

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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

Pages: 1 through 82

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Washington, D.C.

Wednesday, April 25, 2018

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

APPEARANCES:

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Department of Justice, Washington, D.C.;
on behalf of the Petitioners.
NEAL K. KATYAL, ESQ., Washington, D.C.; on behalf
of the Respondents.

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

2 (10:02 a.m.)

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

7 Mr. Francisco.

8 ORAL ARGUMENT OF GENERAL NOEL J. FRANCISCO

9 ON BEHALF OF THE PETITIONERS

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

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

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

1 to protect the country until they do.

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

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

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

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

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

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

1 GENERAL FRANCISCO: And --

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

6 GENERAL FRANCISCO: Right.

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

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

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

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

22 GENERAL FRANCISCO: Right, but --

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

25 GENERAL FRANCISCO: And that's exactly

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

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

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

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

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

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

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

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

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

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

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

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

17 JUSTICE SOTOMAYOR: So given --

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

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

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

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

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

21 GENERAL FRANCISCO: Yes.

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

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

1 It is not --

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

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

7 JUSTICE SOTOMAYOR: And -- and --

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

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

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

25 CHIEF JUSTICE ROBERTS: Is your

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

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

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

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

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

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

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

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

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

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

15 JUSTICE BREYER: If you're about --

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

18 GENERAL FRANCISCO: Yes, Your Honor.

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

1 want to press on that a little bit.

2 GENERAL FRANCISCO: Sure.

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

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

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

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

21 GENERAL FRANCISCO: Uh-huh.

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

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

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

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

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

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

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

4 GENERAL FRANCISCO: Uh-huh.

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

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

18 GENERAL FRANCISCO: Right.

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

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

1 Mandel applies.

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

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

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

22 JUSTICE KAGAN: Well --

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

1 JUSTICE KAGAN: Yes.

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

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

8 (Laughter.)

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

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

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

24 GENERAL FRANCISCO: Right.

25 JUSTICE KAGAN: -- given this context,

1 in which this hypothetical President --

2 GENERAL FRANCISCO: Sure.

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

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

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

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

1 concluded --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8 GENERAL FRANCISCO: Right.

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

14 GENERAL FRANCISCO: Right.

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

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

21 JUSTICE SOTOMAYOR: Well, but I --

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

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

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

10 GENERAL FRANCISCO: Uh-huh.

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

16 GENERAL FRANCISCO: Uh-huh.

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

21 GENERAL FRANCISCO: Uh-huh.

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

24 GENERAL FRANCISCO: Uh-huh.

25 JUSTICE SOTOMAYOR: -- who basically

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

3 GENERAL FRANCISCO: Uh-huh.

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

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

11 GENERAL FRANCISCO: Uh-huh.

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

15 GENERAL FRANCISCO: Right.

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

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

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

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

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

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

25 JUSTICE SOTOMAYOR: General, the

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

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

8 GENERAL FRANCISCO: Right.

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

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

15 GENERAL FRANCISCO: Right.

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

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

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

25 GENERAL FRANCISCO: Well, Your Honor,

1 a couple of responses to that.

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

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

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

17 GENERAL FRANCISCO: Uh-huh.

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

20 GENERAL FRANCISCO: Yes.

21 JUSTICE KAGAN: Did I get you right?

22 GENERAL FRANCISCO: Yes.

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

1 effectively that?

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

15 But for --

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

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

25 JUSTICE KENNEDY: You would say

1 whatever he said in the campaign is irrelevant?

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

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

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

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

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

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

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

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

21 GENERAL FRANCISCO: Uh-huh.

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

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

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

10 GENERAL FRANCISCO: Uh-huh.

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

13 GENERAL FRANCISCO: Uh-huh.

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

21 GENERAL FRANCISCO: Uh-huh.

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

25 GENERAL FRANCISCO: Yeah.

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

3 GENERAL FRANCISCO: Uh-huh.

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

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

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

13 GENERAL FRANCISCO: Yeah.

14 JUSTICE BREYER: You see?

15 GENERAL FRANCISCO: Yeah.

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

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

24 JUSTICE BREYER: What?

25 GENERAL FRANCISCO: First, in terms of

1 the numbers --

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

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

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

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

10 JUSTICE BREYER: Yeah.

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

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

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

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

22 GENERAL FRANCISCO: -- for the waiver.

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

25 GENERAL FRANCISCO: That's why we have

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

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

4 GENERAL FRANCISCO: Yeah.

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

7 GENERAL FRANCISCO: Yes.

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

10 GENERAL FRANCISCO: Yes.

11 (Laughter.)

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

25 GENERAL FRANCISCO: That's not true.

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

10 GENERAL FRANCISCO: Right.

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

14 GENERAL FRANCISCO: Sure.

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

22 GENERAL FRANCISCO: Right.

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

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

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

5 GENERAL FRANCISCO: Yeah.

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

8 GENERAL FRANCISCO: Yes.

9 JUSTICE BREYER: What's the answer?

10 GENERAL FRANCISCO: And two responses.

11 JUSTICE BREYER: Yes.

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

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

19 GENERAL FRANCISCO: And then --

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

25 GENERAL FRANCISCO: No, Your Honor,

1 and I have two -- two responses --

2 JUSTICE BREYER: Yeah.

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

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

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

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

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

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

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

1 GENERAL FRANCISCO: I don't --

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

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

17 Thank you, Mr. Chief Justice.

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

20 GENERAL FRANCISCO: Thank you.

21 CHIEF JUSTICE ROBERTS: Mr. Katyal.

22 ORAL ARGUMENT OF NEAL K. KATYAL

23 ON BEHALF OF THE RESPONDENTS

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

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

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

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

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

25 And, third, Congress was aware

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

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

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

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

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

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

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

7 MR. KATYAL: Right.

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

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

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

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

1 to act when the President asked for
2 legislation.

3 (Laughter.)

4 MR. KATYAL: Right.

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

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

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

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

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

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

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

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

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

23 MR. KATYAL: Correct.

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

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

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

12 MR. KATYAL: Correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 MR. KATYAL: Well, in --

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

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

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

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

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

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

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

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

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

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

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

1 against a majority Muslim country?

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

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

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

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

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

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

25 MR. KATYAL: Oh.

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

4 MR. KATYAL: Yeah.

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

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

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

21 CHIEF JUSTICE ROBERTS: He can never
22 --

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

25 JUSTICE GORSUCH: Mr. Katyal -- Mr.

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

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

18 JUSTICE GORSUCH: Oh behalf of --

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

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

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

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

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

13 MR. KATYAL: Because I --

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

16 MR. KATYAL: Well --

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

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

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

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

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

1 sweeping 1182 power.

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

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

11 MR. KATYAL: That is not our argument.

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

17 MR. KATYAL: Right.

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

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

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

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

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

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

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

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

18 MR. KATYAL: Yes.

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

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

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

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

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

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

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

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

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

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

15 MR. KATYAL: Yes.

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

19 MR. KATYAL: Right.

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

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

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

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

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

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

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

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

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

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

25 It's purely the text of the

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

5 Now --

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

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

10 CHIEF JUSTICE ROBERTS: Yes.

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

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

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

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

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

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

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

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

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

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

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

1 That's the difference.

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

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

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

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

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

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

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

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

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

6 JUSTICE SOTOMAYOR: So if another --

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

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

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

19 MR. KATYAL: Absolutely.

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

23 MR. KATYAL: Right.

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

1 MR. KATYAL: Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8 And the President --

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

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

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

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

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

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

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

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

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

7 MR. KATYAL: Right.

8 JUSTICE BREYER: -- what do we do?

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

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

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

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

2 JUSTICE GORSUCH: That --

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

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

7 MR. KATYAL: Yes.

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

11 MR. KATYAL: Yeah, yeah.

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

15 MR. KATYAL: Right.

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

21 MR. KATYAL: Yeah.

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

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

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

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

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

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

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

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

6 MR. KATYAL: Okay.

7 (Laughter.)

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

10 (Laughter.)

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

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Five minutes for rebuttal, General.

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

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

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

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

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

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

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

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

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

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

25 JUSTICE GINSBURG: How -- how do you

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

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

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

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

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

22 GENERAL FRANCISCO: Yeah.

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

1 don't know what's going on.

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

4 GENERAL FRANCISCO: Well, Your Honor
5 --

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

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

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

1 determination.

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

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

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

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

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

22 JUSTICE SOTOMAYOR: Have you bothered
23 --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 This proclamation is about what it

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

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

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

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