Nos. 17-2231(L), 17-2232, 17-2233, 17-2240 (Consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,
Plaintiffs-Appellees,

IRANIAN ALLIANCES ACROSS BORDERS, *et al*.,
Plaintiffs-Appellees,

EBLAL ZAKZOK, *et al.*,
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, *et al*.,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Maryland, Southern Division
(8:17-cv-00361-TDC)

FIRST CROSS-APPEAL BRIEF FOR APPELLEES

Karen C. Tumlin
Nicholas Espíritu
Melissa S. Keaney
Esther Sung
NATIONAL IMMIGRATION LAW CENTER
3435 Wilshire Boulevard,
Suite 1600
Los Angeles, CA 90010
Tel: (213) 639-3900
Fax: (213) 639-3911
tumlin@nilc.org

Omar C. Jadwat
Lee Gelernt
Hina Shamsi
Hugh Handeyside
Sarah L. Mehta
David Hausman
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004

Additional counsel on the next page

espiritu@nilc.org
keaney@nilc.org
sung@nilc.org

Justin B. Cox
NATIONAL IMMIGRATION LAW CENTER
P.O. Box 170208
Atlanta, GA 30317
Tel: (678) 279-5441
Fax: (213) 639-3911
cox@nilc.org

Kathryn Claire Meyer
Mariko Hirose
INTERNATIONAL REFUGEE ASSISTANCE PROJECT
40 Rector Street, 9th Floor
New York, New York 10006
Tel: (646) 459-3044
Fax: (212) 533-4598
kmeyer@refugeerights.org
mhirose@refugeerights.org

David Rocah
Deborah A. Jeon
Sonia Kumar
Nicholas Taichi Steiner
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MARYLAND
3600 Clipper Mill Road, Suite 350
Baltimore, MD 21211
Tel: (410) 889-8555
Fax: (410) 366-7838
jeon@aclu-md.org
rocah@aclu-md.org
kumar@aclu-md.org
steiner@aclu-md.org

Tel: (212) 549-2600
Fax: (212) 549-2654
ojadwat@aclu.org
lgelernt@aclu.org
hshamsi@aclu.org
hhandeyside@aclu.org
smehta@aclu.org
dhausman@aclu.org

Cecillia D. Wang
Cody H. Wofsy
Spencer E. Amdur
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111
Tel: (415) 343-0770
Fax: (415) 395-0950
cwang@aclu.org
cwofsy@aclu.org
samdur@aclu.org

David Cole
Daniel Mach
Heather L. Weaver
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street NW
Washington, D.C. 20005
Tel: (202) 675-2330
Fax: (202) 457-0805
dcole@aclu.org
dmach@aclu.org
hweaver@aclu.org

Additional counsel on the next page

Counsel for Plaintiffs-Appellees IRAP, et al.

Johnathan Smith
Sirine Shebaya
MUSLIM ADVOCATES
P.O. Box 66408
Washington, D.C. 20035
Tel: (202) 897-2622
Fax: (415) 765-1774
johnathan@muslimadvocates.org
sirine@muslimadvocates.org

Richard B. Katskee
Eric Rothschild
Andrew L. Nellis^
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
1310 L St. NW, Ste. 200
Washington, D.C. 20005
Tel: (202) 466-3234
Fax: (202) 466-3353
katskee@au.org
rothschild@au.org
nellis@au.org

Mark H. Lynch
Mark W. Mosier
Herbert L. Fenster
Jose E. Arvelo
John W. Sorrenti
Katherine E. Cahoy
Rebecca G. Van Tassell
Karun Tilak
COVINGTON & BURLING LLP
One City Center
850 10th Street, NW
Washington, D.C. 20001
Tel: (202) 662-6000
Fax: (202) 662-6302
mlynch@cov.com
mmosier@cov.com
hfenster@cov.com
jarvelo@cov.com
jsorrenti@cov.com
kcahoy@cov.com
rvantassell@cov.com
ktilak@cov.com

Counsel for Plaintiffs-Appellees I.A.A.B., et al.

Charles E. Davidow
Robert A. Atkins
Liza Velazquez
Andrew J. Ehrlich
Steven C. Herzog
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
Tel.: (212) 373-3000
Fax: (212) 757-3990
ratkins@paulweiss.com
lvelazquez@paulweiss.com
aehrlich@paulweiss.com
sherzog@paulweiss.com

Lena F. Masri
Gadeir Abbas
COUNCIL ON AMERICAN-ISLAMIC RELATIONS
453 New Jersey Avenue SE
Washington, D.C. 20003
Tel.: (202) 488-8787
Fax: (202) 488-0833
lmasri@cair.com
gabbas@cair.com

Additional counsel on the next page

Faiza Patel
Michael Price
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
120 Broadway, Suite 1750
New York, NY 10271
Tel.: (646) 292-8335
Fax: (212) 463-7308
faiza.patel@nyu.com
michael.price@nyu.com

Jethro Eisenstein
PROFETA & EISENSTEIN
45 Broadway, Suite 2200
New York, New York 10006
Tel.: (212) 577-6500
Fax: (212) 577-6702
jethro19@gmail.com

Counsel for Plaintiffs-Appellees Zakzok, et al.

^Admitted only in New York; supervised by Richard B. Katskee, a member of the D.C. Bar

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Legislative History

Other Authorities

INTRODUCTION

On September 24, the President issued Proclamation 9645 (the "Proclamation"), imposing an indefinite ban on most travel to the United States by more than 150 million people, the vast majority of whom are Muslim. 82 Fed. Reg. 45161. By its own terms, the Proclamation flows directly from the President's March 6 Executive Order ("EO-2"), 82 Fed. Reg. 13209, which imposed a similar—but temporary—ban, and which this Court found to violate the Establishment Clause. *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 572 (4th Cir.) (en banc), *vacated as moot*, 86 USLW 3175 (U.S. Oct. 10, 2017) (EO-2 "drips with religious intolerance, animus, and discrimination").[1] The government claims, however, that everything is different this time because it undertook a review and recommendation procedure before the President imposed the new ban in the Proclamation.

The district court carefully considered that claim, and rejected it. As the district court explained, the government's argument that the Proclamation has wiped the slate clean cannot be squared with the facts, including: the remarkable similarity between the current ban and its predecessors; EO-2's directives, which

[1] *IRAP* remains persuasive authority, particularly as an en banc decision of this Court addressing an earlier stage of this same litigation. *See Kornahrens v. Evatt*, 66 F.3d 1350, 1357 (4th Cir. 1995) (relying on vacated decision as "instructive" and "persuasive"); *United States v. Adewani*, 467 F.3d 1340, 1342 (D.C. Cir. 2006).

effectively "pre-ordained" the outcome of the review-and-recommendation process; the subjective, post-hoc manipulation of the process to make the results even more of a Muslim ban; and the President's own statements "cast[ing] the Proclamation as the inextricable re-animation of the twice-enjoined Muslim ban." J.A. 1070, 1075.

Once again, the government's arguments in response boil down to a demand for total deference, no matter how strong the evidence is, and an assertion that the Court should simply ignore facts inconvenient to the government. The Court properly rejected the government's demands for judicial abdication before, and it should do so again.

Even leaving aside the Proclamation's purpose and effect of denigrating Islam and disfavoring Muslims, the new ban violates the Immigration and Nationality Act ("INA"). It discriminates on the basis of national origin in direct violation of 8 U.S.C. § 1152(a)(1)(A), as the district court found, and it also exceeds the President's statutory authority under 8 U.S.C. § 1182(f) by unilaterally replacing Congress's detailed admissions system with one designed by the President. The government's breathtaking defense—that the President can override Congress at will, recrafting the immigration system however he sees fit regardless of the Congressional judgments embodied in the INA—is anathema to the separation of powers.

The district court's injunction should therefore be affirmed in full as far as it goes. But, because the court's partial preliminary injunction does not provide complete relief to all the plaintiffs, who are harmed by the indefinite ban's effects on noncitizens lacking formal relationships with U.S. persons, the Court should modify the preliminary injunction so that it is no longer "limited to barring enforcement of Section 2 against those individuals who have a credible claim of a bona fide relationship with a person or entity in the United States."

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343. J.A. 475. This Court has jurisdiction over the appeal and cross-appeal under 28 U.S.C. § 1292(a)(1). The district court entered its order granting a preliminary injunction in these cases on October 17, 2017. J.A. 1084. Defendants filed timely notices of appeal on October 20, 2017. J.A. 1087, 1198, 1494. Plaintiffs in No. 17-2240 filed a timely notice of cross-appeal on October 23, 2017. J.A. 1090.

STATEMENT OF THE ISSUES

Did the district court abuse its discretion by issuing the preliminary injunction?

On cross-appeal:

1) Did the district court err in limiting the preliminary injunction to persons with a bona fide relationship with an individual or entity in the United States?

2) Even if such a limitation were appropriate, did the district court's order define such relationships too narrowly?

STATEMENT OF THE CASE

The Proclamation is the third order the President has signed this year banning more than one hundred million individuals from Muslim-majority nations from coming to the United States. *See generally* J.A. 997-1013 (district court findings of fact). These bans fulfill months of promises to ban Muslims from the United States—promises the President stood by after his election and on the day he signed the first order, and that he justified with the assertions that "Islam hates us" and "we're having problems with the Muslims, and we're having problems with Muslims coming into the country." J.A. 997.

The President signed the first ban, 82 Fed. Reg. 8977 ("EO-1"), on his eighth day in office and with "no consultation with the Department of State, the Department of Defense, the Department of Justice, or the Department of Homeland Security." *Int'l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 545 (D. Md. 2017); *IRAP*, 857 F.3d at 632 (Thacker, J., concurring) (Attorney General was "actively shielded" from learning the order's contents); J.A. 1060. The ban was swiftly challenged and enjoined. J.A. 1000-01.

The second iteration of the ban, signed March 6, 2017, reproduced the original in most respects. 82 Fed. Reg. 13209. In prior proceedings in this case, the district court enjoined Section 2(c) of EO-2, and this Court, sitting en banc, affirmed in relevant part. *IRAP*, 857 F.3d at 604-05; *see also Hawai'i v. Trump*, 245 F. Supp. 3d 1227 (D. Haw.), *aff'd in relevant part*, 859 F.3d 741 (9th Cir. 2017) (per curiam).

EO-2, like EO-1 before it, directed reviews of the information other countries share with the United States to facilitate vetting of visa applicants. EO-1 § 3(a)-(b); EO-2 § 2(a)-(b). It further directed that, once the vetting review was complete, the Secretary of Homeland Security "shall" submit "a list of countries" to be subjected to an *indefinite* ban. EO-1 § 3(e)-(f); EO-2 § 2(e)-(f).

While the Department of Homeland Security was still undertaking the review and recommendations required by EO-2, the President repeatedly issued public statements criticizing the injunctions that had been issued against EO-2 and promising to put a "tougher version" of the ban into place. J.A. 1006-07. The White House also put an individual in charge of the Department of Homeland Security's task force on implementing executive orders, including the directives in EO-2, who said in 2014 that a blanket ban on visas for Muslim-majority countries

"is one of these sort of great ideas that can never happen,"[2] and has a consistent, public history of hostility toward Muslims and Islam, including recent assertions that a notorious mass shooter was simply "a Muslim who is following the strictures of Islam."[3]

As directed, the Department of Homeland Security submitted a list of countries to ban. And on September 24, the President forged the next link in this chain of events: the Proclamation.

The Proclamation, like the first two bans, would disproportionately ban Muslims. The ban encompasses nationals of eight countries: five of the six countries barred by both EO-1 and EO-2—Iran, Libya, Somalia, Syria, and Yemen—along with Chad, North Korea, and individuals affiliated with certain government agencies in Venezuela. Individuals seeking immigrant visas, which

---

[2] Eric Hananoki, *New DHS Senior Advisor Pushed "Mosque Surveillance Program," Claimed that Muslims "By-And-Large" Want to Subjugate Non-Muslims*, Media Matters (Mar. 14, 2017), https://www.mediamatters.org/research/2017/03/14/new-dhs-senior-adviser-pushed-mosque-surveillance-program-claimed-muslims-and-large-want-subjugate/215634.

[3] Noah Lanard, *A Fake Jihadist Has Landed a Top Job at Homeland Security*, Mother Jones (Nov. 1, 2017), http://www.motherjones.com/politics/2017/11/a-fake-jihadist-has-landed-a-top-job-at-homeland-security/. This individual's role overseeing executive order implementation at DHS came to light on November 1, after the district court issued its decision, so the relevant sources are not in the record below.

lead to permanent resident status and the possibility of U.S. citizenship, from each designated country except Venezuela are banned. Restrictions on nonimmigrant visas vary among the banned countries. *See* J.A. 511, 868-69 (charts comparing bans imposed by the three orders).

Chad and the five countries banned by the Proclamation, EO-1, and EO-2, are majority-Muslim, and have a combined population of approximately 150 million. J.A. 852-859. Almost everyone whom the Proclamation will prevent from obtaining visas or entering the United States is from one of those six nations—which collectively are approximately 95% Muslim. J.A. 234-248.

In contrast, virtually no one from North Korea or Venezuela—the two countries named in the Proclamation that are not majority-Muslim—will be affected in that way. North Korea accounts for a negligible number of visas. And for Venezuela, only officials of particular Venezuelan government agencies and their families are banned, and then only from obtaining tourist or temporary visas. To illustrate, if in effect in 2016, the Proclamation would have barred 12,998 Yemenis, 7,727 Iranians, 9 North Koreans, and no Venezuelans from obtaining immigrant visas. J.A. 868.

To justify the bans, the Proclamation asserts that countries were assessed against a set of baseline criteria. Those criteria were not applied uniformly. *See* J.A. 1283-1300 (David Bier, *Travel Ban Is Based on Executive Whim, Not*

Objective Criteria, Cato Institute, Oct. 9, 2017) (explaining, for example, that more than 80 countries fail to issue electronic passports, yet three of the banned Muslim-majority countries do issue such passports). The Proclamation also acknowledges that Somalia (a majority-Muslim country) was banned even though it satisfies the government's baseline criteria, and that Venezuela (a country that is not majority-Muslim) was effectively exempted even though it fails to meet the baseline. Proclamation §§ 2(f), 2(h).[4]

Like its predecessors, the Proclamation does not cite any visa vetting failures or otherwise explain how the President concluded that existing vetting procedures were or might be inadequate. And a sworn declaration by 49 former national security officials explains that the ban is "unnecessary" because of the robust existing vetting procedures, and will instead "cause serious harm" to national security. J.A. 897.

The individual plaintiffs in this litigation are U.S. citizens and lawful permanent residents whose relatives—including spouses, parents, and children—will be unable to obtain visas if the Proclamation takes effect. The organizational

[4] The Proclamation states that the government has other ways of verifying Venezuelans' identity. But it does not suggest that Venezuela is unique in that regard. *See* J.A. 1300 (David Bier, *Travel Ban Is Based on Executive Whim, Not Objective Criteria*, Cato Institute, Oct. 9, 2017) (observing that "there is absolutely no doubt that this factor applies to all eight travel ban countries").

plaintiffs, which include legal and social services organizations and associations of scholars, merchants, and young people, have similarly situated members and clients. *See, e.g.*, J.A. 1244-48, 587-89, 597-98, 612-13; J.A. 1259-62 (spouses); J.A. 1268-69 (fiancé); J.A. 573-75, 1170-71, 1249, 1251, (parent and child); J.A. 1260 (parent and stepchild); J.A. 1174-75 (in-laws).

Several of the plaintiffs have relatives who are gravely ill and are seeking urgent family reunification that will be prevented by the Proclamation. *See, e.g.*, J.A. 1245-46 (critically ill infant); J.A. 1256 (father-in-law with cancer); J.A. 591 (husband with terminal cancer). Some of the plaintiffs' loved ones have little connection with their country of nationality, but are excluded nonetheless. *See, e.g.*, J.A. 1256 (Syrian national has never been to Syria). And several plaintiffs fear that if the Proclamation takes effect, their loved ones will have no choice but to return to countries where they face grave danger. *See, e.g.*, J.A. 611-13, 1159, 1250, 1266.

The organizational plaintiffs are also injured in their own right. For example, plaintiff MESA's mission of bringing together scholars of Middle Eastern Studies will suffer, as will its finances, which rely heavily on the annual meeting that many members and other scholars will no longer be able to attend. J.A. 557-60. Similarly, plaintiff Iranian Alliances Across Borders' planned International Conference on the Iranian Diaspora in New York in April 2018 will

be severely impacted if the Proclamation goes into effect. J.A. 1191. Plaintiffs Arab-American Association of New York and International Refugee Assistance Project ("IRAP") have both been forced to divert resources to aid clients and others. J.A. 565, 567-68, 576-78.

The district court concluded that the Proclamation's nationality-based ban on the issuance and use of immigrant visas violated the INA's anti-discrimination provision, 8 U.S.C. § 1152(a). J.A. 1034-40 (rejecting the government's distinction between visa issuance and entry). The court declined to hold the rest of the Proclamation invalid under 8 U.S.C. § 1182(f), but it acknowledged that "[i]f there is an example of a § 1182(f) order, past or present, that exceeds the authority of that statute, it would be this one." J.A. 1051.

The district court then held that the Proclamation, like EO-2, violated the Establishment Clause. J.A. 1053-76. In so doing, the court rejected the government's argument that the Proclamation's "review process" or the "inclusion of two non-majority Muslim nations" negated the ample evidence of improper purpose and effect. J.A. 1068, 1066. The district court explained that the Proclamation arose from EO-2's criteria for banning countries and from EO-2's requirement that the review process yield a list of banned countries. J.A. 1072. It observed that the "underlying architecture of [EO-1, EO-2,] and the Proclamation is fundamentally the same." J.A. 1067. And it canvassed public statements by the

President since EO-2, which showed that "even before President Trump had received any reports on the DHS Review," he "had already decided that the travel ban would continue." J.A. 1074. The court concluded that "the Proclamation [i]s the inextricable re-animation of the twice-enjoined Muslim ban," only this time it is "no longer temporary." J.A. 1075.

Accordingly, the district court issued a preliminary injunction prohibiting the government from enforcing Section 2 of the Proclamation. The preliminary injunction does not cover North Korea and the limited group of Venezuelans subject to the ban. J.A. 1081. The district court also limited the injunction's protection to "those individuals who have a credible claim of a bona fide relationship with a person or entity in the United States." J.A. 1080 (internal quotation marks omitted).

SUMMARY OF ARGUMENT

I. The district court correctly held that the plaintiffs' claims are justiciable. The doctrine of consular nonreviewability does not apply to policies like the Proclamation, and the plaintiffs have a cause of action under the APA and in equity. Plaintiffs' constitutional claims are also justiciable, as this Court previously held, because the plaintiffs invoke their own rights under the Establishment Clause to be free from religious isolation, exclusion, and condemnation.

II. The Proclamation violates the INA. As the district court held, it violates 8 U.S.C. § 1152(a)(1)(A)'s prohibition of nationality discrimination. The Proclamation also exceeds the President's authority to suspend entry under 8 U.S.C. § 1182(f). Section 1182(f)'s role in the INA is not to allow the President to unilaterally rewrite or discard fundamental aspects of the INA, like its two-track admissions system for visa and visa-less travel. But that is what the Proclamation does, by indefinitely banning eligible individuals from receiving visas even if they can meet their burden under the INA, based solely on their *governments'* failure to satisfy some of the visa *waiver* criteria.

III. The district court correctly held that the Proclamation, like EO-2, violates the Establishment Clause. As this Court previously held, the Court may look beyond the face of the Proclamation because plaintiffs have adduced ample evidence of bad faith. The effect of the ban will overwhelmingly fall on Muslims, and the ban on North Korea and certain Venezuelan officials will have little practical impact. The Proclamation's context and history, like EO-2's, makes clear that this is another attempt to implement the promised Muslim ban. The Proclamation's review and recommendation process does not undercut that conclusion, and in fact underscores the continuity from EO-2.

IV. The injunction was appropriate in light of the religious denigration and separation from loved ones that plaintiffs face, and the lack of concrete or

imminent injury to the government from interim relief. As this Court previously held, nationwide relief is warranted because the ban's effect extends nationwide and a narrower injunction would not fully remedy the ban's condemnation of the plaintiffs.

V. The district court erred in narrowing its injunction to only noncitizens who have a formal, documented relationship with a U.S. person or entity. The Supreme Court fashioned that limitation in a different factual and procedural context. This case now involves an indefinite ban and a wider array of plaintiffs than were before the Supreme Court, who would suffer a variety of harms from the exclusion of even individuals without formal relationships in this country. The government's interests are weaker than they were before the Supreme Court. And the task before the district court was fashioning interim relief after preliminarily deciding the merits, not crafting a stay pending initial consideration of the merits. The statutory and constitutional violations here, and the threatened injuries to the plaintiffs, merit a preliminary injunction that is not narrowed in this way.

VI. At a minimum, the district court's injunction should be modified to make clear that relationships between entities in the United States and their clients are sufficient under the preliminary injunction so long as they are formal, documented, and formed in the ordinary course.

STANDARD OF REVIEW

The Court reviews "the district court's injunction for abuse of discretion." *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 416 (4th Cir. 1999).

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE JUSTICIABLE.

The government relies on two sweeping arguments to oppose judicial review here: That this Court has no power at all to consider statutory claims involving exclusion policies, and that the plaintiffs, who are personally affected by the Proclamation, cannot challenge its denigration of their religion. Both arguments lack merit.

A. Plaintiffs' Statutory Claims Are Justiciable.

1. The government makes the startling claim that the courts cannot review whether the executive's exclusion policies are consistent with the governing statutes. Br. 19-22.

No court has ever recognized the broad nonreviewability principle that the government presses here, despite its claim that the principle is "deeply rooted" in the law. To the contrary, the Supreme Court itself reviewed a statutory claim against an § 1182(f) suspension in *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 165-66, 172 & n.27 (1993). The government offers no persuasive reason to discount *Sale*. Br. 25. Indeed, the government in *Sale* vigorously argued that

exclusion policies under § 1182(f) were immune from judicial review. U.S. Br. 13-18 & n.9, 55-57, 1992 WL 541276, Reply Br. 1-4, 1993 WL 290141, *Sale v. Haitian Ctrs. Council, Inc.* (No. 92-344). The Supreme Court nonetheless reviewed the claim on the merits—precisely what the government now claims has long been forbidden.

What the government's non-justiciability argument really asks this Court to do is to enormously expand the doctrine of consular non-reviewability to preclude review of statutory claims against all exclusion policies. The consular non-reviewability doctrine—which is itself not absolute—restricts the review of purely statutory challenges to "a *consular official's* decision to issue or withhold a visa." *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999) (emphasis added). As the circuits have uniformly held, that doctrine applies *only* to "a particular decision in a particular case," not a "general" policy like the one in this case. *Int'l Union of Bricklayers & Allied Craftsmen v. Meese*, 761 F.2d 798, 801 (D.C. Cir. 1985); *see Patel v. Reno*, 134 F.3d 929, 931-32 (9th Cir. 1997) (same); *Mulligan v. Schultz*, 848 F.2d 655, 657 (5th Cir. 1988) (same).

The single out-of-circuit case on which the government leans heavily (Br. 20-22), *Saavedra Bruno*, was a routine application of the consular non-reviewability doctrine to a single noncitizen's visa denial. The court repeatedly

specified that its analysis pertained to the "decisions of *consular officials*." 197 F.3d at 1160 (emphasis added); *see id.* at 1158, 1162.

Indeed, the very same Circuit has repeatedly reviewed statutory challenges to admissions *policies* on the merits. *See Int'l Union of Bricklayers*, 761 F.2d at 801 (collecting cases); *see also Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State*, 45 F.3d 469, 472 (D.C. Cir. 1995) ("*LAVAS*") (reviewing visa policy abroad), *vacated on other grounds*, 519 U.S. 1 (1996). It has even reviewed statutory claims against *individual* visa denials when necessary to avoid constitutional issues. *See Abourezk v. Reagan*, 785 F.2d 1043, 1050, 1053 (D.C. Cir. 1986); *accord id.* at 1062 n.1 (Bork, J., dissenting).[5]

Consular non-reviewability does not, as the government claims, "invert the constitutional structure [by] limit[ing] review in [the consular] context while permitting review of the President's decision[s]." Br. 21. Distinctions between individual adjudications and high-level policy are common, both in immigration and throughout the law. *See IRAP*, 857 F.3d at 587 (distinguishing between individual fact-finding and "high-level government policy"); *Washington v.*

[5] The government's other cases are even further afield, because they review claims against admissions policies *on the merits*, including statutory claims where raised. *See Fiallo v. Bell*, 430 U.S. 787, 792-99 (1977); *Harisiades v. Shaughnessy*, 342 U.S. 580, 583 & n.4 (1952); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544-47 (1950) (reviewing two statutory claims against regulations promulgated under a presidential proclamation).

Trump, 847 F.3d 1151, 1162-63 (9th Cir. 2017) (per curiam) (same); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 675-76 (1986) (statute granted review of "a regulation" but not a single "determination" made under that regulation); *cf. Crowley Caribbean Transport, Inc. v. Pena*, 37 F.3d 671, 676-77 (D.C. Cir. 1994) ("There are ample reasons for distinguishing the two situations.").[6]

2. The government also argues that Plaintiffs lack a cause of action to bring their statutory claims. It first points out that the President is not subject to the APA. Br. 22. But no APA cause of action is necessary to review presidential action, which the Court can review under its inherent equitable authority. *See Dames & Moore v. Regan*, 453 U.S. 654, 669-88 (1981) (reviewing multiple presidential orders in equity); *see also Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384-85 (2015) (describing "a long history of judicial review of illegal executive action" by "courts of equity").

Nor can the government dispute that the plaintiffs have a cause of action against the agencies implementing the Proclamation. "[I]t is now well established"

[6] Consular officers make millions of individual visa decisions each year, in most cases thousands of miles from the United States, and have unique discretion over granting and denying visas. *See, e.g.*, *Saavedra Bruno*, 197 F.3d at 1156; 8 U.S.C. §§ 1104(a)(1), 1201(a)(1); 6 U.S.C. § 236(b)(1). This case involves no similar considerations.

that "[r]eview of a Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive." *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) (internal quotation marks omitted); *see id.* at 1326-27 (holding that an agency's actions to implement an executive order are not "insulate[d] . . . from judicial review under the APA" or "a non-statutory cause of action").

The government argues that the plaintiffs nonetheless fall outside the relevant zone of interests. Br. 24. Both the Ninth and D.C. Circuits have correctly held otherwise, as the district court did here. *See Hawai'i*, 859 F.3d at 766-67 (concluding that relatives of visa applicants "fall well within the zone of interest Congress intended to protect," as did employer) (quoting *LAVAS*, 45 F.3d at 471-72); *Abourezk*, 785 F.2d at 1047, 1050-51 (holding individuals who invited noncitizens "to attend meetings or address audiences" were within the zone of interests); J.A. 1017, 1021, 1030. The zone-of-interests test "forecloses suit only when a plaintiff's interests" are "marginally related to or inconsistent with the purposes implicit in the statute." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1389 (2014) (internal quotation marks omitted). The

plaintiffs here—family members, spouses, employers, colleagues, conference hosts—easily clear that bar.[7]

Plaintiffs' claims are also ripe. As before, plaintiffs have brought a facial challenge that "is squarely presented for [the Court's] review" and "not dependent on the factual uncertainties of the waiver process." *IRAP*, 857 F.3d at 587 (holding that the waiver process would impose "undue hardship"). In any event, several plaintiffs' relatives have already completed their interviews and are awaiting the administrative processing of their visas. *See, e.g.*, J.A. 605-06; 587-88; 603; 1255; 1247; 1268; 1175; 1171. Their injuries from the Proclamation's ban are all too imminent. Ripeness is not a problem in this case.

B. Plaintiffs' Constitutional Claims Are Justiciable.

Turning to the constitutional claims, the government argues that because the Proclamation does not deny visas to the plaintiffs *themselves*, it cannot injure them, or violate their rights, in a legally relevant manner. That argument has been rejected at every stage of this case, and fails here for the same reasons. *See IRAP*, 857 F.3d at 582-87; J.A. 1023-27.

---

[7] The government's contention that § 1182(f) orders are "committed to agency discretion" because there is no meaningful statutory standard of review, Br. 24-25 (quoting 5 U.S.C. § 701(a)(2)); Br. 30,)), depends entirely on its incorrect view, on the merits, that § 1182(f) grants the President limitless power, addressed *infra*. *See also Sale*, 509 U.S. at 165-66. And in any event this objection is no answer to plaintiffs' argument under § 1152(a).

The plaintiffs have explained in detail how they have been injured by the government's condemnation of their religion. For example, IRAP Plaintiff John Doe #4 feels "demeaned" by the Proclamation's religious intent, and he has perceived the bans as "collective punishment." J.A. 588-89. For plaintiff Khazaeli, the bans have "taken the discrimination that my family has previously endured because people have seen us as Muslim and made it into law." J.A. 593. The same is true for YAMA's and MESA's members, *see* J.A. 608, 611, 555-56, clients of AAANY and IRAP, *see* J.A. 567, 578, 579-80, and other individual plaintiffs in this case, *see, e.g.*, J.A. 585, 571-72, 574, 600-01, 606-07.

The Supreme Court has repeatedly decided the claims of individuals in the United States who—like the plaintiffs here—allege that the government is injuring them and violating their rights by refusing to allow foreign nationals abroad to travel to the United States. *See Kleindienst v. Mandel*, 408 U.S. 753, 764-65 (1972); *Kerry v. Din*, 135 S. Ct. 2128, 2140-42 (2015) (Kennedy, J., concurring); *cf.* Oral Arg., *Washington v. Trump*, No. 17-35105, 2017 WLNR 4070578 (9th Cir. Feb. 7, 2017) (government conceding that "a U.S. citizen with a connection to someone seeking entry" would have standing to challenge EO-1).

The Supreme Court has also recognized that injuries that arise where the government regulates others are cognizable under the Establishment Clause. In *Two Guys From Harrison-Allentown v. McGinley*, 366 U.S. 582 (1961), the

plaintiff company had standing to challenge a Sunday closing law, even though only the company's employees—not the company itself—had been regulated, prosecuted, and fined for violating a previous version of the law, or threatened with prosecution under the new version. *Id*. at 585-87. *Two Guys*' companion case, *McGowan v. Maryland*, 366 U.S. 420 (1961), did not hold that plaintiffs had to be directly regulated to invoke the Establishment Clause. *McGowan* merely explained that the plaintiffs in that case could not allege that their *Free Exercise Clause* rights were violated without explaining what their religious beliefs were. *Id.* at 429. But it went on to hold that the plaintiffs *did* have standing to raise Establishment Clause claims, since they had suffered a "direct economic injury" under the challenged law. *Id.* at 430. *McGowan* and *Two Guys* underscore that the question is whether the challenged action *injures* the plaintiff, not whether it directly regulates him or her. *Accord IRAP*, 857 F.3d at 585 (rejecting government argument that EO-2 was "not directly targeted at plaintiffs").

The district court correctly focused on that question and concluded that plaintiffs who would suffer a particularized injury as a consequence of the government's constitutional violation could sue to enforce their rights. *See* J.A. 1023-24. The district court also correctly rejected the government's attempt to analogize this case to *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc*., 454 U.S. 464 (1982), in which the plaintiffs

were complete strangers to the challenged conduct, "abstractly disagreeing" with a transfer of property far away that they had never seen, who claimed no injury of isolation, exclusion, or condemnation, *id.* at 485. J.A. 1024; *accord IRAP*, 857 F.3d at 585; *see also id.* at 585 n.11 (explaining why *In re Navy Chaplaincy*, 534 F.3d 756 (D.C. Cir. 2008), is inapposite); *id.* at 585 n.10 (finding that "[p]laintiffs' injuries are . . . consistent with the injuries that other courts have recognized in Establishment Clause cases that do not involve religious displays or prayer") (citing *Awad v. Ziriax*, 670 F.3d 1111, 1122 (10th Cir. 2012) and *Catholic League for Religious & Civil Rights v. City & County of San Francisco*, 624 F.3d 1043, 1052 (9th Cir. 2010) (en banc)).

The plaintiffs' claims are justiciable.

II. THE PROCLAMATION VIOLATES THE IMMIGRATION AND NATIONALITY ACT.

For hundreds of millions of people in the United States and abroad, the Proclamation replaces Congress's detailed visa system with a new one of the President's design. On an indefinite and potentially permanent basis, it bars the issuance and use of immigrant visas by nationals of the designated countries. It also erases numerous categories of nonimmigrant visas for those countries. These changes read very much "like a statute," *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952)—just not the one Congress enacted.

These sweeping alterations cannot be reconciled with Congress's admissions scheme. The Proclamation reinstitutes a nationality-based system that Congress outlawed decades ago. And it jettisons Congress's individualized vetting system, which has governed for almost a hundred years, and which Congress has repeatedly reaffirmed, even when considering the same problems the Proclamation purports to address.

The President's authority under the INA does not permit him to make this sort of unilateral revision of the immigration laws. As the Supreme Court explained in a prior immigration case, the Framers were "acutely conscious" of the danger posed by subjecting national policy decisions to the "arbitrary action of one person." *INS v. Chadha*, 462 U.S. 919, 951 (1983). Once Congress enacts its own policy choices into law, nothing "authorizes the President" to "amend, or to repeal" its handiwork. *Clinton v. City of New York*, 524 U.S. 417, 438 (1998). But that is precisely what the Proclamation does.

A. The Proclamation Violates the INA's Non-Discrimination Mandate.

The district court correctly concluded that the Proclamation violates the explicit non-discrimination mandate in 8 U.S.C. § 1152(a)(1)(A), which provides that "no person shall . . . be discriminated against in the issuance of an immigrant visa because of the person's . . . nationality." J.A. 1034-40. Congress enacted

§ 1152(a)(1)(A) in 1965 when it abolished the discriminatory national-origins quota system, which had banned Asian immigration and restricted entry from southern and eastern Europe, preventing family reunification for many immigrants in order to maintain "the ethnic composition of the American people." J.A. 1034-35 (quoting H. Rep. No. 89-745, at 9 (1965)); *IRAP*, 857 F.3d at 626-27 (Wynn, J., concurring).

The Proclamation is nothing less than a new national-origins system. It provides that nationals of the six Muslim-majority countries may not come to the United States "as immigrants," indefinitely, solely because of their nationality. Proclamation § 2(a)-(h); *see id.* § 1(h)(ii) (explaining that the Order "distinguish[es] between the entry of immigrants and nonimmigrants" and bars the use of immigrant visas). The breadth of this nationality-based ban has no post-1965 parallel.

In signing the 1965 bill, President Johnson emphasized that, under the quota system, "[f]amilies were kept apart because a husband or a wife or a child had been born in the wrong place." Lyndon B. Johnson, Remarks at the Signing of the Immigration Bill, 1 Weekly Comp. Pres. Doc. 364, 365 (Oct. 3, 1965). That is exactly what the Proclamation is designed to do. *Cf.* J.A. 832-33 (President Trump calling, in September, for a "larger, tougher and more specific" ban and opposing "CHAIN MIGRATION"). Congress has emphatically rejected that approach. *See*

IRAP, 857 F.3d at 635-38 (Thacker, J., concurring); *Hawai'i*, 859 F.3d at 776-79 (same).

The government claims it is not violating Congress's prohibition because it is barring only "entry" using immigrant visas, not the issuance of those visas. J.A. 1036-37. First, the claim is wrong: The government has repeatedly admitted that it implements these bans "by denying visas." Br. for the Petitioners at 51-52, *Trump v. Int'l Refugee Assistance Project*, Nos. 16-1436 & 16-1540, (U.S. *filed* Aug. 10, 2017). Even the State Department, the agency that issues visas, describes the Proclamation as a "Presidential Proclamation on Visas." J.A. 633. Second, banning entry to immigrant visa holders achieves the same effect as banning issuance of the visas themselves, because a visa is meaningless if its holder is indefinitely barred from entering the country. An indefinite immigrant-visa entry ban therefore achieves the precise result that § 1152(a) forbids. J.A. 1038-39. Asserting, as the government does, that § 1182(f) allows the President to "limit the universe of individuals eligible to receive [immigrant] visas," Br. 35, is simply wordplay. Congress's non-discrimination command cannot be so easily evaded. J.A. 1039-40.[8]

[8] The district court rightly rejected the government's attempt, *see* Br. 39, to repackage visa denials as "a change in 'procedures' or the 'location'" of visa

The government further claims that even as Congress abolished the discriminatory national-origins system in 1965, it intended to preserve the President's ability to reverse its judgment at any time and institute a national-origins ban. Br. 35-36. That makes no sense. The legislative history the government cites does not remotely suggest such a self-defeating intent. Rather, it merely reflects that Congress recognized that *non-nationality-based* grounds of ineligibility for visas, *see* 8 U.S.C. § 1182(a), would remain in effect. And in fact, the "legislative history surrounding the 1965 Act is replete with the bold anti-discriminatory principles of the Civil Rights Era." *Olsen v. Albright*, 990 F. Supp. 31, 37 (D.D.C. 1997); *see* Lyndon B. Johnson, Remarks at the Signing of the Immigration Bill, 1 Weekly. Comp. Pres. Doc. 364, 365 (Oct. 3, 1965) (immigration policy had been "twisted and . . . distorted by the harsh injustice" of the "un-American" quota system).

Nor does § 1152(a) conflict with 8 U.S.C. § 1182(f). As explained below, *infra* Part II.B.1, § 1182(f) only authorizes the President to take action *consistent* with the INA, *see* J.A. 1048-49, including its repudiation of national origins discrimination, as set forth in 8 U.S.C. § 1152(a)(1)(A). But if there were any conflict, § 1152(a) would control. It was enacted *after* § 1182(f) and is more

---

processing. J.A. 1040 (quoting 8 U.S.C. § 1152(a)(1)(B)); *accord Hawai'i*, 859 F.3d at 779.

specific, because it addresses nationality discrimination in the issuance of visas, whereas § 1182(f) is silent as to both visa issuance in general and discrimination in particular. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 & n.7 (1976); *accord* J.A. 1036.[9]

Finally, the government tries to justify the Proclamation's nationality discrimination by pointing to past entry suspensions against Cuban and Iranian nationals. Br. 37. Those suspensions were never challenged under § 1152(a).[10] Whatever the President's authority to react to bilateral emergencies, § 1182(f) does not license him to transform the congressionally-enacted visa process into a congressionally-rejected nationality-based system. *Cf. LAVAS*, 45 F.3d at 473 (holding that an exception to § 1152(a) would require a justification that was "most compelling—perhaps a national emergency").

[9] The government points to a post-1965 amendment to 8 U.S.C. § 1185(a). But "a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum." *Radzanower*, 426 U.S. at 153.

[10] The government wrongly suggests that this Court reviewed a § 1152(a) claim in *Malek-Marzban v. INS*, 653 F.2d 113, 116 (4th Cir. 1981). Br. 36. In fact, no party in that case raised § 1152(a), and the Court did not mention it.

B. The Proclamation Exceeds the President's Delegated Authority Under § 1182(f).

The President's authority to alter Congress's admission system "extends only as far as the statutory authority conferred by Congress." *Abourezk*, 785 F.2d at 1061. Section 1182(f) does not, contrary to the government's claims, provide the President with limitless authority to restructure Congress's visa system and override congressional judgments that are embedded in the INA. Because that is precisely what the Proclamation does, it exceeds the President's authority.

1. The President Cannot Override the INA.

The government claims that, as long as a proclamation contains a bare recital that the banned entry would be detrimental to the Nation's interests, there is no limit to what parts of the INA the President can cancel or revise. Br. 30. That position raises grave separation-of-powers concerns. "Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring).

The government's position is also wrong as a matter of statutory interpretation. Under the government's interpretation of § 1182(f), the President could override not only the parts of the INA implicated here, *see supra* (non-discrimination mandate); *infra* (individualized visa system), but any others as well.

The President could declare that immigrant workers are detrimental to the interests of the United States, and then ban all entry on employment-based visas indefinitely. He could declare that U.S. interests require skills-based immigration only, and then ban all entry on family-based visas. It would be no obstacle, on the government's view, that Congress had enacted a detailed employment- and family-based immigration system. 8 U.S.C. §1153(b) ("Preference allocation for employment-based immigrants"); *id.* § 1153(a) ("Preference allocation for family-sponsored immigrants"). The President would be free to upend the basic structure of Congress's visa system.

That cannot be. The Constitution assigns the legislative power, including the power to make "[p]olicies pertaining to the entry of aliens[,] . . . exclusively to Congress." *Arizona v. United States*, 567 U.S. 387, 409 (2012) (internal quotation marks omitted). By entrusting this power to Congress, the Framers avoided the sort of unlimited "prerogative" over immigration that had been "exercised by George III." *Youngstown*, 343 U.S. at 641 (1952) (Jackson, J., concurring); *see* The Declaration of Independence (U.S. 1776) (identifying acts of "absolute Tyranny" by "the present King of Great Britain" that included "obstructing the laws for Naturalization of Foreigners" and "refusing to pass [Laws] to encourage their migrations hither").

The Congress that enacted § 1182(f) was acutely aware of these separation-of-powers principles: Just months earlier, the Supreme Court had reaffirmed, in an immigration case, that a "delegation of legislative power" is "permissible" only when "the executive judgment is limited by adequate standards." *Carlson v. Landon*, 342 U.S. 524, 542-44 (1952). And as the Supreme Court confirmed, even a statute dealing with "the formulation of travel controls" cannot "grant the Executive totally unrestricted freedom of choice." *Zemel v. Rusk*, 381 U.S. 1, 17 (1965). Section 1182(f) thus does not grant the President authority to reverse Congress's own policy decisions codified in the INA.

Instead, the President may exercise his § 1182(f) authority only in "carrying out the congressional intent." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543-47 (1950);[11] *Mahler v. Eby*, 264 U.S. 32, 40-41 (1924) (executive immigration actions must conform to the "declared policy of Congress"); *see Carlson*, 342 U.S. at 543 (interpreting statute to require the executive to "justify" its use of delegated authority "by reference to the legislative scheme"); *United States v. Witkovich*, 353 U.S. 194, 199-200 (1957) (holding that even apparently

[11] By contrast, the Court in *Knauff* noted that Congress could commit to executive discretion the decision "to exclude *a given alien*" during "the national emergency of World War II." 338 U.S. at 542-43 (emphasis added). The Court did not address rewriting the statutory scheme.

"unbounded authority" must be exercised consistent with the "purpose of the legislative scheme").

Section 1182(f)'s text confirms that the President's power is not limitless and must be exercised consistent with the rest of the INA. It eschews the language of other parts of the INA that explicitly commit immigration decisions to sole executive "discretion." *See, e.g.*, 8 U.S.C. § 1182(a)(9)(B)(v), (a)(10)(C)(iii)(II); *see also* 6 U.S.C. § 485(f)(1); 22 U.S.C. § 1631a(c). It applies to "class[es] of aliens," a term that other parts of § 1182 make clear does not encompass entire nations. *See* 8 U.S.C. § 1182(a)(1)-(10) (enumerating the "classes of aliens" who are inadmissible, none of which are connected to nationality); *accord* J.A. 1041. It only authorizes the President to "suspend" entry for a limited "period," not to rewrite the INA permanently. *See* Amicus Br. of T.A. 4-7 (discussing textual limits on § 1182(f) authority). And it requires an explicit "find[ing]" of detriment, which of course cannot conflict with Congress's own enacted determination about what would serve "the interests of the United States." 8 U.S.C. § 1182(f).

Unsurprisingly, no President has ever claimed the power under § 1182(f) to do anything like what the Proclamation does. Instead, nearly all prior § 1182(f) suspensions have targeted very narrow groups, reaching only a handful of individuals who had contributed to recent crises abroad. *See generally* J.A. 844-48

(listing § 1182(f) suspensions); 9 Foreign Affairs Manual 302.14-3(B)(1)(b)(2)-(3) (2016).[12]

The only two suspensions that applied to more than a small group of individuals each addressed acute foreign policy crises that Congress had not already addressed. When President Carter imposed restrictions on Iranian nationals in 1979, Exec. Order No. 12,172, 44 Fed. Reg. 67947 (Nov. 26, 1979); Exec. Order No. 12,206, 45 Fed. Reg. 24101 (Apr. 7, 1980), Iran was holding U.S. citizens hostage. President Reagan suspended the entry of Cuban nationals as immigrants one month after a breakdown in bilateral negotiations. *See* Associated Press, *U.S., Cuba Fail to Reach Accord on Immigration*, July 10, 1986;[13] *contra* Br. 29. And he suspended Cuban nonimmigrant entry mere months after Cuba withdrew from a migration agreement. *See* Proclamation No. 5377, 50 Fed. Reg.

[12] The government also invokes 8 U.S.C. § 1185(a), Br. 29-30, but does not seriously contend that § 1185(a) provides authority beyond § 1182(f). That is a sensible concession, because § 1185(a) does not speak to entry suspensions, it requires that any conditions on entry be "reasonable," and it is subject to the same separation-of-powers principles as § 1182(f).

[13] http://articles.latimes.com/1986-07-10/news/mn-22586_1_radio-marti.

41329 (Oct. 4, 1985).[14] Like all the narrower § 1182(f) orders, these suspensions responded to situations that Congress had not already addressed.

2. The Proclamation Conflicts with the Basic Design of Congress's Admissions System.

The Proclamation upends the basic operation of Congress's visa system. For nearly a century, that system has relied on individual visa applicants, not governments, to establish that they are eligible for visas and not inadmissible. Without identifying any problems with that system, the Proclamation fundamentally alters it by denying visas regardless of whether applicants can meet their burden under the INA. Yet Congress has repeatedly reaffirmed its own system in the face of the same security and information-sharing concerns cited by the Proclamation. Section 1182(f) does not empower the President to upend Congress's approach, especially with no relevant explanation.

1. For decades, Congress's admissions system has been divided into two different tracks: one for entry on visas, the other for visa-less entry. The visa system places the burdens of production and persuasion on individual visa applicants. *See* Nat'l Sec. Officials Decl. ¶¶ 7-8, J.A. 898. The applicant must produce sufficient information and documentation to establish her identity and

[14] President Bush's suspension of entry by sea in 1992 addressed only individuals "without necessary documentation," Exec. Order 12,807, 57 Fed. Reg. 23133 (May 24, 1992), and so created no conflict with congressional immigration admissions policy.

eligibility for a visa. 8 U.S.C. § 1202(a)-(d). The applicant must then "submit to an in person interview with a consular officer." 8 U.S.C. § 1202(h). And the applicant bears the ultimate burden to convince the consular officer that she is not subject to any ground of inadmissibility, 8 U.S.C. §§ 1361, 1201(g), including numerous terrorism and public-safety bars, 8 U.S.C. § 1182(a)(2), (a)(3)(A)-(C), (a)(3)(F). Individuals about whom the government does not have adequate information are denied visas, while individuals who *can* supply the requisite information are not needlessly excluded solely because of the perceived failings of their governments.

The visa-less admissions system—the Visa Waiver Program—is different. Since 1986, Congress has allowed certain foreign nationals to enter the country without visas if their *governments* meet certain criteria. To participate, a foreign government must issue electronic passports, 8 U.S.C. § 1187(a)(3)(B), report lost or stolen passports, *id.* § 1187(c)(2)(D), share terrorism and crime information about its nationals, *id.* § 1187(c)(2)(F), not provide safe haven for terrorists, *id.* § 1187(a)(12)(D)(ii), maintain control over its territory, *id.* § 1187(c)(5)(B)(ii), and receive its deported nationals, *id.* § 1187(c)(2)(E). Reliance on governments for identity and security information makes sense in the context of visa-less entry, because individuals are no longer supplying that information through the visa application process.

The Proclamation upends this deliberate structure. It places the burden on *governments* to provide information for visa applications, even though the INA places it on *individuals*. And its new requirements for *visa* travel are almost exactly the same as Congress's requirements for *visa-less* travel: governments must issue electronic passports, report lost or stolen passports, Proclamation § 1(c)(i), share terrorism and crime information, *id.* § 1(c)(ii), not provide safe haven for terrorists, maintain control over their territory, and receive deported nationals, *id.* § 1(c)(iii). *See* J.A. 1047 (noting that the Proclamation's criteria are "strikingly similar" to the Visa Waiver Program's). The conflict here is stark. Under Congress's scheme, nationals of countries that fail these criteria must apply for visas; under the Proclamation's scheme, nationals of those countries are *barred* from receiving visas.

The Proclamation thus discards the individualized visa system Congress has chosen. Even if an applicant can "establish to the satisfaction of the consular officer that he is eligible to receive a visa" and "is not inadmissible," 8 U.S.C. § 1361, he must *still* be denied a visa because his government fails some of the requirements for visa-less travel. That revision is incompatible with the INA. It is also unprecedented. Congress's individualized visa system has been in place since

1924.[15] In recent decades, Congress has frequently updated the requirements for both visa and visa-less travel, but it has never conflated the two. Nor has any President invoked § 1182(f) to alter the basic method for determining visa eligibility. Instead, as described above, all prior § 1182(f) suspensions have addressed conduct or diplomatic events that Congress had not. None has been based merely on dissatisfaction with the core structure of the INA's applicant-based visa process.

Congress, moreover, has repeatedly and recently adhered to that basic structure. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 137, 143 (2000) (rejecting statutory authority to deviate from recent congressional policy choices). In the years after September 11, 2001, Congress adjusted both the visa and visa-less schemes, but maintained the clear distinction. *See, e.g.*, Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 711 ("enhancing program security requirements" for governments to participate in the Visa Waiver Program); Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, §§ 5301, 5302 (imposing new "visa

[15] *See* Immigration Act of 1924, Pub. L. No. 68-139, §§ 7, 23; Report of the Comm. on Imm. & Naturalization, at 9, H.R. Rep. 68-176, 68 Cong., 1st Sess. (Feb. 9, 1924) (noting that an applicant would have to produce "all available public records concerning him kept by the government to which he owes allegiance"); *id.*, Minority Report, at 11 (acknowledging that this would be a difficult burden to meet for applicants from war-torn countries).

requirements" on individual applicants); Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, § 501(b) (identifying new "information required of [certain] visa applicant[s]"), § 303(c)(1) (imposing new requirements on "government[s]" who "participate in the visa waiver program"), § 307(a) (same).

Indeed, in 2015 Congress addressed the possibility that nationals of and visitors to certain countries—including the very countries banned in EO-1, EO-2, and now the Proclamation—might pose a security risk. Congress's solution was to transfer those individuals from the visa-less system to the visa system, where they would now have to supply the necessary information themselves. *See* Pub. L. No. 114-113, div. O, tit. II, § 203, 129 Stat. 2242 (codified at 8 U.S.C. § 1187(a)(12)); *see* 161 Cong. Rec. H9050 (Dec. 8, 2015) (Rep. Lofgren) (explaining that "a visa interview, rather than visa-free travel, would be required"). Congress pointedly declined to make them categorically ineligible to travel to the United States. *See* 161 Cong. Rec. H9051 (Dec. 8, 2015) (Rep. Conyers), H9054-55 (Rep. Lee), H9056 (Rep. McCarthy), H9057 (Rep. Schiff). Congress thus *reaffirmed* its confidence in the existing visa process.[16]

[16] *See, e.g.*, 161 Cong. Rec. H9051 (Dec. 8, 2015) (Rep. Miller) (describing "the formal visa screening process" as providing "an abundance of caution"); *see also id.* at H9054-55 (Rep. Lee) (emphasizing the importance of the visa interview); *id.*

That process represents a careful balancing of competing interests. By adhering to an individual-based regime, and eschewing nationality bans since 1965, Congress has weighed security needs against countervailing values. *See, e.g.*, H.R. Rep. No. 1365, H.R. 5678, 82d Cong., 2d Sess., Feb. 14, 1952 (explaining that "legislation such as" the 1952 Act required a "careful weighing of equities, human rights," and the "social, economic, and security interests of the people of the United States"); 161 Cong. Rec. H9058 (Dec. 8, 2015) (Rep. Titus) (2015 visa waiver amendment "strikes the right balance between security and accommodation" of economic interests); *id.* (Rep. Quigley) (same). The President cannot overturn that balance.

2. Worse still, the Proclamation does not even acknowledge, must less explain, its conflation of Congress's visa and visa-less admission schemes. So while it purports to identify deficient practices by foreign *governments*—which might justify excluding their nationals from *visa-less* travel—it contains no findings at all about its real target: the visa system. *See IRAP*, 857 F.3d at 609 (Keenan, J., concurring in part and concurring in the judgment) (explaining that "an unsupported conclusion will not satisfy [§ 1182(f)'s] 'finding' requirement"); *Hawai'i*, 859 F.3d at 770-74 (same).

---

at H9057 (Rep. Schiff) (emphasizing the "in-person interview" and the visa system's "rigorous security screening processes").

The Proclamation asserts that its unprecedented bans are "necessary to prevent the entry" of visa applicants about whom consular officers "lack[] sufficient information," Proclamation § 1(h)(i), but fails to mention that existing law *already* requires consular officers to deny visas when they lack sufficient information. 8 U.S.C. § 1361; 22 C.F.R. § 40.6. It also claims that the bans are necessary to elicit information from foreign governments, Proclamation § 1(b), (h), but does not acknowledge that Congress's visa scheme *already* accounts for the potential lack of such information from foreign governments. In fact, Congress recently considered the specific question of how to encourage information-sharing by countries that do not participate in the Visa Waiver Program, and settled on a dramatically different solution: helping those countries supply the information, rather than banning their nationals. *See* 8 U.S.C. § 1187a (providing for "assistance to non-program countries" in meeting certain program criteria); *see also* Pub. L. No. 108-458, § 7204(b) (2004) (directing the President to encourage secure passport practices by seeking "international agreements").

The Proclamation provides no explanation as to "why the country suddenly needs to shift from this tested system of individualized vetting . . . to a national origin-based ban." Nat'l Sec. Officials Decl. ¶ 7, J.A. 898. It gives no reason to doubt the efficacy of Congress's applicant-based visa system. It points to no new circumstances that Congress has not addressed. It documents no problems with

fraud, mistaken identity, missing information, or vetting failures of any kind.[17] These are glaring omissions for such a sweeping order. The Proclamation strikes at the basic premise of our visa system—that individuals bear the burden to produce documentation and establish eligibility—without tying that premise to any actual "detriment[s] to the interests of the United States." 8 U.S.C. § 1182(f).

The government responds that prior § 1182(f) orders contained little explanation. Br. 31-32 & n.4. But none of those proclamations sought to rewrite the INA's basic approach to visa adjudication. They were self-explanatory, because they addressed discrete, narrow, often fast-developing problems that Congress plainly had not addressed, like a mass influx of unauthorized migrants, or the Iran hostage crisis.[18] Whatever finding may be required in those more limited circumstances, the President cannot fundamentally reorient Congress's visa system, and certainly cannot do so without explaining what was wrong with it.

---

[17] In reality, vetting failures for nationals of the banned countries are vanishingly rare. *See* J.A. 861-64 (David Bier, *The Basic Premise of Trump's Travel Ban is Wrong*, Cato Institute, Sept. 26, 2017). Moreover, in the banned countries, consular officers have *already* been denying visa applications at a much higher rate than for other countries. *See* Br. for Cato Inst. at 9-11, *IRAP*, No. 16-1436, (U.S. *filed* Sept. 9, 2017) (denial rates for banned countries "79 percent higher than for all other nationalities").

[18] Contrary to the government's suggestion, Br. 31-32, no court addressed, much less upheld, the Iran entry restrictions. The government's other examples (Br. 31 n.4) not only addressed problems that the INA clearly did not—and thus required little explanation—but also applied to a very small number of individuals.

* * *

Congress rejected national-origin quotas fifty years ago, and has long maintained an individualized visa process. The Proclamation—with its nationality-based bans, indefinite duration, focus on governments instead of visa applicants, and failure to find any problems with Congress's applicant-based system—vastly exceeds the President's § 1182(f) authority and violates § 1152(a)'s bar on nationality discrimination.

III. THE PROCLAMATION VIOLATES THE ESTABLISHMENT CLAUSE.

This Court previously rejected the government's requests "to ignore evidence, circumscribe [the Court's] own review, and blindly defer to executive action." *IRAP*, 857 F.3d at 594, 601. The legal principles this Court articulated were correct, and the evidentiary record contains all it did before and more. Like its predecessor, the Proclamation is an attempt to implement the promised Muslim ban and overwhelmingly impacts Muslims. Unlike its predecessor, the Proclamation is indefinite and potentially permanent. The district court rightly enjoined it.

A. *Mandel* Does Not Defeat the Plaintiffs' Establishment Clause Claim.

As an initial matter, the government again contends that the fundamental constraints of the Establishment Clause have no bearing here because of *Mandel*, 408 U.S. 753.[19]

Under *Mandel*, the government may "defeat a constitutional challenge" if the challenged action is *both* "facially legitimate" and "bona fide," but "where a plaintiff makes 'an affirmative showing of bad faith' that is 'plausibly alleged with sufficient particularity,' courts may 'look behind' the challenged action to assess its 'facially legitimate' justification." *IRAP*, 857 F.3d at 590-91 (quoting *Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring in the judgment)). The district court correctly found that the plaintiffs had made the affirmative showing of bad faith that is required under *Mandel*, based on the "combined record" demonstrating how the improper purpose behind EO-2 also motivates the Proclamation. J.A. 1056; *see also infra* Part III.B.2 (addressing the involvement of executive agencies).

The government asserts that the face of the Proclamation itself demonstrates that it is both facially legitimate and bona fide. That cannot be reconciled with

[19] As the district court recognized, even though it applied *Mandel* there are "persuasive reasons" not to take that approach, including that the Establishment Clause violation is not only "a limitation on an individual's right" but also a structurally forbidden "public message that the Government has adopted an official policy of favoring one religion." J.A. 1054.

Mandel itself or with Justice Kennedy's controlling concurrence in *Din*. *See IRAP*, 857 F.3d at 592 (government's argument "reads out *Mandel*'s 'bona fide' test altogether"). The government also contends that *Din* suggested only that "when the government does identify a factual basis . . . that is the end of the analysis," Br. 42, but that likewise cannot be squared with what *Din* actually says: If there is an "an affirmative showing of bad faith," the analysis continues. 135 S. Ct. at 2141; *see IRAP*, 857 F.3d at 590.[20]

And the government is wrong that subsequent Supreme Court precedent contradicts this Court's interpretation of *Mandel*. Br. 41. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1693-94 (2017), does not cite *Mandel* at all. Instead, it cites *Fiallo v. Bell*. But *Fiallo*—like *Morales-Santana*—involved an equal protection challenge to congressional line-drawing on the face of a statute, with no allegation of bad faith. 430 U.S. at 792-97. This Court has already rejected the rote application of rational-basis review doctrine to the very different context of an executive officer's bad faith. *IRAP*, 857 F.3d at 589 & n.14 (explaining that the label "rational basis" is "incomplete" in a case like this one because it "does not properly account for *Mandel*'s 'bona fide' requirement").

[20] *Cf. Morfin v. Tillerson*, 851 F. 3d 710, 713 (7th Cir. 2017) (Br. 42) (acknowledging that visa denial might be reviewable if consular officer acted in bad faith by citing a basis he believed to be false).

B. The Proclamation Suffers from the Same Constitutional Defects as Did the Precursor Executive Orders.

In reviewing the constitutionality of EO-2, the en banc Court rejected the government's contention that courts should defer to presidential action without regard to how a challenged policy came about, or how the President describes and justifies it. The Court observed that deference to the President "must yield in certain circumstances, lest [the Court] abdicate [its] own duties to uphold the Constitution." *Id.* at 601. And looking at all the evidence, the Court concluded that EO-2 simply could not be "divorced from the cohesive narrative linking it to the animus that inspired it." *Id.*

Applying this same framework, the district court found that the Proclamation, too, cannot be divorced from the policy and history that gave rise to it. "The Proclamation does not abandon th[e] fundamental approach" of barring entry by people from Muslim-majority countries "but rather doubles down on it." J.A. 1068.

1. As a practical matter, the Proclamation almost exclusively targets Muslims. Like the executive orders from which it springs, the Muslim-majority countries the Proclamation bans are together approximately 95% Muslim. J.A. 234-48, 852-59. The government leans heavily on the inclusion of two non-Muslim-majority countries, but as the district court recognized, their inclusion will

have "little practical consequence." J.A. 1066 (explaining that the ban will affect only certain Venezuelan officials and "fewer than 100" North Koreans).

Nor is this vastly disproportionate effect explainable based on any objective set of criteria. The Proclamation repeatedly deviates from the very test that it purports to impose, banning more Muslims and exempting more non-Muslims than its "baseline" criteria (which are really just the visa waiver criteria) would dictate. Those criteria were themselves applied haphazardly and inconsistently. *See* J.A. 1283-1300 (David Bier, *Travel Ban Is Based on Executive Whim, Not Objective Criteria*, Cato Institute, Oct. 9, 2017) (documenting dozens of countries that fail various criteria but were not banned); Nat'l Sec. Officials Decl. ¶ 12, J.A. 900 (noting that "non-Muslim majority countries such as Belgium" were not banned despite "widely-documented problems with information sharing" and nationals who "have carried out terrorist attacks on Europe").

An examination of the actual effects of the ban thus fatally undermines the government's reliance on supposedly "tailored substantive restrictions." Br. 47. While different nonimmigrant visas are banned for each country, the reality is that Muslims—especially those seeking to permanently immigrate—will overwhelmingly be the ones excluded from the country. Such governmental targeting of minorities based on religion or belief, *see Bd. of Educ. of Kiryas Joel*

Village Sch. Dist. v. Grumet, 512 U.S. 687, 728 (1994) (Kennedy, J., concurring in the judgment), violates the mandates of the Establishment Clause.

The government responds that the Proclamation is legitimate because it "neither mentions nor draws any distinction based on religion." Br. 43 (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993)). It said the same of the prior order, which this Court invalidated. Moreover, *Lukumi* makes clear that the Establishment Clause "extends beyond facial discrimination" to "forbid[] subtle departures from neutrality and covert suppression of particular religious beliefs." 508 U.S. at 534 (internal quotation marks omitted); *id*. at 547 (striking down religious gerrymander that did not expressly identify its target); *see also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 307 n.21 (2000); *Kiryas Joel*, 512 U.S. at 699. This Court was correct to reject the government's claim that it can sidestep the Establishment Clause by studiously avoiding the words "Islam" or "Muslim" in the operative order. *See IRAP*, 857 F.3d at 597.

2. Likewise, "the context in which this policy arose" demonstrates the constitutional violation. *Santa Fe*, 530 U.S. at 315 (warning against "turn[ing] a blind eye" to context); *see also, e.g., McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 866 (2005); *Edwards v. Aguillard*, 482 U.S. 578, 595 (1987). To be sure, "past actions do not 'forever taint' present ones." J.A. 1064 (quoting *McCreary*, 545 U.S. at 874). But as the district court recognized, the Proclamation is a clear

continuation and outgrowth of the Muslim ban policy and the executive orders on which it is built. J.A. 1072.

The Proclamation is on its face a successor to and continuation of EO-2. The new order implements the indefinite ban that EO-2 expressly contemplated and that the President has long promised. And as the district court observed, the "underlying architecture of [EO-1, EO-2] and the Proclamation is fundamentally the same." J.A. 1067. Each invokes 8 U.S.C. § 1182(f), and each bars nationals of various countries from entering the United States, subject to a case-by-case waiver procedure. As this Court previously observed, such use of nationality was the "exact form" the President had earlier promised for his Muslim ban. *IRAP*, 857 F.3d at 594. Indeed, even as he reiterated his calls for a nationality-based Muslim ban during the campaign, the President announced his plan to issue a temporary ban followed by more permanent measures. J.A. 652.

The government argues that "the Proclamation is significantly different from the prior entry suspensions" because of the "multi-agency review and recommendation process." Br. 45, 47. But nothing about that process or the officials' recommendations can overcome the ban's clear purpose and effect: to deliver the promised Muslim ban.

Notably, the government has flatly refused to disclose what was recommended by those officials. Indeed, the government has declined even to say

whether there were "material inconsistencies" between the DHS report, the DHS recommendation, and the Proclamation as actually issued. J.A. 952-53; *see id.* (conceding that "it's potentially possible that various government advisors disagree among themselves"). As the district court recognized here, such hidden recommendations can offer "little to 'assure the public that the government is not endorsing a religious view.'" J.A. 1072-73 (quoting *Felix v. City of Bloomfield*, 841 F.3d 848, 863-64 (10th Cir. 2016)) (alterations omitted).

What the courts and the public *do* know—beyond the President's many calls for a Muslim ban—forecloses the government's argument that the involvement and unknown recommendations of agency officials cure the Establishment Clause violation. *First*, EO-2 *required* 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." EO-2 § 2(e) (emphasis added); *see id.* (Secretary "shall" submit list). As the district court explained, that directive itself reveals "that the President had decided, even before the study had been conducted, that regardless of the results, some countries' nationals would be subject to a travel ban." J.A. 1068. *Second*, any doubt on that score was dispelled by the President himself, who announced publicly his plan to impose a "much tougher version" of the ban even before EO-2's review process was underway. J.A. 664, 1074. And during the review he

called for "the travel ban into the United States" to "be far larger, tougher and more specific." J.A. 832, 1074.

Third, the Proclamation's extreme disproportionate effect is not surprising: As the district court observed, "many of the criteria . . . used to justify the ban on specific countries in the Proclamation[] were substantially similar to those used to select the list of countries banned by EO-2." J.A. 1068-69 (describing overlap between the criteria used). Moreover, it has recently come to light that the White House placed an official who has a record of overt anti-Muslim animus to oversee the report and recommendation process at the Department of Homeland Security. *See* Hananoki, *supra* note 2, at 4; Lanard, *supra* note 3, at 4; *contra* Br. 47 (relying on "the process of review and recommendation by government officials whose motives have never been questioned"). And *fourth*, there are other troubling indications that White House pressure may well have warped the agency recommendations.[21] Thus, as with the government's prior assertion that EO-2 was

[21] *See* Jonathan Blitzer, How Stephen Miller Single-Handedly Got the U.S. to Accept Fewer Refugees, The New Yorker (Oct. 13, 2017), https://www.newyorker.com/news/news-desk/how-stephen-miller-singlehandedly-got-the-us-to-accept-fewer-refugees (indicating that the parallel agency process for reaching a recommendation regarding the new annual cap on refugees—which both EO-1 and EO-2 addressed—was "purely political" and dictated by White House senior advisor Stephen Miller); *cf. IRAP*, 857 F.3d at 575 (discussing the conclusions of two DHS reports that contradict the premise of all three bans, which became public only after being leaked to the press).

adopted based on the recommendations of agency officials, *see IRAP*, 857 F.3d at 577, 598, here the mere existence of recommendations from advisors—which may not match the ban—does not break the straight line from the President's promises of a Muslim ban through all three ban orders.

More fundamentally, the involvement of Executive Branch officials does not and cannot insulate the Proclamation from the President's record of religious animus and promises to ban Muslims, because, as the government itself concedes, "[a]t the end of the day, the President is the one who made the decision and the President has adopted the rules he wants by issuing the proclamation." J.A. 952-53.

Candidate Trump promised a ban on Muslims, and never repudiated that promise. President Trump, one week into office, issued EO-1 without consulting any of the relevant national security agencies. After he issued EO-2 to replace it, he repeatedly asserted that he accepted the alterations, which he described as "watered down," only at the urging of his lawyers, and that in his view he "should have stayed with the original." J.A. 780, 791. Now, he has issued the Proclamation, the indefinite Muslim ban he had planned and promised all along.

3. Nor can the government's invocation of national security justify this ban any more than it did EO-2. *See IRAP*, 857 F.3d at 597. Examining the same criteria as the Proclamation, Congress—balancing security and other values—

chose *not* to ban entire nations from entering, but instead to require individualized vetting. *See supra* Part II.B. And, like EO-2, the Proclamation does not identify any failures in the vetting system that justify these drastic and unprecedented measures.

The available evidence is to the contrary. As this Court noted in its decision on the last appeal, 857 F.3d at 575, 596, the Department of Homeland Security has found that restrictions based on nationality do not advance national security, *see* J.A. 213-20, and a bipartisan group of dozens of former national security officials has concluded that the Proclamation, like EO-2 before it, serves no legitimate national security interests, *see* J.A. 892–903. This is, once again, "strong evidence that any national security justification for [the ban] was secondary to its primary religious purpose." *IRAP*, 857 F.3d at 596.

4. Finally, the government points to a single address by the President as showing a more tolerant attitude toward Muslims. *See* Br. 52. This isolated speech did not repudiate his previously enjoined executive orders, and does nothing to counteract his long-standing, frequent, and ongoing denigration of Muslims and professed intent to exclude Muslim immigrants and travelers.

Indeed, the President has time and again expressed his overriding desire to make permanent, and harsher, his ban on Muslims. He did so in EO-2's text. *See* EO-2 § 2(e); J.A. 1068. He did so in his repeated calls for a "tougher" ban even

before the mandated review was completed. *See* J.A. 791. He did so on the very day that he received DHS's recommendations, tweeting: "the travel ban into the United States should be far larger, tougher and more specific—but stupidly, that would not be politically correct!" J.A. 832. And he recently reaffirmed his hostility to Islam, tweeting "a statement that . . . shooting Muslims with bullets dipped in pig's blood should be used to deter future terrorism." *See* J.A. 1073. As the district court found, these statements—regardless of what DHS recommended or why—"cast the Proclamation as the inextricable re-animation of the twice-enjoined Muslim ban." J.A. 1075.[22]

C. The Proclamation Violates the Establishment Clause's Fundamental Command that the Government Not Target and Disfavor People Based on Their Religion.

Because the evidence of denigration of Islam is so strong in this case, the analysis in the Court's prior opinion properly focused on the thread of Establishment Clause jurisprudence addressing the *purpose* of government conduct. But it is equally true that the primary *effect* of the Proclamation is to

[22] The government again seeks to cloak itself in deference to the President's "predictive judgment." Br. 51-52. But the "judgment" here has been the same since before he was elected, and it was initially adopted and implemented without consultation with the relevant national security agencies. In any event, the deference to predictive judgments afforded in the cases that the government cites concerned only case-by-case decisions about individuals, and none addressed—much less blessed—such judgments based on religion or national origin. *See Hawai'i*, 859 F.3d at 772.

"burden . . . [a] selected religious denomination[]"—Islam, through restrictions on the immigration overwhelmingly of Muslims to the United States. *Larson v. Valente*, 456 U.S. 228, 255 (1982). Indeed, the contours of the ban—barring almost entirely Muslims, effectively exempting Venezuela, including a ban on North Korea that will have almost no effect, and banning Somalia despite the government's own baseline—reflect a religious "gerrymander." *Lukumi*, 508 U.S. at 533-35, 538 (basing free-exercise analysis on Establishment Clause jurisprudence, and striking down as impermissible religious "gerrymander" an ordinance for which "almost the only conduct subject to it" was associated with a particular religion).

As this Court recognized in holding EO-2 unconstitutional, "the Establishment Clause of the First Amendment yet stands as an untiring sentinel for the protection of one of our most cherished founding principles—that government shall not establish any religious orthodoxy, or favor or disfavor one religion over another." *IRAP*, 857 F.3d at 572; *accord Awad*, 670 F.3d at 1127 (striking down anti-Muslim state constitutional amendment). "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson*, 456 U.S. at 244; *see also id.* at 255 ("the Framers of the First Amendment forbade" any "official denominational preference"). Accordingly, the Supreme Court's "Establishment Clause cases . . . have often

stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion." *Lukumi*, 508 U.S. at 532. At its most fundamental level, this means that "the Establishment Clause forbids the government to use religion as a line-drawing criterion." *Kiryas Joel*, 512 U.S. at 728 (Kennedy, J., concurring in the judgment).[23]

No matter which aspect of the Proclamation the Court focuses on—its purpose, effect, or religious gerrymandered line drawing—the conclusion is the same. The new Proclamation, like its forbears, operates both by design and in actual effect to disadvantage Muslims like the individual plaintiffs here in the most personal, palpable ways: It forcibly separates their families and marks them as the object of official denigration, disfavor, and maltreatment in ways that individuals of other faiths do not experience. That flies in the face of the Establishment Clause. *See, e.g.*, *Cty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 593-94 (1989) ("The Establishment Clause, at the very least, prohibits

[23] The Establishment Clause works in tandem with the Free Exercise Clause and equal protection to safeguard this principle of equality and equal respect under law without regard to religion or belief. *See, e.g.*, *Kiryas Joel*, 512 U.S. at 715 (O'Connor, J., concurring in the judgment) ("[T]he Free Exercise Clause, the Establishment Clause, the Religious Test Clause, Art. VI, cl. 3, and the Equal Protection Clause as applied to religion[] all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits."); *Larson*, 456 U.S. at 245. The same evidence that establishes the Establishment Clause violation also establishes a violation of equal protection in this case.

government from appearing to take a position on questions of religious belief or from making adherence to a religion relevant in any way to a person's standing in the political community.") (internal quotation marks omitted); *Larson*, 456 U.S. at 246.

There is no dispute that a presidential directive expressly banning Muslims would be unconstitutional even if imposed in the name of national security. *See* Oral Arg., *Int'l Refugee Assistance Project v. Trump*, CSPAN 30:29 (May 8, 2017), http://cs.pn/2j4kM4h. The same is true where, as here, such a ban is effectuated by "talking territory instead of Muslim." *IRAP*, 857 F.3d at 594. The contrary holding the government seeks, would, as Justice Jackson warned in *Korematsu v. United States*, "lie[] about like a loaded weapon." 323 U.S. 214, 246 (1944) (Jackson, J., dissenting). Governmental denigration of and disregard for a religious minority and its adherents cannot be squared with the mandates of the Establishment Clause.

IV. A NATIONWIDE PRELIMINARY INJUNCTION IS APPROPRIATE.

The district court issued a nationwide preliminary injunction of the Proclamation, as it had previously issued a nationwide preliminary injunction of EO-2. This Court and the Supreme Court rejected the government's requests to vacate or stay the EO-2 preliminary injunction in its entirety, or to limit it to the specific plaintiffs or their family members. *Trump v. Int'l Refugee Assistance*

Project, 137 S. Ct. 2080, 2087 (2017) (per curiam) (leaving in effect a nationwide injunction). The Court should reject the government's renewed request to limit the current injunction in the same way.

As the district court recognized, the plaintiffs would suffer "significant, irreparable harm . . . both from the prolonged separation from family members *and* the Establishment Clause violation." J.A. 1077 (emphasis added). The government asserts that "delay in entry alone does not amount to irreparable harm," Br. 55, but it fails to explain how "[t]he absence of a family member" could possibly be "cured through a later payment of money damages." J.A. 1077; *see Hawai'i*, 859 F.3d at 782. For example, Fahed Muqbil's wife needs to enter the United States to help Mr. Muqbil, a U.S. citizen, care for their desperately ill one-year-old U.S. citizen daughter. J.A. 1245-46. IAAB plaintiff Jane Doe #5, a 79-year-old wheelchair-bound permanent resident in poor health, may never again see her youngest son, an Iranian national, if he is banned or delayed from receiving a visa. J.A. 1170-71. Nor does the government dispute that Establishment Clause injuries are irreparable; it simply rehashes its standing arguments. Br. 55-56.

On the other side of the balance, the government offers the same abstract interest this Court previously rejected—"the notion that the President, because he or she represents the entire nation, suffers irreparable harm whenever an executive action is enjoined," *IRAP*, 857 F.3d at 603, together with invocations of national

security interests—without any identification of concrete harms. The government's invocation of national security is not a "silver bullet that defeats all other asserted injuries." *Id.* at 603; *see also* Nat'l Sec. Officials Decl. ¶¶ 13-15, J.A. 900-01 (explaining why "Travel Ban 3.0 would undermine the national security of the United States"). The public interest also strongly favors a preliminary injunction: when courts "protect the constitutional rights of the few," or, in this case, the many, "it inures to the benefit of all." *IRAP*, 857 F.3d at 604.

Finally, a policy as sweeping and disruptive as this one will injure millions of people, harming the plaintiffs in complex and unpredictable ways. It would be exceptionally difficult, if not impossible, to effectively tailor an injunction to the plaintiffs. The "systemwide impact" here warrants a "systemwide remedy." *Lewis v. Casey*, 518 U.S. 343, 359 (1996) (internal quotation marks omitted).

V. CROSS-APPEAL: THE DISTRICT COURT ERRED IN LIMITING THE PRELIMINARY INJUNCTION TO INDIVIDUALS WITH BONA FIDE RELATIONSHIPS TO U.S. PERSONS OR ENTITIES.

The district court limited the scope of the preliminary injunction in light of the temporary "equitable balance" that the Supreme Court struck in its opinion partially staying the injunction of Section 2(c) of EO-2. *IRAP*, 137 S. Ct. at 2089. But the Supreme Court's stay opinion does not require or even support that limitation.

The Supreme Court's stay opinion considered a different question from the one that faced the district court. The Supreme Court was deciding whether to issue a partial, temporary stay pending appeal, *id.* at 2087, and did not address the merits of the plaintiffs' claims; by contrast, the district court was fashioning relief after (preliminarily) resolving the merits.

Moreover, the equities involved are different from those the Supreme Court balanced in *IRAP*. This time, the government's ban is indefinite and possibly permanent, and will injure the plaintiffs for months or even years (not just 90 days) while the case is resolved. The plaintiffs currently before the Court are also more likely to be injured by the exclusion of an individual who does not have the "bona fide relationship" required by the district court's order (for example, an extended family member, a friend, or a professional collaborator with whom they have no current formal relationship). Yet in the face of these even more serious harms to the plaintiffs, the government has presented weaker claims of harm pending appeal. The balance of harms therefore favors a comprehensive injunction.

A. The Partial Injunction Does Not Provide Complete Relief to the Plaintiffs.

The plaintiffs will be injured by the Proclamation's restrictions on noncitizens whose relationships to U.S. persons or entities—while significant—are insufficiently formal or documented to meet the bona fide relationship standard.

The injunction therefore fails to provide the plaintiffs "complete relief." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

The Supreme Court's equitable balance in crafting its stay standard placed particular emphasis on the injuries that John Doe #1, Dr. Elshikh, and Hawai'i had alleged. *IRAP*, 137 S. Ct. at 2088 ("The injunctions remain in place only with respect to parties similarly situated to Doe, Dr. Elshikh, and Hawai'i."); *see also Hawai'i*, 859 F.3d at 761-65 (9th Cir. 2017) (per curiam); *IRAP*, 857 F.3d at 581-87. The temporary but severe injuries to those plaintiffs—for example, the exclusion of close family members—were reflected in the temporary equitable balance the Court set. The Court did not discuss possible injuries to friends and more distant relatives, or injuries to individuals with whom U.S. organizations had significant but informal relationships. *See* J.A. 1080; *Hawai'i v. Trump*, 871 F.3d 646, 653 (9th Cir. 2017), stay denied in relevant part, No. 17A275 (16-1540), 2017 WL 4014838 (U.S. Sept. 12, 2017).

The plaintiffs now before this Court have described injuries that the narrowed injunction will not remedy, and which would persist over the ban's indefinite period. For example, YAMA's members have felt the impact of the bans through friends and acquaintances abroad, as well as through family members. J.A. 611. Similarly, AAANY's clients have been and will be harmed by the bans' effects on friends and distant family members. J.A. 567, 570. IRAP has diverted

resources to produce materials on the Proclamation, J.A. 577, which are distributed to clients and non-clients alike. IAAB will have many fewer participants at its conference, including participants who would attend but are not invited as speakers. J.A. 1154. And MESA will be harmed not only by the Proclamation's impact on its members, but also by its impact on nonmembers who would attend its meeting (without necessarily signing up in advance) but will be barred from doing so. J.A. 559-60.

Moreover, an injunction limited to noncitizens with formal relationships fails to fully remedy the condemnation, exclusion, and isolation that the Proclamation imposes on the plaintiffs. Plaintiffs are injured by the stigmatizing message it sends—even when that message is sent by the exclusion of noncitizens with whom they do not have a qualifying relationship. This harm is more severe than EO-2's because the Proclamation's ban is indefinite. The lack of interim relief could cause condemnation injuries to persist for years as this case makes its way through the courts. *See supra* Part I.B (describing the condemnation harms the Proclamation would inflict).

B. The Government's Harms Are Significantly Weaker Even Than Those It Claimed in Defending EO-2.

At the same time that the Proclamation's indefinite duration heightens the harm to the plaintiffs, the government's claimed harm from the injunction is even

weaker. The government no longer asserts, for example, that the ban is required to make resources available while it conducts a review—an assertion on which the Supreme Court specifically relied in granting a partial stay. *IRAP*, 137 S. Ct. at 2089; *see also* Amicus Br. of T.A. 21-26 (describing differences between the rationales for EO-2 and the Proclamation). And the President's decisions to allow in the nationals of several countries that failed the review process's baseline evaluation (Iraq and Venezuela), as well as individuals with certain nonimmigrant visas from other countries that fail the baseline, illustrate that individuals from countries that do not meet the baseline criteria do not pose a categorical risk.

The government, apparently appreciating the weakness of the rationale for EO-2, has asserted a newfound "independent" reason for the Proclamation's ban: that it is necessary to provide leverage with other nations and thereby "elicit improved identify-management and information-sharing" practices. Defs' Opp. to Mot. for Prelim. Inj. 23-24, Dist. Ct. Dkt. No. 212 (quoting Proclamation § 1(h)(i)). Yet in seeking a stay from this Court, the government correctly declined to claim that it was urgently harmed on this basis. Stay Mot. 8-9; Stay Opp. 5 n.2; *cf.* Br. 54-55.

In sum, the government claims less severe harm in justifying a new ban that more seriously injures the plaintiffs, including through the exclusion of noncitizens

with whom the plaintiffs have significant but non-qualifying relationships. The balance of harms tips decisively in favor of a comprehensive injunction.

C. A Full Injunction Is Appropriate After This Court Reaches the Merits.

In *IRAP*, the Supreme Court did not address the merits; it limited its discussion to "interim equitable relief." 137 S. Ct. at 2087. That interim equitable balance should not dictate what this Court does once it reaches a decision on the merits.[24] When a court determines, on the merits, that an executive action facially violates constitutional or statutory constraints, the "result is that [the action is] vacated—not that [its] application to the individual petitioners is proscribed." *Nat'l Min. Ass'n v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (internal quotation marks omitted).

Such standard injunctive relief is especially appropriate here, where the Proclamation's entry restrictions facially violate two structural constitutional limits. The Establishment Clause creates both an individual right and a structural constraint on governmental power. *See Engel v. Vitale*, 370 U.S. 421, 431-32 (1962); *McGowan*, 366 U.S. at 430. And the Proclamation's wholesale rewriting

[24] At a minimum, if this Court finds for the plaintiffs on the merits, it should remove the "bona fide relationship" limitation from the preliminary injunction itself and then consider whether to partially stay the preliminary injunction pending further review. In the plaintiffs' view, because the interim balance of harms favors a complete injunction, such a stay would not be appropriate.

of the INA fundamentally upsets the separation of powers. *Clinton*, 524 U.S. at 438 (noting that the President may not enact, amend, or repeal laws). Only a comprehensive injunction can prevent the President from violating these structural restraints.

Any other result would allow the President to violate the Constitution and the INA indefinitely, so long as the targets of the illegal action are noncitizens without formal relationships with U.S. persons. The Supreme Court did not remotely suggest that it intended that result. This Court should reverse the district court's order limiting the injunction to noncitizens who have bona fide relationships with U.S. persons or entities.

VI. CROSS-APPEAL: THE DISTRICT COURT ERRED IN SUGGESTING THAT IRAP AND HIAS CLIENTS CATEGORICALLY LACK BONA FIDE RELATIONSHIPS.

Even if the district court correctly limited its injunction to those without bona fide relationships, one particular aspect of the ruling should still be corrected. The district court held that "clients of IRAP and HIAS, and those similarly situated, are not covered by the injunction absent a separate bona fide relationship as defined above." J.A. 1080. This definition excludes noncitizens from the injunction who were protected by the previous equitable balance struck by the Supreme Court, and should be reversed.

The district court's holding in this regard appears to be grounded in a misapprehension of the Supreme Court's actions implementing the bona fide relationship standard. Plaintiffs in the *Hawai'i* litigation argued that refugees with formal assurances from a refugee resettlement organization were categorically protected by the injunctions against EO-2, and the *Hawai'i* district court agreed. The Supreme Court stayed that decision only "with respect to refugees covered by a formal assurance." *Trump v. Hawai'i*, — S. Ct. —, 2017 WL 4014838 (Sept. 12, 2017).

The district court in this case appears to have interpreted this stay ruling to mean that no client relationships can ever qualify under the Supreme Court's standard. But the government conceded before the District of Hawai'i that some client relationships (as opposed to refugee assurance relationships) *would* satisfy the "bona fide relationship" standard. *See* Defs' Opp. to Mot. to Enforce, Dkt. No. 338, *Hawai'i v. Trump*, No. 17-cv-50, at 14-15 (D. Haw. *filed* July 11, 2017) (stating that client relationships "require[] a case-by-case analysis"). The *Hawai'i* district court agreed, explaining that, for client relationships, "the nature of [the] representational services varies significantly," making it impossible to determine, as a categorical matter, whether client relationships qualify. *Hawai'i v. Trump*, — F. Supp. 3d —, 2017 WL 2989048, at *8 (D. Haw. July 13, 2017). Neither the

government nor the plaintiffs appealed that decision, and the Ninth Circuit did not address it. *Hawai'i*, 871 F.3d at 653 n.4.

Under the Supreme Court's stay order, whether or not a given client has formed a qualifying relationship therefore depends on whether the connection is "formal, documented, and formed in the ordinary course." *IRAP*, 137 S. Ct. at 2088. While some client relationships may not meet that standard—for instance, if they are formed solely to "secure [the client's] entry" under the injunction, *id.*—many others will. The district court erred to the extent it held that the clients of IRAP and HIAS, and similar organizations, *categorically* lack a qualifying relationship with those organizations.

CONCLUSION

The preliminary injunction should be affirmed, except as to its limitation to persons with a bona fide relationship with an individual or entity in the United States.

Dated: November 15, 2017

Respectfully submitted,

/s/ Omar C. Jadwat

Omar C. Jadwat
Lee Gelernt
Hina Shamsi
Hugh Handeyside
Sarah L. Mehta
David Hausman
AMERICAN CIVIL LIBERTIES UNION FOUNDATION

Karen C. Tumlin
Nicholas Espíritu
Melissa S. Keaney
Esther Sung
NATIONAL IMMIGRATION LAW CENTER
3435 Wilshire Boulevard,
Suite 1600

Los Angeles, CA 90010
Tel: (213) 639-3900
Fax: (213) 639-3911
tumlin@nilc.org
espiritu@nilc.org
keaney@nilc.org
sung@nilc.org

Justin B. Cox
NATIONAL IMMIGRATION LAW CENTER
P.O. Box 170208
Atlanta, GA 30317
Tel: (678) 279-5441
Fax: (213) 639-3911
cox@nilc.org

Kathryn Claire Meyer
Mariko Hirose
INTERNATIONAL REFUGEE ASSISTANCE PROJECT
40 Rector Street, 9th Floor
New York, New York 10006
Tel: (646) 459-3044
Fax: (212) 533-4598
kmeyer@refugeerights.org
mhirose@refugeerights.org

David Rocah
Deborah A. Jeon
Sonia Kumar
Nicholas Taichi Steiner
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MARYLAND
3600 Clipper Mill Road, Suite 350
Baltimore, MD 21211
Tel: (410) 889-8555
Fax: (410) 366-7838
jeon@aclu-md.org

125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 549-2600
Fax: (212) 549-2654
ojadwat@aclu.org
lgelernt@aclu.org
hshamsi@aclu.org
hhandeyside@aclu.org
smehta@aclu.org
dhausman@aclu.org

Cecillia D. Wang
Cody H. Wofsy
Spencer E. Amdur
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111
Tel: (415) 343-0770
Fax: (415) 395-0950
cwang@aclu.org
cwofsy@aclu.org
samdur@aclu.org

David Cole
Daniel Mach
Heather L. Weaver
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street NW
Washington, D.C. 20005
Tel: (202) 675-2330
Fax: (202) 457-0805
dcole@aclu.org
dmach@aclu.org
hweaver@aclu.org

rocah@aclu-md.org
kumar@aclu-md.org
steiner@aclu-md.org

Counsel for Plaintiffs-Appellees IRAP, et al.

Johnathan Smith
Sirine Shebaya
MUSLIM ADVOCATES
P.O. Box 66408
Washington, D.C. 20035
Tel: (202) 897-2622
Fax: (415) 765-1774
johnathan@muslimadvocates.org
sirine@muslimadvocates.org

Richard B. Katskee
Eric Rothschild
Andrew L. Nellis^
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
1310 L St. NW, Ste. 200
Washington, D.C. 20005
Tel: (202) 466-3234
Fax: (202) 466-3353
katskee@au.org
rothschild@au.org
nellis@au.org

Mark H. Lynch
Mark W. Mosier
Herbert L. Fenster
Jose E. Arvelo
John W. Sorrenti
Katherine E. Cahoy
Rebecca G. Van Tassell
Karun Tilak
COVINGTON & BURLING LLP
One City Center
850 10th Street, NW
Washington, D.C. 20001
Tel: (202) 662-6000
Fax: (202) 662-6302
mlynch@cov.com
mmosier@cov.com
hfenster@cov.com
jarvelo@cov.com
jsorrenti@cov.com
kcahoy@cov.com
rvantassell@cov.com
ktilak@cov.com

Counsel for Plaintiffs-Appellees I.A.A.B., et al.

Charles E. Davidow
Robert A. Atkins
Liza Velazquez
Andrew J. Ehrlich
Steven C. Herzog
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas

Lena F. Masri
Gadeir Abbas
COUNCIL ON AMERICAN-ISLAMIC RELATIONS
453 New Jersey Avenue SE
Washington, D.C. 20003
Tel.: (202) 488-8787
Fax: (202) 488-0833

New York, NY 10019-6064
Tel.: (212) 373-3000
Fax: (212) 757-3990
ratkins@paulweiss.com
lvelazquez@paulweiss.com
aehrlich@paulweiss.com
sherzog@paulweiss.com

Faiza Patel
Michael Price
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
120 Broadway, Suite 1750
New York, NY 10271
Tel.: (646) 292-8335
Fax: (212) 463-7308
faiza.patel@nyu.com
michael.price@nyu.com

lmasri@cair.com
gabbas@cair.com

Jethro Eisenstein
PROFETA & EISENSTEIN
45 Broadway, Suite 2200
New York, New York 10006
Tel.: (212) 577-6500
Fax: (212) 577-6702
jethro19@gmail.com

Counsel for Plaintiffs-Appellees Zakzok, et al.

^Admitted only in New York; supervised by Richard B. Katskee, a member of the D.C. Bar

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-face requirements of Federal Rule of Appellate Procedure 28.1(e)(2)(B)(ii) and the type-volume limitations of Rule 28.1(e)(2)(B)(i). The brief contains 14,572 words, excluding the parts of the brief described in Rule 32(f).

/s/ Omar C. Jadwat
Omar. C. Jadwat

CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system, except for the following, who will be served by first class mail on November 15, 2017:

Hashim M. Mooppan
U.S. Department of Justice
Civil Division, Appellate Section
950 Pennsylvania Avenue, NW
Washington, DC 20530-0000

/s/ Omar C. Jadwat
Omar C. Jadwat