73 (proper exercise of Section 1182(f) authority must "provide a rationale" and "bridge the gap" between the findings and ultimate restrictions).

EO-3's scope and provisions also contradict its stated rationale. As noted above, many of EO-3's structural provisions are unsupported by verifiable evidence, undermining any claim that its findings "support the conclusion" to categorically ban the entry of millions.[18] *Cf.*

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[17] *See also* Joint Decl. of Former Nat'l Sec. Officials ¶ 12 ("[A]lthough for some of the countries, the Ban applies only to certain non-immigrant visas, together those visas are far and away the most frequently used non-immigrant visas from these nations.").

[18] For example, although the order claims a purpose "to protect [United States] citizens from terrorist attacks," EO-3 § 1(a), "the Ban targets a list of countries whose nationals have committed no deadly terrorist attacks on U.S. soil in the last forty years." Joint Decl. of Former Nat'l Sec. Officials ¶ 11 (citing Alex Nowrasteh, *President Trump's New Travel Executive Order Has Little National Security Justification*, Cato Institute: Cato at Liberty, September 25, 2017).

*Hawaii*, 859 F.3d at 770. EO-3's aspirational justifications—*e.g.*, fostering a "willingness to cooperate and play a substantial role in combatting terrorism" and encouraging additional information- sharing—are no more satisfying. EO-3 § 1(h)(3); *see also* Mem. in Opp'n 22-23 ("The utility of entry restrictions as a foreign-policy tool is confirmed by the results of the diplomatic engagement period described in [EO-3] . . . These foreign-relations efforts independently justify [EO-3] and yet they are almost wholly ignored by Plaintiffs."). However laudatory they may be, these foreign policy goals do not satisfy Section 1182(f)'s requirement that the President actually "find" that the "entry of any aliens" into the United States "*would be detrimental*" to the interests of the United States, and are thus an insufficient basis on which to invoke his Section 1182(f) authority.

The Government reads in Sections 1182(f) and 1185(a) a grant of limitless power and absolute discretion to the President, and cautions that it would "be inappropriate for this Court to second-guess" the "Executive Branch's national-security judgements," Mem. in Opp'n 22, or to engage in "unwarranted judicial interference in the conduct of foreign policy," Mem. in Opp'n 23 (quoting *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 115-16 (2013)). The Government counsels that deference is historically afforded the President in the core areas of national security and foreign relations, "which involve delicate balancing in the face of ever-changing circumstances, such that the Executive must be permitted to act quickly and flexibly." Mem. in Opp'n 28 (citing *Zemel v. Rusk*, 381 U.S. 1, 17 (1965); *Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 348 (2005)).

These concerns are not insignificant. There is no dispute that national security is an important objective and that errors could have serious consequences. Yet, "[n]ational security is not a 'talismanic incantation' that, once invoked, can support any and all exercise of executive power under § 1182(f)." *Hawaii*, 859 F.3d at 774 (citation omitted). The Ninth Circuit itself rejected the Government's arguments that it is somehow injured "by nature of the judiciary limiting the President's authority." *Id.* at 783 n.22 (quoting *United States v. Robel*, 389 U.S. 258, 264 (1967) ("[The] concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of . . . power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart.")).

The actions taken by the President in the challenged sections of EO-3 require him to "first [] make sufficient findings that the entry of nationals from the six designated countries . . . would be detrimental to the interests of the United States." *Hawaii*, 859 F.3d at 776. Because the President has not satisfied this precondition in the manner described by the Ninth Circuit before exercising his delegated authority, Plaintiffs have demonstrated a likelihood of success on the merits of their claim that the President exceeded his authority under Sections 1182(f) and 1185(a).

**B. Plaintiffs Are Likely to Succeed on the Merits of Their Section 1152(a) Claim**

It is equally clear that Plaintiffs are likely to prevail on their claim that EO-3 violates the INA's prohibition on nationality-based discrimination with respect to the issuance of immigrant visas. Section 1152(a)(1)(A)

provides that "[e]xcept as specifically provided" in certain subsections not applicable here, "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."

By indefinitely and categorically suspending immigration from the six countries challenged by Plaintiffs,[19] EO-3 attempts to do exactly what Section 1152 prohibits. EO-3, like its predecessor, thus "runs afoul" of the INA provision "that prohibit[s] nationality-based discrimination" in the issuance of immigrant visas. *Hawaii*, 859 F.3d at 756.

For its part, the Government contends that Section 1152 cannot restrict the President's Section 1182(f) authority because "the statutes operate in two different spheres." "Sections 1182(f) and 1185(a)(1), along with other grounds in Section 1182(a), limit the universe of individuals eligible to receive visas, and then § 1152(a)(1)(A) prohibits discrimination on the basis of nationality *within* that universe of eligible individuals." Mem. in Opp'n 29.

In making this argument, however, the Government completely ignores *Hawaii*. *See* Mem. in Opp'n 29-32. In *Hawaii*, the Ninth Circuit reached the opposite conclusion: Section "1152(a)(1)(A)'s non-discrimination mandate cabins the President's authority under

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[19] EO-3 § 2(a)(ii) ("The entry into the United States of nationals of Chad, as immigrants . . . is hereby suspended."); *id.* §§ 2(b)(ii) (dictating the same for Iran), (c)(ii) (Libya), (e)(ii) (Syria), (g)(ii) (Yemen), (h)(ii) (Somalia).

§ 1182(f) [based on several] canons of statutory construction" and that "in suspending the issuance of immigrant visas and denying entry based on nationality, [EO-2] exceeds the restriction of § 1152(a)(1)(A) and the overall statutory scheme intended by Congress." *Hawaii*, 859 F.3d at 778-79. Although asserted now with respect to EO-3, the Government's position untenably contradicts the Ninth's Circuit's holding.

In short, EO-3 plainly violates Section 1152(a) by singling out immigrant visa applicants seeking entry to the United States on the basis of nationality. Having considered the scope of the President's authority under Section 1182(f) and the non-discrimination requirement of Section 1152(a)(1)(A), the Court determines that Plaintiffs have shown a likelihood of success on the merits of their claim that EO-3 "exceeds the restriction of Section 1152(a)(1)(A) and the overall statutory scheme intended by Congress."[20] *Hawaii*, 859 F.3d at 779.

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[20] The Court finds that Plaintiffs have shown a likelihood of success on the merits of their claim that EO-3 violates Section 1152(a), *but only as to the issuance of immigrant visas*. To the extent Plaintiffs ask the Court to enjoin EO-3's "nationality-based restrictions . . . in their entirety," as violative of Section 1152(a)(1)(A), Mem. in Supp. 16-17, the Court declines to do so. *See* Mem. in Supp. 16-17; *see also Hawaii*, 859 F.3d 779 (applying holding to immigrant visas). Such an extension is not consistent with the face of Section 1152. Moreover, the primary case relied upon by Plaintiffs, *Olsen v. Albright*, 990 F. Supp. 31 (D.D.C. 1997), does not support extending the plain text of the statute to encompass nonimmigrant visas. First, *Olsen*'s statutory analysis is thin —beyond reciting the text of Section 1152(a), which specifically references only "immigrant visas"—the order does not parse the text of Section 1152(a)(1)(A) or acknowledge the distinction between immigrant and nonimmigrant visas. 990 F. Supp. at 37-39. Second, *Olsen* is factually distinct,

## IV. Analysis of TRO Factors: Irreparable Harm

Plaintiffs identify a multitude of harms that are not compensable with monetary damages and that are irreparable—among them, prolonged separation from family members, constraints to recruiting and retaining students and faculty members to foster diversity and quality within the University community, and the diminished membership of the Association, which impacts the vibrancy of its religious practices and instills fear among its members. *See, e.g.*, *Hawaii*, 859 F.3d at 782-83 (characterizing similar harms to many of the same actors); *Washington*, 847 F.3d at 1169 (identifying harms such as those to public university employees and students, separated families, and stranded residents abroad); *Regents of Univ. of Cal. v. Am. Broad. Cos., Inc.*, 747 F.2d 511, 520 (9th Cir. 1984) (crediting intangible harms such as the "impairment of their ongoing recruitment programs [and] the dissipation of alumni and community goodwill and support garnered over the years"). The Court finds that Plaintiffs have made a sufficient showing of such irreparable harm in the absence of preliminary relief.

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involving review of a grievance board's decision to uphold a foreign service officer's termination because he refused to strictly adhere to a local consular-level policy of determining which visa applicants received interviews based upon "fraud profiles" and to "adjudicate [nonimmigrant] visas on the basis of the applicant's race, ethnicity, national origin, economic class, and physical appearance." *Id.* at 33. The district court in *Olsen* found that the grievance board erred by failing to "address the question of the Consulate's visa policies when it reviewed Plaintiff's termination," and remanded the matter for reconsideration of its decision. *Id.* Thus, the Court does not find its analysis to be particularly relevant or persuasive.

Defendants, on the other hand, are not likely harmed by having to adhere to immigration procedures that have been in place for years—that is, by maintaining the status quo. *See Washington*, 847 F.3d at 1168.

## V. Analysis of TRO Factors: The Balance of Equities and Public Interest Weigh in Favor of Granting Emergency Relief

The final step in determining whether to grant the Plaintiffs' Motion for TRO is to assess the balance of equities and examine the general public interests that will be affected. Here, the substantial controversy surrounding this Executive Order, like its predecessors, illustrates that important public interests are implicated by each party's positions. *See Washington*, 847 F.3d at 1169. The Ninth Circuit has recognized that Plaintiffs and the public have a vested interest in the "free flow of travel, in avoiding separation of families, and in freedom from discrimination." *Washington*, 847 F.3d at 1169-70.

National security and the protection of our borders is unquestionably also of significant public interest. *See Haig v. Agee*, 453 U.S. 280, 307 (1981). Although national security interests are legitimate objectives of the highest order, they cannot justify the public's harms when the President has wielded his authority unlawfully. *See Hawaii*, 859 F.3d at 783.

In carefully weighing the harms, the equities tip in Plaintiffs' favor. "The public interest is served by 'curtailing unlawful executive action.'" *Hawaii*, 859 F.3d at 784 (quoting *Texas v. United States*, 809 F.3d 134, 187 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016)). When considered alongside the

statutory injuries and harms discussed above, the balance of equities and public interests justify granting the Plaintiffs' TRO.

Nationwide relief is appropriate in light of the likelihood of success on Plaintiffs' INA claims. *See Washington*, 847 F.3d at 1166-67 (citing *Texas*, 809 F.3d at 187-88); *see also Hawaii*, 859 F.3d at 788 (finding no abuse of discretion in enjoining on a nationwide basis Sections 2(c) and 6 of EO-2, "which in all applications would violate provisions of the INA").

**CONCLUSION**

Plaintiffs have satisfied all four *Winter* factors, warranting entry of preliminary injunctive relief. Based on the foregoing, Plaintiffs' Motion for TRO (ECF No. 368) is hereby GRANTED.

**TEMPORARY RESTRAINING ORDER**

It is hereby ADJUDGED, ORDERED, and DECREED that:

Defendant ELAINE DUKE, in her official capacity as Acting Secretary of Homeland Security; REX W. TILLERSON, in his official capacity as Secretary of State; and all their respective officers, agents, servants, employees, and attorneys, and persons in active concert or participation with them who receive actual notice of this Order, hereby are enjoined fully from enforcing or implementing Sections 2(a), (b), (c), (e), (g), and (h) of the Proclamation issued on September 24, 2017, entitled "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats" across the Nation. Enforcement of these provisions in all places, including the United States, at all United States borders

and ports of entry, and in the issuance of visas is prohibited, pending further orders from this Court.

No security bond is required under Federal Rule of Civil Procedure 65(c).

Pursuant to Federal Rule of Civil Procedure 65(b)(2), the Court intends to set an expedited hearing to determine whether this Temporary Restraining Order should be extended. The parties shall submit a stipulated briefing and hearing schedule for the Court's approval forthwith, or promptly indicate whether they jointly consent to the conversion of this Temporary Restraining Order to a Preliminary Injunction without the need for additional briefing or a hearing.

The Court declines to stay this ruling or hold it in abeyance should an emergency appeal of this order be filed.

IT IS SO ORDERED.

Dated: Oct. 17, 2017 at Honolulu, Hawai'i.

/s/ DERRICK K. WATSON
DERRICK K. WATSON
United States District Judge

## APPENDIX F

1. U.S. Const. Amend. I provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. 8 U.S.C. 1152(a) provides:

**Numerical limitations on individual foreign states**

**(a) Per country level**

**(1) Nondiscrimination**

(A) Except as specifically provided in paragraph (2) and in sections 1101(a)(27), 1151(b)(2)(A)(i), and 1153 of this title, 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.

(B) Nothing in this paragraph shall be construed to limit the authority of the Secretary of State to determine the procedures for the processing of immigrant visa applications or the locations where such applications will be processed.

**(2) Per country levels for family-sponsored and employment-based immigrants**

Subject to paragraphs (3), (4), and (5), the total number of immigrant visas made available to natives

of any single foreign state or dependent area under subsections (a) and (b) of section 1153 of this title in any fiscal year may not exceed 7 percent (in the case of a single foreign state) or 2 percent (in the case of a dependent area) of the total number of such visas made available under such subsections in that fiscal year.

**(3) Exception if additional visas available**

If because of the application of paragraph (2) with respect to one or more foreign states or dependent areas, the total number of visas available under both subsections (a) and (b) of section 1153 of this title for a calendar quarter exceeds the number of qualified immigrants who otherwise may be issued such a visa, paragraph (2) shall not apply to visas made available to such states or areas during the remainder of such calendar quarter.

**(4) Special rules for spouses and children of lawful permanent resident aliens**

**(A) 75 percent of 2nd preference set-aside for spouses and children not subject to per country limitation**

**(i) In general**

Of the visa numbers made available under section 1153(a) of this title to immigrants described in section 1153(a)(2)(A) of this title in any fiscal year, 75 percent of the 2-A floor (as defined in clause (ii)) shall be issued without regard to the numerical limitation under paragraph (2).

**(ii) "2-A floor" defined**

In this paragraph, the term "2-A floor" means, for a fiscal year, 77 percent of the total number of visas made available under section 1153(a) of this title to immigrants described in section 1153(a)(2) of this title in the fiscal year.

**(B) Treatment of remaining 25 percent for countries subject to subsection (e)**

**(i) In general**

Of the visa numbers made available under section 1153(a) of this title to immigrants described in section 1153(a)(2)(A) of this title in any fiscal year, the remaining 25 percent of the 2-A floor shall be available in the case of a state or area that is subject to subsection (e) only to the extent that the total number of visas issued in accordance with subparagraph (A) to natives of the foreign state or area is less than the subsection (e) ceiling (as defined in clause (ii)).

**(ii) "Subsection (e) ceiling" defined**

In clause (i), the term "subsection (e) ceiling" means, for a foreign state or dependent area, 77 percent of the maximum number of visas that may be made available under section 1153(a) of this title to immigrants who are natives of the state or area under section 1153(a)(2) of this title consistent with subsection (e).

**(C) Treatment of unmarried sons and daughters in countries subject to subsection (e)**

In the case of a foreign state or dependent area to which subsection (e) applies, the number of immigrant visas that may be made available to natives of the state or area under section 1153(a)(2)(B) of this title may not exceed—

(i) 23 percent of the maximum number of visas that may be made available under section 1153(a) of this title to immigrants of the state or area described in section 1153(a)(2) of this title consistent with subsection (e), or

(ii) the number (if any) by which the maximum number of visas that may be made available under section 1153(a) of this title to immigrants of the state or area described in section 1153(a)(2) of this title consistent with subsection (e) exceeds the number of visas issued under section 1153(a)(2)(A) of this title,

whichever is greater.

**(D) Limiting pass down for certain countries subject to subsection (e)**

In the case of a foreign state or dependent area to which subsection (e) applies, if the total number of visas issued under section 1153(a)(2) of this title exceeds the maximum number of visas that may be made available to immigrants of the state or area under section 1153(a)(2) of this title consistent with subsection (e) (determined without regard to this paragraph), in applying paragraphs (3) and (4) of section 1153(a) of this title under subsection (e)(2) all visas shall be deemed to have been

required for the classes specified in paragraphs (1) and (2) of such section.

**(5) Rules for employment-based immigrants**

**(A) Employment-based immigrants not subject to per country limitation if additional visas available**

If the total number of visas available under paragraph (1), (2), (3), (4), or (5) of section 1153(b) of this title for a calendar quarter exceeds the number of qualified immigrants who may otherwise be issued such visas, the visas made available under that paragraph shall be issued without regard to the numerical limitation under paragraph (2) of this subsection during the remainder of the calendar quarter.

**(B) Limiting fall across for certain countries subject to subsection (e)**

In the case of a foreign state or dependent area to which subsection (e) applies, if the total number of visas issued under section 1153(b) of this title exceeds the maximum number of visas that may be made available to immigrants of the state or area under section 1153(b) of this title consistent with subsection (e) (determined without regard to this paragraph), in applying subsection (e) all visas shall be deemed to have been required for the classes of aliens specified in section 1153(b) of this title.

3. 8 U.S.C. 1182 provides in pertinent part:

**Inadmissible aliens**

**(a) Classes of aliens ineligible for visas or admission**

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * * * *

**(3) Security and related grounds**

* * * * *

**(B) Terrorist activities**

**(i) In general**

Any alien who—

(I) has engaged in a terrorist activity;

(II) a consular officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity (as defined in clause (iv));

(III) has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity;

(IV) is a representative (as defined in clause (v)) of—

(aa) a terrorist organization (as defined in clause (vi)); or

(bb) a political, social, or other group that endorses or espouses terrorist activity;

(V) is a member of a terrorist organization described in subclause (I) or (II) of clause (vi);

(VI) is a member of a terrorist organization described in clause (vi)(III), unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization;

(VII) endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization;

(VIII) has received military-type training (as defined in section 2339D(c)(1) of title 18) from or on behalf of any organization that, at the time the training was received, was a terrorist organization (as defined in clause (vi)); or

(IX) is the spouse or child of an alien who is inadmissible under this subparagraph, if the activity causing the alien to be found inadmissible occurred within the last 5 years,

is inadmissible. An alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered, for purposes of this chapter, to be engaged in a terrorist activity.

**(ii) Exception**

Subclause (IX) of clause (i) does not apply to a spouse or child—

(I) who did not know or should not reasonably have known of the activity causing the alien to be found inadmissible under this section; or

(II) whom the consular officer or Attorney General has reasonable grounds to believe has renounced the activity causing the alien to be found inadmissible under this section.

**(iii) "Terrorist activity" defined**

As used in this chapter, the term "terrorist activity" means any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

(I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18) or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any—

(a) biological agent, chemical agent, or nuclear weapon or device, or

(b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain),

with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

**(iv) "Engage in terrorist activity" defined**

As used in this chapter, the term "engage in terrorist activity" means, in an individual capacity or as a member of an organization—

(I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;

(II) to prepare or plan a terrorist activity;

(III) to gather information on potential targets for terrorist activity;

(IV) to solicit funds or other things of value for—

(aa) a terrorist activity;

(bb) a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization;

(V) to solicit any individual—

(aa) to engage in conduct otherwise described in this subsection;

(bb) for membership in a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) for membership in a terrorist organization described in clause (vi)(III) unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization; or

(VI) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training—

(aa) for the commission of a terrorist activity;

(bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity;

(cc) to a terrorist organization described in subclause (I) or (II) of clause (vi) or to any member of such an organization; or

(dd) to a terrorist organization described in clause (vi)(III), or to any member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.

**(v) "Representative" defined**

As used in this paragraph, the term "representative" includes an officer, official, or spokesman of an organization, and any person who directs, counsels, commands, or induces an organization or its members to engage in terrorist activity.

**(vi) "Terrorist organization" defined**

As used in this section, the term "terrorist organization" means an organization—

(I) designated under section 1189 of this title;

(II) otherwise designated, upon publication in the Federal Register, by the Secretary of State in consultation with or upon the request of the Attorney General or the Secretary of Homeland Security, as a terrorist organization, after finding that the organization engages in the activities described in subclauses (I) through (VI) of clause (iv); or

(III) that is a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in subclauses (I) through (VI) of clause (iv).

* * * * *

**(f) Suspension of entry or imposition of restrictions by President**

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. Whenever the Attorney General finds that a commercial airline has failed to comply with regulations of the Attorney General relating to requirements of airlines for the detection of fraudulent documents used by passengers traveling to the United States (including the training of personnel in such detection), the Attorney General may suspend the entry of some or all aliens transported to the United States by such airline.

* * * * *

4. 8 U.S.C. 1185(a)(1) provides:

**Travel control of citizens and aliens**

**(a) Restrictions and prohibitions**

Unless otherwise ordered by the President, it shall be unlawful—

> (1) for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe;

5. 8 U.S.C. 1201 provides in pertinent part:

**Issuance of visas**

* * * * *

**(g) Nonissuance of visas or other documents**

No visa or other documentation shall be issued to an alien if (1) it appears to the consular officer, from statements in the application, or in the papers submitted therewith, that such alien is ineligible to receive a visa or such other documentation under section 1182 of this title, or any other provision of law, (2) the application fails to comply with the provisions of this chapter, or the regulations issued thereunder, or (3) the consular officer knows or has reason to believe that such alien is ineligible to receive a visa or such other documentation under section 1182 of this title, or any other provision of law: *Provided*, That a visa or other documentation

may be issued to an alien who is within the purview of section 1182(a)(4) of this title, if such alien is otherwise entitled to receive a visa or other documentation, upon receipt of notice by the consular officer from the Attorney General of the giving of a bond or undertaking providing indemnity as in the case of aliens admitted under section 1183 of this title: *Provided further*, That a visa may be issued to an alien defined in section 1101(a)(15)(B) or (F) of this title, if such alien is otherwise entitled to receive a visa, upon receipt of a notice by the consular officer from the Attorney General of the giving of a bond with sufficient surety in such sum and containing such conditions as the consular officer shall prescribe, to insure that at the expiration of the time for which such alien has been admitted by the Attorney General, as provided in section 1184(a) of this title, or upon failure to maintain the status under which he was admitted, or to maintain any status subsequently acquired under section 1258 of this title, such alien will depart from the United States.

**(h) Nonadmission upon arrival**

Nothing in this chapter shall be construed to entitle any alien, to whom a visa or other documentation has been issued, to be admitted[1] the United States, if, upon arrival at a port of entry in the United States, he is found to be inadmissible under this chapter, or any other provision of law. The substance of this subsection shall appear upon every visa application.

* * * * *

[1] So in original. Probably should be followed by "two".

6. Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 27, 2017) provides:

**Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats**

**By the President of the United States of America**

**A Proclamation**

In Executive Order 13780 of March 6, 2017 (Protecting the Nation from Foreign Terrorist Entry into the United States), on the recommendations of the Secretary of Homeland Security and the Attorney General, I ordered a worldwide review of whether, and if so what, additional information would be needed from each foreign country to assess adequately whether their nationals seeking to enter the United States pose a security or safety threat. This was the first such review of its kind in United States history. As part of the review, the Secretary of Homeland Security established global requirements for information sharing in support of immigration screening and vetting. The Secretary of Homeland Security developed a comprehensive set of criteria and applied it to the information-sharing practices, policies, and capabilities of foreign governments. The Secretary of State thereafter engaged with the countries reviewed in an effort to address deficiencies and achieve improvements. In many instances, those efforts produced positive results. By obtaining additional information and formal commitments from foreign governments, the United States Government has improved its capacity and ability to assess whether foreign nationals attempting to enter the United States

pose a security or safety threat. Our Nation is safer as a result of this work.

Despite those efforts, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, has determined that a small number of countries—out of nearly 200 evaluated—remain deficient at this time with respect to their identity-management and information-sharing capabilities, protocols, and practices. In some cases, these countries also have a significant terrorist presence within their territory.

As President, I must act to protect the security and interests of the United States and its people. I am committed to our ongoing efforts to engage those countries willing to cooperate, improve information-sharing and identity-management protocols and procedures, and address both terrorism-related and public-safety risks. Some of the countries with remaining inadequacies face significant challenges. Others have made strides to improve their protocols and procedures, and I commend them for these efforts. But until they satisfactorily address the identified inadequacies, I have determined, on the basis of recommendations from the Secretary of Homeland Security and other members of my Cabinet, to impose certain conditional restrictions and limitations, as set forth more fully below, on entry into the United States of nationals of the countries identified in section 2 of this proclamation.

NOW, THEREFORE, I, DONALD J. TRUMP, by the authority vested in me by the Constitution and the laws of the United States of America, including sections 212(f) and 215(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(f) and 1185(a), and section 301 of

title 3, United States Code, hereby find that, absent the measures set forth in this proclamation, the immigrant and nonimmigrant entry into the United States of persons described in section 2 of this proclamation would be detrimental to the interests of the United States, and that their entry should be subject to certain restrictions, limitations, and exceptions. I therefore hereby proclaim the following:

**Section 1.** *Policy and Purpose.* (a) It is the policy of the United States to protect its citizens from terrorist attacks and other public-safety threats. Screening and vetting protocols and procedures associated with visa adjudications and other immigration processes play a critical role in implementing that policy. They enhance our ability to detect foreign nationals who may commit, aid, or support acts of terrorism, or otherwise pose a safety threat, and they aid our efforts to prevent such individuals from entering the United States.

(b) Information-sharing and identity-management protocols and practices of foreign governments are important for the effectiveness of the screening and vetting protocols and procedures of the United States. Governments manage the identity and travel documents of their nationals and residents. They also control the circumstances under which they provide information about their nationals to other governments, including information about known or suspected terrorists and criminal-history information. It is, therefore, the policy of the United States to take all necessary and appropriate steps to encourage foreign governments to improve their information-sharing and identity-management protocols and practices and to regularly share identity

and threat information with our immigration screening and vetting systems.

(c) Section 2(a) of Executive Order 13780 directed a "worldwide review 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 (adjudications) in order to determine that the individual is not a security or public-safety threat." That review culminated in a report submitted to the President by the Secretary of Homeland Security on July 9, 2017. In that review, the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, developed a baseline for the kinds of information required from foreign governments to support the United States Government's ability to confirm the identity of individuals seeking entry into the United States as immigrants and nonimmigrants, as well as individuals applying for any other benefit under the immigration laws, and to assess whether they are a security or public-safety threat. That baseline incorporates three categories of criteria:

(i) *Identity-management information.* The United States expects foreign governments to provide the information needed to determine whether individuals seeking benefits under the immigration laws are who they claim to be. The identity-management information category focuses on the integrity of documents required for travel to the United States. The criteria assessed in this category include whether the country issues electronic passports embedded with data to enable confirmation of identity, reports lost and stolen passports to appropriate entities, and

makes available upon request identity-related information not included in its passports.

(ii) *National security and public-safety information.* The United States expects foreign governments to provide information about whether persons who seek entry to this country pose national security or public-safety risks. The criteria assessed in this category include whether the country makes available, directly or indirectly, known or suspected terrorist and criminal-history information upon request, whether the country provides passport and national-identity document exemplars, and whether the country impedes the United States Government's receipt of information about passengers and crew traveling to the United States.

(iii) *National security and public-safety risk assessment.* The national security and public-safety risk assessment category focuses on national security risk indicators. The criteria assessed in this category include whether the country is a known or potential terrorist safe haven, whether it is a participant in the Visa Waiver Program established under section 217 of the INA, 8 U.S.C. 1187, that meets all of its requirements, and whether it regularly fails to receive its nationals subject to final orders of removal from the United States.

(d) The Department of Homeland Security, in coordination with the Department of State, collected data on the performance of all foreign governments and assessed each country against the baseline described in subsection (c) of this section. The assessment focused, in particular, on identity management, security and public-safety threats, and national security risks.

Through this assessment, the agencies measured each country's performance with respect to issuing reliable travel documents and implementing adequate identity-management and information-sharing protocols and procedures, and evaluated terrorism-related and public-safety risks associated with foreign nationals seeking entry into the United States from each country.

(e) The Department of Homeland Security evaluated each country against the baseline described in subsection (c) of this section. The Secretary of Homeland Security identified 16 countries as being "inadequate" based on an analysis of their identity-management protocols, information-sharing practices, and risk factors. Thirty-one additional countries were classified "at risk" of becoming "inadequate" based on those criteria.

(f) As required by section 2(d) of Executive Order 13780, the Department of State conducted a 50-day engagement period to encourage all foreign governments, not just the 47 identified as either "inadequate" or "at risk," to improve their performance with respect to the baseline described in subsection (c) of this section. Those engagements yielded significant improvements in many countries. Twenty-nine countries, for example, provided travel document exemplars for use by Department of Homeland Security officials to combat fraud. Eleven countries agreed to share information on known or suspected terrorists.

(g) The Secretary of Homeland Security assesses that the following countries continue to have "inadequate" identity-management protocols, information-sharing practices, and risk factors, with respect to the baseline described in subsection (c) of this section, such that entry restrictions and limitations are recommended:

Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen. The Secretary of Homeland Security also assesses that Iraq did not meet the baseline, but that entry restrictions and limitations under a Presidential proclamation are not warranted. The Secretary of Homeland Security recommends, however, that nationals of Iraq who seek to enter the United States be subject to additional scrutiny to determine if they pose risks to the national security or public safety of the United States. In reaching these conclusions, the Secretary of Homeland Security considered the close cooperative relationship between the United States and the democratically elected government of Iraq, the strong United States diplomatic presence in Iraq, the significant presence of United States forces in Iraq, and Iraq's commitment to combating the Islamic State of Iraq and Syria (ISIS).

(h) Section 2(e) of Executive Order 13780 directed the Secretary of Homeland Security to "submit to the President a list of countries recommended for inclusion in a Presidential proclamation that would prohibit the entry of appropriate categories of foreign nationals of countries that have not provided the information requested until they do so or until the Secretary of Homeland Security certifies that the country has an adequate plan to do so, or has adequately shared information through other means." On September 15, 2017, the Secretary of Homeland Security submitted a report to me recommending entry restrictions and limitations on certain nationals of 7 countries determined to be "inadequate" in providing such information and in light of other factors discussed in the report. According to the report, the recommended restrictions would help address the threats that the countries' identity-management protocols, information-sharing inadequacies, and other

risk factors pose to the security and welfare of the United States. The restrictions also encourage the countries to work with the United States to address those inadequacies and risks so that the restrictions and limitations imposed by this proclamation may be relaxed or removed as soon as possible.

(i) In evaluating the recommendations of the Secretary of Homeland Security and in determining what restrictions to impose for each country, I consulted with appropriate Assistants to the President and members of the Cabinet, including the Secretaries of State, Defense, and Homeland Security, and the Attorney General. I considered several 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, such as whether it has a significant terrorist presence within its territory. I also considered foreign policy, national security, and counterterrorism goals. I reviewed these factors and assessed these goals, with a particular focus on crafting those country-specific restrictions that would be most likely to encourage cooperation given each country's distinct circumstances, and that would, at the same time, protect the United States until such time as improvements occur. The restrictions and limitations imposed by this proclamation are, in my judgment, 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. These restrictions and limitations are also needed to elicit improved identity-management and information-

sharing protocols and practices from foreign governments; and to advance foreign policy, national security, and counterterrorism objectives.

(ii) After reviewing the Secretary of Homeland Security's report of September 15, 2017, and accounting for the foreign policy, national security, and counterterrorism objectives of the United States, I have determined to restrict and limit the entry of nationals of 7 countries found to be "inadequate" with respect to the baseline described in subsection (c) of this section: Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen. These restrictions distinguish between the entry of immigrants and nonimmigrants. Persons admitted on immigrant visas become lawful permanent residents of the United States. Such persons may present national security or public-safety concerns that may be distinct from those admitted as nonimmigrants. The United States affords lawful permanent residents more enduring rights than it does to nonimmigrants. Lawful permanent residents are more difficult to remove than nonimmigrants even after national security concerns arise, which heightens the costs and dangers of errors associated with admitting such individuals. And although immigrants generally receive more extensive vetting than nonimmigrants, such vetting is less reliable when the country from which someone seeks to emigrate exhibits significant gaps in its identity-management or information-sharing policies, or presents risks to the national security of the United States. For all but one of those 7 countries, therefore, I am restricting the entry of all immigrants.

(iii) I am adopting a more tailored approach with respect to nonimmigrants, in accordance with the recommendations of the Secretary of Homeland Security. For some countries found to be "inadequate" with respect to the baseline described in subsection (c) of this section, I am restricting the entry of all nonimmigrants. For countries with certain mitigating factors, such as a willingness to cooperate or play a substantial role in combatting terrorism, I am restricting the entry only of certain categories of nonimmigrants, which will mitigate the security threats presented by their entry into the United States. In those cases in which future cooperation seems reasonably likely, and accounting for foreign policy, national security, and counterterrorism objectives, I have tailored the restrictions to encourage such improvements.

(i) Section 2(e) of Executive Order 13780 also provided that the "Secretary of State, the Attorney General, or the Secretary of Homeland Security may also submit to the President the names of additional countries for which any of them recommends other lawful restrictions or limitations deemed necessary for the security or welfare of the United States." The Secretary of Homeland Security determined that Somalia generally satisfies the information-sharing requirements of the baseline described in subsection (c) of this section, but its government's inability to effectively and consistently cooperate, combined with the terrorist threat that emanates from its territory, present special circumstances that warrant restrictions and limitations on the entry of its nationals into the United States. Somalia's identity-management deficiencies and the significant terrorist

presence within its territory make it a source of particular risks to the national security and public safety of the United States. Based on the considerations mentioned above, and as described further in section 2(h) of this proclamation, I have determined that entry restrictions, limitations, and other measures designed to ensure proper screening and vetting for nationals of Somalia are necessary for the security and welfare of the United States.

(j) Section 2 of this proclamation describes some of the inadequacies that led me to impose restrictions on the specified countries. Describing all of those reasons publicly, however, would cause serious damage to the national security of the United States, and many such descriptions are classified.

**Sec. 2.** *Suspension of Entry for Nationals of Countries of Identified Concern.* The entry into the United States of nationals of the following countries is hereby suspended and limited, as follows, subject to categorical exceptions and case-by-case waivers, as described in sections 3 and 6 of this proclamation:

(a) *Chad.*

(i) The government of Chad is an important and valuable counterterrorism partner of the United States, and the United States Government looks forward to expanding that cooperation, including in the areas of immigration and border management. Chad has shown a clear willingness to improve in these areas. Nonetheless, Chad does not adequately share public-safety and terrorism-related information and fails to satisfy at least one key risk crite-

rion. Additionally, several terrorist groups are active within Chad or in the surrounding region, including elements of Boko Haram, ISIS-West Africa, and al-Qa'ida in the Islamic Maghreb. At this time, additional information sharing to identify those foreign nationals applying for visas or seeking entry into the United States who represent national security and public-safety threats is necessary given the significant terrorism-related risk from this country.

(ii) The entry into the United States of nationals of Chad, as immigrants, and as nonimmigrants on business (B-1), tourist (B-2), and business/tourist (B-1/B-2) visas, is hereby suspended.

(b) *Iran.*

(i) Iran regularly fails to cooperate with the United States Government in identifying security risks, fails to satisfy at least one key risk criterion, is the source of significant terrorist threats, and fails to receive its nationals subject to final orders of removal from the United States. The Department of State has also designated Iran as a state sponsor of terrorism.

(ii) The entry into the United States of nationals of Iran as immigrants and as nonimmigrants is hereby suspended, except that entry by such nationals under valid student (F and M) and exchange visitor (J) visas is not suspended, although such individuals should be subject to enhanced screening and vetting requirements.

(c) *Libya.*

(i) The government of Libya is an important and valuable counterterrorism partner of the United

States, and the United States Government looks forward to expanding on that cooperation, including in the areas of immigration and border management. Libya, nonetheless, faces significant challenges in sharing several types of information, including public-safety and terrorism-related information necessary for the protection of the national security and public safety of the United States. Libya also has significant inadequacies in its identity-management protocols. Further, Libya fails to satisfy at least one key risk criterion and has been assessed to be not fully cooperative with respect to receiving its nationals subject to final orders of removal from the United States. The substantial terrorist presence within Libya's territory amplifies the risks posed by the entry into the United States of its nationals.

(ii) The entry into the United States of nationals of Libya, as immigrants, and as nonimmigrants on business (B-1), tourist (B-2), and business/tourist (B-1/B-2) visas, is hereby suspended.

(d) *North Korea.*

(i) North Korea does not cooperate with the United States Government in any respect and fails to satisfy all information-sharing requirements.

(ii) The entry into the United States of nationals of North Korea as immigrants and nonimmigrants is hereby suspended.

(e) *Syria.*

(i) Syria regularly fails to cooperate with the United States Government in identifying security risks, is the source of significant terrorist threats, and has been designated by the Department of State

as a state sponsor of terrorism. Syria has significant inadequacies in identity-management protocols, fails to share public-safety and terrorism information, and fails to satisfy at least one key risk criterion.

(ii) The entry into the United States of nationals of Syria as immigrants and nonimmigrants is hereby suspended.

(f) *Venezuela.*

(i) Venezuela has adopted many of the baseline standards identified by the Secretary of Homeland Security and in section 1 of this proclamation, but its government is uncooperative in verifying whether its citizens pose national security or public-safety threats. Venezuela's government fails to share public-safety and terrorism-related information adequately, fails to satisfy at least one key risk criterion, and has been assessed to be not fully cooperative with respect to receiving its nationals subject to final orders of removal from the United States. There are, however, alternative sources for obtaining information to verify the citizenship and identity of nationals from Venezuela. As a result, the restrictions imposed by this proclamation focus on government officials of Venezuela who are responsible for the identified inadequacies.

(ii) Notwithstanding section 3(b)(v) of this proclamation, the entry into the United States of officials of government agencies of Venezuela involved in screening and vetting procedures—including the Ministry of the Popular Power for Interior, Justice

and Peace; the Administrative Service of Identification, Migration and Immigration; the Scientific, Penal and Criminal Investigation Service Corps; the Bolivarian National Intelligence Service; and the Ministry of the Popular Power for Foreign Relations —and their immediate family members, as nonimmigrants on business (B-1), tourist (B-2), and business/tourist (B-1/B-2) visas, is hereby suspended. Further, nationals of Venezuela who are visa holders should be subject to appropriate additional measures to ensure traveler information remains current.

(g) *Yemen.*

(i) The government of Yemen is an important and valuable counterterrorism partner, and the United States Government looks forward to expanding that cooperation, including in the areas of immigration and border management. Yemen, nonetheless, faces significant identity-management challenges, which are amplified by the notable terrorist presence within its territory. The government of Yemen fails to satisfy critical identity-management requirements, does not share public-safety and terrorism-related information adequately, and fails to satisfy at least one key risk criterion.

(ii) The entry into the United States of nationals of Yemen as immigrants, and as nonimmigrants on business (B-1), tourist (B-2), and business/tourist (B-1/B-2) visas, is hereby suspended.

(h) *Somalia.*

(i) The Secretary of Homeland Security's report of September 15, 2017, determined that Somalia satis-

fies the information-sharing requirements of the baseline described in section 1(c) of this proclamation. But several other considerations support imposing entry restrictions and limitations on Somalia. Somalia has significant identity-management deficiencies. For example, while Somalia issues an electronic passport, the United States and many other countries do not recognize it. A persistent terrorist threat also emanates from Somalia's territory. The United States Government has identified Somalia as a terrorist safe haven. Somalia stands apart from other countries in the degree to which its government lacks command and control of its territory, which greatly limits the effectiveness of its national capabilities in a variety of respects. Terrorists use under-governed areas in northern, central, and southern Somalia as safe havens from which to plan, facilitate, and conduct their operations. Somalia also remains a destination for individuals attempting to join terrorist groups that threaten the national security of the United States. The State Department's 2016 Country Reports on Terrorism observed that Somalia has not sufficiently degraded the ability of terrorist groups to plan and mount attacks from its territory. Further, despite having made significant progress toward formally federating its member states, and its willingness to fight terrorism, Somalia continues to struggle to provide the governance needed to limit terrorists' freedom of movement, access to resources, and capacity to operate. The government of Somalia's lack of territorial control also compromises Somalia's ability, already limited because of poor recordkeeping, to share information about its nationals who pose criminal or terrorist

risks. As a result of these and other factors, Somalia presents special concerns that distinguish it from other countries.

(ii) The entry into the United States of nationals of Somalia as immigrants is hereby suspended. Additionally, visa adjudications for nationals of Somalia and decisions regarding their entry as nonimmigrants should be subject to additional scrutiny to determine if applicants are connected to terrorist organizations or otherwise pose a threat to the national security or public safety of the United States.

**Sec. 3.** *Scope and Implementation of Suspensions and Limitations.* (a) *Scope.* Subject to the exceptions set forth in subsection (b) of this section and any waiver under subsection (c) of this section, the suspensions of and limitations on entry pursuant to section 2 of this proclamation shall apply only to foreign nationals of the designated countries who:

(i) are outside the United States on the applicable effective date under section 7 of this proclamation;

(ii) do not have a valid visa on the applicable effective date under section 7 of this proclamation; and

(iii) do not qualify for a visa or other valid travel document under section 6(d) of this proclamation.

(b) *Exceptions.* The suspension of entry pursuant to section 2 of this proclamation shall not apply to:

(i) any lawful permanent resident of the United States;

(ii) any foreign national who is admitted to or paroled into the United States on or after the applicable effective date under section 7 of this proclamation;

(iii) any foreign national who has a document other than a visa—such as a transportation letter, an appropriate boarding foil, or an advance parole document—valid on the applicable effective date under section 7 of this proclamation or issued on any date thereafter, that permits him or her to travel to the United States and seek entry or admission;

(iv) any dual national of a country designated under section 2 of this proclamation when the individual is traveling on a passport issued by a non-designated country;

(v) any foreign national traveling on a diplomatic or diplomatic-type visa, North Atlantic Treaty Organization visa, C-2 visa for travel to the United Nations, or G-1, G-2, G-3, or G-4 visa; or

(vi) any foreign national who has been granted asylum by the United States; any refugee who has already been admitted to the United States; or any individual who has been granted withholding of removal, advance parole, or protection under the Convention Against Torture.

(c) *Waivers.* Notwithstanding the suspensions of and limitations on entry set forth in section 2 of this proclamation, a consular officer, or the Commissioner, United States Customs and Border Protection (CBP), or the Commissioner's designee, as appropriate, may, in their discretion, grant waivers on a case-by-case basis to permit the entry of foreign nationals for whom entry is otherwise suspended or limited if such foreign nationals demonstrate that waivers would be appropriate and consistent with subsections (i) through (iv) of this subsection. The Secretary of State and the Secretary of

Homeland Security shall coordinate to adopt guidance addressing the circumstances in which waivers may be appropriate for foreign nationals seeking entry as immigrants or nonimmigrants.

(i) A waiver may be granted only if a foreign national demonstrates to the consular officer's or CBP official's satisfaction that:

(A) denying entry would cause the foreign national undue hardship;

(B) entry would not pose a threat to the national security or public safety of the United States; and

(C) entry would be in the national interest.

(ii) The guidance issued by the Secretary of State and the Secretary of Homeland Security under this subsection shall address the standards, policies, and procedures for:

(A) determining whether the entry of a foreign national would not pose a threat to the national security or public safety of the United States;

(B) determining whether the entry of a foreign national would be in the national interest;

(C) addressing and managing the risks of making such a determination in light of the inadequacies in information sharing, identity management, and other potential dangers posed by the nationals of individual countries subject to the restrictions and limitations imposed by this proclamation;

(D) assessing whether the United States has access, at the time of the waiver determination, to suf-

ficient information about the foreign national to determine whether entry would satisfy the requirements of subsection (i) of this subsection; and

(E) determining the special circumstances that would justify granting a waiver under subsection (iv)(E) of this subsection.

(iii) Unless otherwise specified by the Secretary of Homeland Security, any waiver issued by a consular officer as part of the visa adjudication process will be effective both for the issuance of a visa and for any subsequent entry on that visa, but will leave unchanged all other requirements for admission or entry.

(iv) Case-by-case waivers may not be granted categorically, but may be appropriate, subject to the limitations, conditions, and requirements set forth under subsection (i) of this subsection and the guidance issued under subsection (ii) of this subsection, in individual circumstances such as the following:

(A) the foreign national has previously been admitted to the United States for a continuous period of work, study, or other long-term activity, is outside the United States on the applicable effective date under section 7 of this proclamation, seeks to reenter the United States to resume that activity, and the denial of reentry would impair that activity;

(B) the foreign national has previously established significant contacts with the United States but is outside the United States on the applicable effective date under section 7 of this proclamation for work, study, or other lawful activity;

(C) the foreign national seeks to enter the United States for significant business or professional obligations and the denial of entry would impair those obligations;

(D) the foreign national seeks to enter the United States to visit or reside with a close family member *(e.g.,* a spouse, child, or parent) who is a United States citizen, lawful permanent resident, or alien lawfully admitted on a valid nonimmigrant visa, and the denial of entry would cause the foreign national undue hardship;

(E) the foreign national is an infant, a young child or adoptee, an individual needing urgent medical care, or someone whose entry is otherwise justified by the special circumstances of the case;

(F) the foreign national has been employed by, or on behalf of, the United States Government (or is an eligible dependent of such an employee), and the foreign national can document that he or she has provided faithful and valuable service to the United States Government;

(G) the foreign national is traveling for purposes related to an international organization designated under the International Organizations Immunities Act (IOIA), 22 U.S.C. 288 *et seq.,* traveling for purposes of conducting meetings or business with the United States Government, or traveling to conduct business on behalf of an international organization not designated under the IOIA;

(H) the foreign national is a Canadian permanent resident who applies for a visa at a location within Canada;

(I) the foreign national is traveling as a United States Government-sponsored exchange visitor; or

(J) the foreign national is traveling to the United States, at the request of a United States Government department or agency, for legitimate law enforcement, foreign policy, or national security purposes.

**Sec. 4.** *Adjustments to and Removal of Suspensions and Limitations.* (a) The Secretary of Homeland Security shall, in consultation with the Secretary of State, devise a process to assess whether any suspensions and limitations imposed by section 2 of this proclamation should be continued, terminated, modified, or supplemented. The process shall account for whether countries have improved their identity-management and information-sharing protocols and procedures based on the criteria set forth in section 1 of this proclamation and the Secretary of Homeland Security's report of September 15, 2017. Within 180 days of the date of this proclamation, and every 180 days thereafter, the Secretary of Homeland Security, in consultation with the Secretary of State, the Attorney General, the Director of National Intelligence, and other appropriate heads of agencies, shall submit a report with recommendations to the President, through appropriate Assistants to the President, regarding the following:

(i) the interests of the United States, if any, that continue to require the suspension of, or limitations on, the entry on certain classes of nationals of countries identified in section 2 of this proclamation and whether the restrictions and limitations imposed by section 2 of this proclamation should be continued, modified, terminated, or supplemented; and

(ii) the interests of the United States, if any, that require the suspension of, or limitations on, the entry of certain classes of nationals of countries not identified in this proclamation.

(b) The Secretary of State, in consultation with the Secretary of Homeland Security, the Secretary of Defense, the Attorney General, the Director of National Intelligence, and the head of any other executive department or agency (agency) that the Secretary of State deems appropriate, shall engage the countries listed in section 2 of this proclamation, and any other countries that have information-sharing, identity-management, or risk-factor deficiencies as practicable, appropriate, and consistent with the foreign policy, national security, and public-safety objectives of the United States.

(c) Notwithstanding the process described above, and consistent with the process described in section 2(f) of Executive Order 13780, if the Secretary of Homeland Security, in consultation with the Secretary of State, the Attorney General, and the Director of National Intelligence, determines, at any time, that a country meets the standards of the baseline described in section 1(c) of this proclamation, that a country has an adequate plan to provide such information, or that one or more of the restrictions or limitations imposed on the entry of a country's nationals are no longer necessary for the security or welfare of the United States, the Secretary of Homeland Security may recommend to the President the removal or modification of any or all such restrictions and limitations. The Secretary of Homeland Security, the Secretary of State, or the Attorney General may also, as provided for in Executive Order 13780, submit to the President the names of additional countries for which

any of them recommends any lawful restrictions or limitations deemed necessary for the security or welfare of the United States.

**Sec. 5.** *Reports on Screening and Vetting Procedures.* (a) The Secretary of Homeland Security, in coordination with the Secretary of State, the Attorney General, the Director of National Intelligence, and other appropriate heads of agencies shall submit periodic reports to the President, through appropriate Assistants to the President, that:

(i) describe the steps the United States Government has taken to improve vetting for nationals of all foreign countries, including through improved collection of biometric and biographic data;

(ii) describe the scope and magnitude of fraud, errors, false information, and unverifiable claims, as determined by the Secretary of Homeland Security on the basis of a validation study, made in applications for immigration benefits under the immigration laws; and

(iii) evaluate the procedures related to screening and vetting established by the Department of State's Bureau of Consular Affairs in order to enhance the safety and security of the United States and to ensure sufficient review of applications for immigration benefits.

(b) The initial report required under subsection (a) of this section shall be submitted within 180 days of the date of this proclamation; the second report shall be submitted within 270 days of the first report; and reports shall be submitted annually thereafter.

(c) The agency heads identified in subsection (a) of this section shall coordinate any policy developments associated with the reports described in subsection (a) of this section through the appropriate Assistants to the President.

**Sec. 6.** *Enforcement.* (a) The Secretary of State and the Secretary of Homeland Security shall consult with appropriate domestic and international partners, including countries and organizations, to ensure efficient, effective, and appropriate implementation of this proclamation.

(b) In implementing this proclamation, the Secretary of State and the Secretary of Homeland Security shall comply with all applicable laws and regulations, including those that provide an opportunity for individuals to enter the United States on the basis of a credible claim of fear of persecution or torture.

(c) No immigrant or nonimmigrant visa issued before the applicable effective date under section 7 of this proclamation shall be revoked pursuant to this proclamation.

(d) Any individual whose visa was marked revoked or marked canceled as a result of Executive Order 13769 of January 27, 2017 (Protecting the Nation from Foreign Terrorist Entry into the United States), shall be entitled to a travel document confirming that the individual is permitted to travel to the United States and seek entry under the terms and conditions of the visa marked revoked or marked canceled. Any prior cancellation or revocation of a visa that was solely pursuant to Executive Order 13769 shall not be the basis of inadmissibility for any future determination about entry or admissibility.

(e) This proclamation shall not apply to an individual who has been granted asylum by the United States, to a refugee who has already been admitted to the United States, or to an individual granted withholding of removal or protection under the Convention Against Torture. Nothing in this proclamation shall be construed to limit the ability of an individual to seek asylum, refugee status, withholding of removal, or protection under the Convention Against Torture, consistent with the laws of the United States.

**Sec. 7.** *Effective Dates.* Executive Order 13780 ordered a temporary pause on the entry of foreign nationals from certain foreign countries. In two cases, however, Federal courts have enjoined those restrictions. The Supreme Court has stayed those injunctions as to foreign nationals who lack a credible claim of a bona fide relationship with a person or entity in the United States, pending its review of the decisions of the lower courts.

(a) The restrictions and limitations established in section 2 of this proclamation are effective at 3:30 p.m. eastern daylight time on September 24, 2017, for foreign nationals who:

(i) were subject to entry restrictions under section 2 of Executive Order 13780, or would have been subject to the restrictions but for section 3 of that Executive Order, and

(ii) lack a credible claim of a bona fide relationship with a person or entity in the United States.

(b) The restrictions and limitations established in section 2 of this proclamation are effective at 12:01 a.m. eastern daylight time on October 18, 2017, for all other

persons subject to this proclamation, including nationals of:

(i) Iran, Libya, Syria, Yemen, and Somalia who have a credible claim of a bona fide relationship with a person or entity in the United States; and

(ii) Chad, North Korea, and Venezuela.

**Sec. 8.** *Severability.* It is the policy of the United States to enforce this proclamation to the maximum extent possible to advance the national security, foreign policy, and counterterrorism interests of the United States. Accordingly:

(a) if any provision of this proclamation, or the application of any provision to any person or circumstance, is held to be invalid, the remainder of this proclamation and the application of its other provisions to any other persons or circumstances shall not be affected thereby; and

(b) if any provision of this proclamation, or the application of any provision to any person or circumstance, is held to be invalid because of the lack of certain procedural requirements, the relevant executive branch officials shall implement those procedural requirements to conform with existing law and with any applicable court orders.

**Sec. 9.** *General Provisions.* (a) Nothing in this proclamation shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This proclamation shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This proclamation is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-fourth day of September, in the year of our Lord two thousand seventeen, and of the Independence of the United States of America the two hundred and forty-second.

/s/ DONALD J. TRUMP

7. Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) provides:

**Protecting the Nation from Foreign Terrorist Entry into the United States**

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.,* and section 301 of title 3, United States Code, and to protect the Nation from terrorist activities by foreign nationals admitted to the United States, it is hereby ordered as follows:

**Section 1**. *Policy and Purpose.* (a) It is the policy of the United States to protect its citizens from terrorist attacks, including those committed by foreign nationals. The screening and vetting protocols and procedures associated with the visa-issuance process and the United States Refugee Admissions Program (USRAP) play a crucial role in detecting foreign nationals who may commit, aid, or support acts of terrorism and in preventing those individuals from entering the United States. It is therefore the policy of the United States to improve the screening and vetting protocols and procedures associated with the visa-issuance process and the USRAP.

(b) On January 27, 2017, to implement this policy, I issued Executive Order 13769 (Protecting the Nation from Foreign Terrorist Entry into the United States).

(i) Among other actions, Executive Order 13769 suspended for 90 days the entry of certain aliens from seven countries: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen. These are countries that had already been identified as presenting heightened concerns about terrorism and travel to the United States. Specifically, the suspension applied to countries referred to in, or designated under, section 217(a)(12) of the INA, 8 U.S.C. 1187(a)(12), in which Congress restricted use of the Visa Waiver Program for nationals of, and aliens recently present in, (A) Iraq or Syria, (B) any country designated by the Secretary of State as a state sponsor of terrorism (currently Iran, Syria, and Sudan), and (C) any other country designated as a country of concern by the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of Na-

tional Intelligence. In 2016, the Secretary of Homeland Security designated Libya, Somalia, and Yemen as additional countries of concern for travel purposes, based on consideration of three statutory factors related to terrorism and national security: "(I) whether the presence of an alien in the country or area increases the likelihood that the alien is a credible threat to the national security of the United States; (II) whether a foreign terrorist organization has a significant presence in the country or area; and (III) whether the country or area is a safe haven for terrorists." 8 U.S.C. 1187(a)(12)(D)(ii). Additionally, Members of Congress have expressed concerns about screening and vetting procedures following recent terrorist attacks in this country and in Europe.

(ii) In ordering the temporary suspension of entry described in subsection (b)(i) of this section, I exercised my authority under Article II of the Constitution and under section 212(f) of the INA, which provides in relevant part: "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." 8 U.S.C. 1182(f). Under these authorities, I determined that, for a brief period of 90 days, while existing screening and vetting procedures were under review, the entry into the United States of certain aliens from the seven identified countries—each afflicted by terrorism in a manner that compromised the ability of the United States to

rely on normal decision-making procedures about travel to the United States—would be detrimental to the interests of the United States. Nonetheless, I permitted the Secretary of State and the Secretary of Homeland Security to grant case-by-case waivers when they determined that it was in the national interest to do so.

(iii) Executive Order 13769 also suspended the USRAP for 120 days. Terrorist groups have sought to infiltrate several nations through refugee programs. Accordingly, I temporarily suspended the USRAP pending a review of our procedures for screening and vetting refugees. Nonetheless, I permitted the Secretary of State and the Secretary of Homeland Security to jointly grant case-by-case waivers when they determined that it was in the national interest to do so.

(iv) Executive Order 13769 did not provide a basis for discriminating for or against members of any particular religion. While that order allowed for prioritization of refugee claims from members of persecuted religious minority groups, that priority applied to refugees from every nation, including those in which Islam is a minority religion, and it applied to minority sects within a religion. That order was not motivated by animus toward any religion, but was instead intended to protect the ability of religious minorities—whoever they are and wherever they reside—to avail themselves of the USRAP in light of their particular challenges and circumstances.

(c) The implementation of Executive Order 13769 has been delayed by litigation. Most significantly, enforcement of critical provisions of that order has been

temporarily halted by court orders that apply nationwide and extend even to foreign nationals with no prior or substantial connection to the United States. On February 9, 2017, the United States Court of Appeals for the Ninth Circuit declined to stay or narrow one such order pending the outcome of further judicial proceedings, while noting that the "political branches are far better equipped to make appropriate distinctions" about who should be covered by a suspension of entry or of refugee admissions.

(d) Nationals from the countries previously identified under section 217(a)(12) of the INA warrant additional scrutiny in connection with our immigration policies because the conditions in these countries present heightened threats. Each of these countries is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones. Any of these circumstances diminishes the foreign government's willingness or ability to share or validate important information about individuals seeking to travel to the United States. Moreover, the significant presence in each of these countries of terrorist organizations, their members, and others exposed to those organizations increases the chance that conditions will be exploited to enable terrorist operatives or sympathizers to travel to the United States. Finally, once foreign nationals from these countries are admitted to the United States, it is often difficult to remove them, because many of these countries typically delay issuing, or refuse to issue, travel documents.

(e) The following are brief descriptions, taken in part from the Department of State's *Country Reports on Terrorism 2015* (June 2016), of some of the conditions

in six of the previously designated countries that demonstrate why their nationals continue to present heightened risks to the security of the United States:

(i) *Iran.* Iran has been designated as a state sponsor of terrorism since 1984 and continues to support various terrorist groups, including Hizballah, Hamas, and terrorist groups in Iraq. Iran has also been linked to support for al-Qa'ida and has permitted al-Qa'ida to transport funds and fighters through Iran to Syria and South Asia. Iran does not cooperate with the United States in counterterrorism efforts.

(ii) *Libya.* Libya is an active combat zone, with hostilities between the internationally recognized government and its rivals. In many parts of the country, security and law enforcement functions are provided by armed militias rather than state institutions. Violent extremist groups, including the Islamic State of Iraq and Syria (ISIS), have exploited these conditions to expand their presence in the country. The Libyan government provides some cooperation with the United States' counterterrorism efforts, but it is unable to secure thousands of miles of its land and maritime borders, enabling the illicit flow of weapons, migrants, and foreign terrorist fighters. The United States Embassy in Libya suspended its operations in 2014.

(iii) *Somalia.* Portions of Somalia have been terrorist safe havens. Al-Shabaab, an al-Qa'ida-affiliated terrorist group, has operated in the country for years and continues to plan and mount operations within Somalia and in neighboring countries. Somalia has porous borders, and most countries do not recognize Somali identity documents. The Somali

government cooperates with the United States in some counterterrorism operations but does not have the capacity to sustain military pressure on or to investigate suspected terrorists.

(iv) *Sudan.* Sudan has been designated as a state sponsor of terrorism since 1993 because of its support for international terrorist groups, including Hizballah and Hamas. Historically, Sudan provided safe havens for al-Qa'ida and other terrorist groups to meet and train. Although Sudan's support to al-Qa'ida has ceased and it provides some cooperation with the United States' counterterrorism efforts, elements of core al-Qa'ida and ISIS-linked terrorist groups remain active in the country.

(v) *Syria.* Syria has been designated as a state sponsor of terrorism since 1979. The Syrian government is engaged in an ongoing military conflict against ISIS and others for control of portions of the country. At the same time, Syria continues to support other terrorist groups. It has allowed or encouraged extremists to pass through its territory to enter Iraq. ISIS continues to attract foreign fighters to Syria and to use its base in Syria to plot or encourage attacks around the globe, including in the United States. The United States Embassy in Syria suspended its operations in 2012. Syria does not cooperate with the United States' counterterrorism efforts.

(vi) *Yemen.* Yemen is the site of an ongoing conflict between the incumbent government and the Houthi-led opposition. Both ISIS and a second group, al-Qa'ida in the Arabian Peninsula (AQAP), have exploited this conflict to expand their presence

in Yemen and to carry out hundreds of attacks. Weapons and other materials smuggled across Yemen's porous borders are used to finance AQAP and other terrorist activities. In 2015, the United States Embassy in Yemen suspended its operations, and embassy staff were relocated out of the country. Yemen has been supportive of, but has not been able to cooperate fully with, the United States in counterterrorism efforts.

(f) In light of the conditions in these six countries, until the assessment of current screening and vetting procedures required by section 2 of this order is completed, the risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harm the national security of the United States is unacceptably high. Accordingly, while that assessment is ongoing, I am imposing a temporary pause on the entry of nationals from Iran, Libya, Somalia, Sudan, Syria, and Yemen, subject to categorical exceptions and case-by-case waivers, as described in section 3 of this order.

(g) Iraq presents a special case. Portions of Iraq remain active combat zones. Since 2014, ISIS has had dominant influence over significant territory in northern and central Iraq. Although that influence has been significantly reduced due to the efforts and sacrifices of the Iraqi government and armed forces, working along with a United States-led coalition, the ongoing conflict has impacted the Iraqi government's capacity to secure its borders and to identify fraudulent travel documents. Nevertheless, the close cooperative relationship between the United States and the democratically elected Iraqi government, the strong United States diplomatic presence

in Iraq, the significant presence of United States forces in Iraq, and Iraq's commitment to combat ISIS justify different treatment for Iraq. In particular, those Iraqi government forces that have fought to regain more than half of the territory previously dominated by ISIS have shown steadfast determination and earned enduring respect as they battle an armed group that is the common enemy of Iraq and the United States. In addition, since Executive Order 13769 was issued, the Iraqi government has expressly undertaken steps to enhance travel documentation, information sharing, and the return of Iraqi nationals subject to final orders of removal. Decisions about issuance of visas or granting admission to Iraqi nationals should be subjected to additional scrutiny to determine if applicants have connections with ISIS or other terrorist organizations, or otherwise pose a risk to either national security or public safety.

(h) Recent history shows that some of those who have entered the United States through our immigration system have proved to be threats to our national security. Since 2001, hundreds of persons born abroad have been convicted of terrorism-related crimes in the United States. They have included not just persons who came here legally on visas but also individuals who first entered the country as refugees. For example, in January 2013, two Iraqi nationals admitted to the United States as refugees in 2009 were sentenced to 40 years and to life in prison, respectively, for multiple terrorism-related offenses. And in October 2014, a native of Somalia who had been brought to the United States as a child refugee and later became a naturalized United States citizen was sentenced to 30 years in prison for attempting to use a weapon of mass destruction as

part of a plot to detonate a bomb at a crowded Christmas-tree-lighting ceremony in Portland, Oregon. The Attorney General has reported to me that more than 300 persons who entered the United States as refugees are currently the subjects of counterterrorism investigations by the Federal Bureau of Investigation.

(i) Given the foregoing, the entry into the United States of foreign nationals who may commit, aid, or support acts of terrorism remains a matter of grave concern. In light of the Ninth Circuit's observation that the political branches are better suited to determine the appropriate scope of any suspensions than are the courts, and in order to avoid spending additional time pursuing litigation, I am revoking Executive Order 13769 and replacing it with this order, which expressly excludes from the suspensions categories of aliens that have prompted judicial concerns and which clarifies or refines the approach to certain other issues or categories of affected aliens.

**Sec. 2**. *Temporary Suspension of Entry for Nationals of Countries of Particular Concern During Review Period.* (a) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall conduct a worldwide review 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 (adjudications) in order to determine that the individual is not a security or public-safety threat. The Secretary of Homeland Security may conclude that certain information is needed from particular countries even if it is not needed from every country.

(b) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall submit to the President a report on the results of the worldwide review described in subsection (a) of this section, including the Secretary of Homeland Security's determination of the information needed from each country for adjudications and a list of countries that do not provide adequate information, within 20 days of the effective date of this order. The Secretary of Homeland Security shall provide a copy of the report to the Secretary of State, the Attorney General, and the Director of National Intelligence.

(c) To temporarily reduce investigative burdens on relevant agencies during the review period described in subsection (a) of this section, to ensure the proper review and maximum utilization of available resources for the screening and vetting of foreign nationals, to ensure that adequate standards are established to prevent infiltration by foreign terrorists, and in light of the national security concerns referenced in section 1 of this order, I hereby proclaim, pursuant to sections 212(f) and 215(a) of the INA, 8 U.S.C. 1182(f) and 1185(a), that the unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen would be detrimental to the interests of the United States. I therefore direct that the entry into the United States of nationals of those six countries be suspended for 90 days from the effective date of this order, subject to the limitations, waivers, and exceptions set forth in sections 3 and 12 of this order.

(d) Upon submission of the report described in subsection (b) of this section regarding the information

needed from each country for adjudications, the Secretary of State shall request that all foreign governments that do not supply such information regarding their nationals begin providing it within 50 days of notification.

(e) After the period described in subsection (d) of this section expires, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, shall submit to the President a list of countries recommended for inclusion in a Presidential proclamation that would prohibit the entry of appropriate categories of foreign nationals of countries that have not provided the information requested until they do so or until the Secretary of Homeland Security certifies that the country has an adequate plan to do so, or has adequately shared information through other means. The Secretary of State, the Attorney General, or the Secretary of Homeland Security may also submit to the President the names of additional countries for which any of them recommends other lawful restrictions or limitations deemed necessary for the security or welfare of the United States.

(f) At any point after the submission of the list described in subsection (e) of this section, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, may submit to the President the names of any additional countries recommended for similar treatment, as well as the names of any countries that they recommend should be removed from the scope of a proclamation described in subsection (e) of this section.

(g) The Secretary of State and the Secretary of Homeland Security shall submit to the President a joint report on the progress in implementing this order

within 60 days of the effective date of this order, a second report within 90 days of the effective date of this order, a third report within 120 days of the effective date of this order, and a fourth report within 150 days of the effective date of this order.

**Sec. 3**. *Scope and Implementation of Suspension.*

(a) *Scope.* Subject to the exceptions set forth in subsection (b) of this section and any waiver under subsection (c) of this section, the suspension of entry pursuant to section 2 of this order shall apply only to foreign nationals of the designated countries who:

(i) are outside the United States on the effective date of this order;

(ii) did not have a valid visa at 5:00 p.m., eastern standard time on January 27, 2017; and

(iii) do not have a valid visa on the effective date of this order.

(b) *Exceptions.* The suspension of entry pursuant to section 2 of this order shall not apply to:

(i) any lawful permanent resident of the United States;

(ii) any foreign national who is admitted to or paroled into the United States on or after the effective date of this order;

(iii) any foreign national who has a document other than a visa, valid on the effective date of this order or issued on any date thereafter, that permits him or her to travel to the United States and seek entry or admission, such as an advance parole document;

(iv) any dual national of a country designated under section 2 of this order when the individual is traveling on a passport issued by a non-designated country;

(v) any foreign national traveling on a diplomatic or diplomatic-type visa, North Atlantic Treaty Organization visa, C-2 visa for travel to the United Nations, or G-1, G-2, G-3, or G-4 visa; or

(vi) any foreign national who has been granted asylum; any refugee who has already been admitted to the United States; or any individual who has been granted withholding of removal, advance parole, or protection under the Convention Against Torture.

(c) *Waivers.* Notwithstanding the suspension of entry pursuant to section 2 of this order, a consular officer, or, as appropriate, the Commissioner, U.S. Customs and Border Protection (CBP), or the Commissioner's delegee, may, in the consular officer's or the CBP official's discretion, decide on a case-by-case basis to authorize the issuance of a visa to, or to permit the entry of, a foreign national for whom entry is otherwise suspended if the foreign national has demonstrated to the officer's satisfaction that denying entry during the suspension period would cause undue hardship, and that his or her entry would not pose a threat to national security and would be in the national interest. Unless otherwise specified by the Secretary of Homeland Security, any waiver issued by a consular officer as part of the visa issuance process will be effective both for the issuance of a visa and any subsequent entry on that visa, but will leave all other requirements for admission or entry unchanged. Case-by-case waivers could be appropriate in circumstances such as the following:

(i) the foreign national has previously been admitted to the United States for a continuous period of work, study, or other long-term activity, is outside the United States on the effective date of this order, seeks to reenter the United States to resume that activity, and the denial of reentry during the suspension period would impair that activity;

(ii) the foreign national has previously established significant contacts with the United States but is outside the United States on the effective date of this order for work, study, or other lawful activity;

(iii) the foreign national seeks to enter the United States for significant business or professional obligations and the denial of entry during the suspension period would impair those obligations;

(iv) the foreign national seeks to enter the United States to visit or reside with a close family member (*e.g.,* a spouse, child, or parent) who is a United States citizen, lawful permanent resident, or alien lawfully admitted on a valid nonimmigrant visa, and the denial of entry during the suspension period would cause undue hardship;

(v) the foreign national is an infant, a young child or adoptee, an individual needing urgent medical care, or someone whose entry is otherwise justified by the special circumstances of the case;

(vi) the foreign national has been employed by, or on behalf of, the United States Government (or is an eligible dependent of such an employee) and the employee can document that he or she has provided faithful and valuable service to the United States Government;

(vii) the foreign national is traveling for purposes related to an international organization designated under the International Organizations Immunities Act (IOIA), 22 U.S.C. 288 *et seq.,* traveling for purposes of conducting meetings or business with the United States Government, or traveling to conduct business on behalf of an international organization not designated under the IOIA;

(viii) the foreign national is a landed Canadian immigrant who applies for a visa at a location within Canada; or

(ix) the foreign national is traveling as a United States Government-sponsored exchange visitor.

**Sec. 4**. *Additional Inquiries Related to Nationals of Iraq.* An application by any Iraqi national for a visa, admission, or other immigration benefit should be subjected to thorough review, including, as appropriate, consultation with a designee of the Secretary of Defense and use of the additional information that has been obtained in the context of the close U.S.-Iraqi security partnership, since Executive Order 13769 was issued, concerning individuals suspected of ties to ISIS or other terrorist organizations and individuals coming from territories controlled or formerly controlled by ISIS. Such review shall include consideration of whether the applicant has connections with ISIS or other terrorist organizations or with territory that is or has been under the dominant influence of ISIS, as well as any other information bearing on whether the applicant may be a threat to commit acts of terrorism or otherwise threaten the national security or public safety of the United States.

**Sec. 5**. *Implementing Uniform Screening and Vetting Standards for All Immigration Programs.* (a) The Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Director of National Intelligence shall implement a program, as part of the process for adjudications, to identify individuals who seek to enter the United States on a fraudulent basis, who support terrorism, violent extremism, acts of violence toward any group or class of people within the United States, or who present a risk of causing harm subsequent to their entry. This program shall include the development of a uniform baseline for screening and vetting standards and procedures, such as in-person interviews; a database of identity documents proffered by applicants to ensure that duplicate documents are not used by multiple applicants; amended application forms that include questions aimed at identifying fraudulent answers and malicious intent; a mechanism to ensure that applicants are who they claim to be; a mechanism to assess whether applicants may commit, aid, or support any kind of violent, criminal, or terrorist acts after entering the United States; and any other appropriate means for ensuring the proper collection of all information necessary for a rigorous evaluation of all grounds of inadmissibility or grounds for the denial of other immigration benefits.

(b) The Secretary of Homeland Security, in conjunction with the Secretary of State, the Attorney General, and the Director of National Intelligence, shall submit to the President an initial report on the progress of the program described in subsection (a) of this section within 60 days of the effective date of this order, a second report within 100 days of the effective date of this

order, and a third report within 200 days of the effective date of this order.

**Sec. 6**. *Realignment of the U.S. Refugee Admissions Program for Fiscal Year 2017.* (a) The Secretary of State shall suspend travel of refugees into the United States under the USRAP, and the Secretary of Homeland Security shall suspend decisions on applications for refugee status, for 120 days after the effective date of this order, subject to waivers pursuant to subsection (c) of this section. During the 120-day period, the Secretary of State, in conjunction with the Secretary of Homeland Security and in consultation with the Director of National Intelligence, shall review the USRAP application and adjudication processes to determine what additional procedures should be used to ensure that individuals seeking admission as refugees do not pose a threat to the security and welfare of the United States, and shall implement such additional procedures. The suspension described in this subsection shall not apply to refugee applicants who, before the effective date of this order, have been formally scheduled for transit by the Department of State. The Secretary of State shall resume travel of refugees into the United States under the USRAP 120 days after the effective date of this order, and the Secretary of Homeland Security shall resume making decisions on applications for refugee status only for stateless persons and nationals of countries for which the Secretary of State, the Secretary of Homeland Security, and the Director of National Intelligence have jointly determined that the additional procedures implemented pursuant to this subsection are adequate to ensure the security and welfare of the United States.

(b) Pursuant to section 212(f) of the INA, I hereby proclaim that the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States, and thus suspend any entries in excess of that number until such time as I determine that additional entries would be in the national interest.

(c) Notwithstanding the temporary suspension imposed pursuant to subsection (a) of this section, the Secretary of State and the Secretary of Homeland Security may jointly determine to admit individuals to the United States as refugees on a case-by-case basis, in their discretion, but only so long as they determine that the entry of such individuals as refugees is in the national interest and does not pose a threat to the security or welfare of the United States, including in circumstances such as the following: the individual's entry would enable the United States to conform its conduct to a preexisting international agreement or arrangement, or the denial of entry would cause undue hardship.

(d) It is the policy of the executive branch that, to the extent permitted by law and as practicable, State and local jurisdictions be granted a role in the process of determining the placement or settlement in their jurisdictions of aliens eligible to be admitted to the United States as refugees. To that end, the Secretary of State shall examine existing law to determine the extent to which, consistent with applicable law, State and local jurisdictions may have greater involvement in the process of determining the placement or resettlement of refugees in their jurisdictions, and shall devise a proposal to lawfully promote such involvement.

**Sec. 7**. *Rescission of Exercise of Authority Relating to the Terrorism Grounds of Inadmissibility.* The Secretary of State and the Secretary of Homeland Security shall, in consultation with the Attorney General, consider rescinding the exercises of authority permitted by section 212(d)(3)(B) of the INA, 8 U.S.C. 1182(d)(3)(B), relating to the terrorism grounds of inadmissibility, as well as any related implementing directives or guidance.

**Sec. 8**. *Expedited Completion of the Biometric Entry-Exit Tracking System.* (a) The Secretary of Homeland Security shall expedite the completion and implementation of a biometric entry-exit tracking system for in-scope travelers to the United States, as recommended by the National Commission on Terrorist Attacks Upon the United States.

(b) The Secretary of Homeland Security shall submit to the President periodic reports on the progress of the directive set forth in subsection (a) of this section. The initial report shall be submitted within 100 days of the effective date of this order, a second report shall be submitted within 200 days of the effective date of this order, and a third report shall be submitted within 365 days of the effective date of this order. The Secretary of Homeland Security shall submit further reports every 180 days thereafter until the system is fully deployed and operational.

**Sec. 9**. *Visa Interview Security.* (a) The Secretary of State shall immediately suspend the Visa Interview Waiver Program and ensure compliance with section 222 of the INA, 8 U.S.C. 1202, which requires that all individuals seeking a nonimmigrant visa undergo an in-person interview, subject to specific statutory exceptions. This suspension shall not apply to any foreign national

traveling on a diplomatic or diplomatic-type visa, North Atlantic Treaty Organization visa, C-2 visa for travel to the United Nations, or G-1, G-2, G-3, or G-4 visa; traveling for purposes related to an international organization designated under the IOIA; or traveling for purposes of conducting meetings or business with the United States Government.

(b) To the extent permitted by law and subject to the availability of appropriations, the Secretary of State shall immediately expand the Consular Fellows Program, including by substantially increasing the number of Fellows, lengthening or making permanent the period of service, and making language training at the Foreign Service Institute available to Fellows for assignment to posts outside of their area of core linguistic ability, to ensure that nonimmigrant visa-interview wait times are not unduly affected.

**Sec. 10**. *Visa Validity Reciprocity.* The Secretary of State shall review all nonimmigrant visa reciprocity agreements and arrangements to ensure that they are, with respect to each visa classification, truly reciprocal insofar as practicable with respect to validity period and fees, as required by sections 221(c) and 281 of the INA, 8 U.S.C. 1201(c) and 1351, and other treatment. If another country does not treat United States nationals seeking nonimmigrant visas in a truly reciprocal manner, the Secretary of State shall adjust the visa validity period, fee schedule, or other treatment to match the treatment of United States nationals by that foreign country, to the extent practicable.

**Sec. 11**. *Transparency and Data Collection.* (a) To be more transparent with the American people and to implement more effectively policies and practices that

serve the national interest, the Secretary of Homeland Security, in consultation with the Attorney General, shall, consistent with applicable law and national security, collect and make publicly available the following information:

(i) information regarding the number of foreign nationals in the United States who have been charged with terrorism-related offenses while in the United States; convicted of terrorism-related offenses while in the United States; or removed from the United States based on terrorism-related activity, affiliation with or provision of material support to a terrorism-related organization, or any other national-security-related reasons;

(ii) information regarding the number of foreign nationals in the United States who have been radicalized after entry into the United States and who have engaged in terrorism-related acts, or who have provided material support to terrorism-related organizations in countries that pose a threat to the United States;

(iii) information regarding the number and types of acts of gender-based violence against women, including so-called "honor killings," in the United States by foreign nationals; and

(iv) any other information relevant to public safety and security as determined by the Secretary of Homeland Security or the Attorney General, including information on the immigration status of foreign nationals charged with major offenses.

(b) The Secretary of Homeland Security shall release the initial report under subsection (a) of this section within 180 days of the effective date of this order and shall include information for the period from September 11, 2001, until the date of the initial report. Subsequent reports shall be issued every 180 days thereafter and reflect the period since the previous report.

**Sec. 12**. *Enforcement.* (a) The Secretary of State and the Secretary of Homeland Security shall consult with appropriate domestic and international partners, including countries and organizations, to ensure efficient, effective, and appropriate implementation of the actions directed in this order.

(b) In implementing this order, the Secretary of State and the Secretary of Homeland Security shall comply with all applicable laws and regulations, including, as appropriate, those providing an opportunity for individuals to claim a fear of persecution or torture, such as the credible fear determination for aliens covered by section 235(b)(1)(A) of the INA, 8 U.S.C. 1225(b)(1)(A).

(c) No immigrant or nonimmigrant visa issued before the effective date of this order shall be revoked pursuant to this order.

(d) Any individual whose visa was marked revoked or marked canceled as a result of Executive Order 13769 shall be entitled to a travel document confirming that the individual is permitted to travel to the United States and seek entry. Any prior cancellation or revocation of a visa that was solely pursuant to Executive Order 13769 shall not be the basis of inadmissibility for any future determination about entry or admissibility.

(e) This order shall not apply to an individual who has been granted asylum, to a refugee who has already been admitted to the United States, or to an individual granted withholding of removal or protection under the Convention Against Torture. Nothing in this order shall be construed to limit the ability of an individual to seek asylum, withholding of removal, or protection under the Convention Against Torture, consistent with the laws of the United States.

**Sec. 13**. *Revocation.* Executive Order 13769 of January 27, 2017, is revoked as of the effective date of this order.

**Sec. 14**. *Effective Date.* This order is effective at 12:01 a.m., eastern daylight time on March 16, 2017.

**Sec. 15**. *Severability.* (a) If any provision of this order, or the application of any provision to any person or circumstance, is held to be invalid, the remainder of this order and the application of its other provisions to any other persons or circumstances shall not be affected thereby.

(b) If any provision of this order, or the application of any provision to any person or circumstance, is held to be invalid because of the lack of certain procedural requirements, the relevant executive branch officials shall implement those procedural requirements.

**Sec. 16**. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

/s/ DONALD J. TRUMP

THE WHITE HOUSE,

*Mar. 6, 2017*.