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

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, a project of the Urban Justice Center, Inc., on behalf of itself and its clients; HIAS, INC., on behalf of itself and its clients; JOHN DOES # 1 & 3; JANE DOE #2; MIDDLE EAST STUDIES ASSOCIATION OF NORTH AMERICA, INC., on behalf of itself and its members; MUHAMMED METEAB; PAUL HARRISON; IBRAHIM AHMED MOHOMED; ARAB AMERICAN ASSOCIATION OF NEW YORK, on behalf of itself and its clients,

Plaintiffs-Appellees,

and

ALLAN HAKKY; SAMANEH TAKALOO,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; DEPARTMENT OF STATE; OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE; ELAINE DUKE in her official capacity as Acting Secretary of Homeland Security; REX TILLERSON, in his official capacity as Secretary of State; DANIEL R. COATS, in his official capacity as Director of National Intelligence,

Defendants – Appellants.

No. 17-2231 (L)
(8:17-cv-00361-TDC)

[Caption continued on inside cover]

MOTION OF DEFENDANTS-APPELLANTS FOR AN EMERGENCY STAY PENDING EXPEDITED APPEAL AND ADMINISTRATIVE STAY

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IRANIAN ALLIANCES ACROSS BORDERS; JANE DOE #1; JANE DOE #2; JANE DOE #3; JANE DOE #4; JANE DOE #5; JANE #6,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; ELAINE C. DUKE, in her official capacity as Acting Secretary of Homeland Security; KEVIN K. MCALEENAN, in his official capacity as Acting Commission of U.S. Customs and Border Protection; JAMES MCCAMENT, in his official capacity as Acting Director of U.S. Citizenship and Immigration Services; REX TILLERSON; JEFFERSON B. SESSIONS III, in his official capacity as Attorney General of the United States,

Defendants – Appellants.

No. 17-2232
(8:17-cv-02921-TDC)

EBLAL ZAKZOK; SUMAYA HAMADMAD; FAHED MUQBIL; JOHN DOE #1; JOHN DOE #2; JOHN DOE #3,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; UNITED STATES DEPARTMENT OF STATE; ELAINE C. DUKE, in her official capacity as Acting Secretary of Homeland Security; REX TILLERSON, in his official capacity as Secretary of State,

Defendants – Appellants.

No. 17-2233
(1:17-cv-02969-TDC)

INTRODUCTION

The district court enjoined worldwide a Proclamation issued by the President of the United States pursuant to his broad constitutional and statutory authority to suspend or restrict the entry of aliens abroad when he deems it in the Nation's interest. The Proclamation—"Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public Safety Threats," 82 Fed. Reg. 45,161 (Sept. 27, 2017)—was issued after a global review by the Department of Homeland Security (DHS) and the Department of State of foreign governments' information-sharing practices and risk factors, culminating in a recommendation that the President restrict entry of certain nationals of eight countries that have inadequate practices or otherwise present heightened risks. The Proclamation imposes country-specific restrictions that, in the President's judgment, would most effectively "encourage cooperation" in information sharing and "protect the United States until such time as improvements occur." *Id.* at 45,164.

The district court nevertheless ruled that, despite this thorough review process and tailored substantive measures, the Proclamation is motivated by religious animus and constitutes nationality discrimination under 8 U.S.C. § 1152(a). That ruling threatens the ability of this and future Presidents to address national security threats. It is also wrong: the alleged flaws in the prior entry suspension do not apply to the Proclamation, which was issued after a worldwide, religion-neutral review by

multiple Cabinet officials whose good faith has never been questioned, and which imposes only tailored restrictions on Muslim-majority as well as non-Muslim majority nations. The district court's conclusion that this is insufficient to refute religious discrimination threatens to disable the President permanently from addressing immigration-related national-security risks in countries that pose the greatest concern. Nor does the Immigration and Nationality Act (INA) prohibit the President from imposing nationality-specific restrictions on entry to the United States, as past Presidents have also done. In any event, plaintiffs' challenge to the exclusion of aliens abroad is not justiciable.

The remaining stay factors support staying the injunction pending expedited appeal. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). The balance of harms tips sharply in favor of a stay: Barring effectuation of the President's judgment that restricting entry for certain nationals of eight countries is warranted to protect the Nation's safety threatens the interests of the government and the public (which merge, *Nken v. Holder*, 556 U.S. 418, 435 (2009)). By contrast, plaintiffs have not identified any cognizable and irreparable injury that they personally would incur if the restrictions on entry take effect, especially during the brief period of an expedited appeal. Nor do the equities support the district court's worldwide injunction. This Court should stay the injunction pending final disposition of the appeal of its validity and scope, and grant an administrative stay until it rules on this request.

BACKGROUND

1. On March 6, 2017, the President issued Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) ("EO-2"). EO-2 directed the Secretary of DHS to conduct a global review of whether foreign governments provide adequate information about their nationals seeking U.S. visas. EO-2 § 2(a). EO-2 directed the Secretary to report findings to the President, after which nations identified as deficient would be encouraged to alter their practices, prior to the Secretary recommending appropriate entry restrictions on any nations that remained inadequate or presented other special circumstances. *Id*. § 2(d)-(f).

During that review, EO-2 temporarily suspended the entry of foreign nationals from six countries that had been identified by Congress or the Executive as presenting terrorism-related concerns. *See id*. § 2(c). The district court below, and another district court, preliminarily enjoined that entry suspension, *IRAP v. Trump*, 241 F. Supp. 3d 539 (D. Md. 2017); *Hawaii v. Trump*, 245 F. Supp. 3d 1227 (D. Haw. 2017), and were affirmed in relevant part, *IRAP v. Trump*, 857 F.3d 554 (4th Cir. 2017) (en banc); *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017) (per curiam).

The Supreme Court granted certiorari, and partially stayed the injunctions pending review, *Trump v. IRAP*, 137 S. Ct. 2080 (2017). After EO-2's entry suspension expired, the Supreme Court vacated this Court's ruling as moot. *Trump v. IRAP*, 2017 WL 4518553.

2. On September 24, 2017, the President issued the Proclamation, which is the product of a comprehensive review of vetting and screening procedures. First, the Secretary of DHS, in consultation with the Secretary of State and the Director of National Intelligence, identified the information needed from foreign governments to enable the United States to make informed decisions about foreign nationals applying for visas. Procl. § 1(c). DHS, in coordination with the Department of State, collected data on, and evaluated, nearly 200 countries, and identified each country's information-sharing practices and risk factors. *Id.* § 1(d). The Department of State engaged with foreign governments to encourage them to improve their performance, which yielded significant gains. *Id.* § 1(f). The Secretary of DHS then recommended that the President impose entry restrictions on certain nationals from eight countries; after further Executive Branch consultation, the President acted in accordance with that recommendation. *Id.* § 1(h), (i).

For countries that refuse to cooperate regularly with the United States (Iran, North Korea, and Syria), the Proclamation suspends entry of all nationals, except for Iranian nationals seeking non-immigrant student (F and M) and exchange-visitor (J) visas. Procl. §§ 2(b)(ii), (d)(ii), (e)(ii). For countries that are valuable counter-terrorism partners but have information-sharing deficiencies (Chad, Libya, and Yemen), the Proclamation suspends entry only of nationals seeking immigrant visas and non-immigrant business, tourist, and business/tourist (B-1, B-2, B-1/B-2) visas.

Id. §§ 2(a)(ii), (c)(ii), (g)(ii). For Somalia, which has significant identity-management deficiencies and is unable to effectively control all of its territory, the Proclamation suspends entry of nationals seeking immigrant visas and requires additional scrutiny of nationals seeking nonimmigrant visas. *Id.* § 2(h)(ii). And for Venezuela, which refuses to cooperate in information-sharing but for which alternative means of obtaining information are available, the Proclamation suspends entry of government officials "involved in screening and vetting procedures," and "their immediate family members," on nonimmigrant business or tourist visas. *Id.* § 2(f)(ii). The Proclamation provides for case-by-case waivers, *id.* § 3(c), and ongoing review to determine whether restrictions should remain in place. *Id.* § 4.

3. The district court preliminarily enjoined enforcement of Section 2's restrictions against any alien with a bona fide relationship to a U.S. person or entity, except nationals of Venezuela and North Korea. Order. Although agreeing with the government that the Proclamation falls within the President's broad authority to restrict the entry of aliens under 8 U.S.C. § 1182(f), the district court concluded that the entry restrictions likely violate the Establishment Clause, and that the immigrant entry restrictions likely violate 8 U.S.C. § 1152(a)(1)'s ban on nationality discrimination in the issuance of immigrant visas. Opinion 52-85, 42-48.

ARGUMENT

I. The Balance Of Harms Weighs Strongly In Favor Of A Stay

A. The District Court's Injunction Imposes Serious, Irreparable Harm On The Government And The Public

1. The district court's injunction barring enforcement of the Proclamation's entry restrictions undermines the President's constitutional and statutory authority to safeguard the Nation's security and intrudes on the political branches' constitutional prerogatives. "[N]o governmental interest is more compelling than the security of the Nation," *Haig v. Agee*, 453 U.S. 280, 307 (1981), and "the Government's interest in combatting terrorism is an urgent objective of the highest order," *Holder v. Humanitarian Law Project (HLP)*, 561 U.S. 1, 28 (2010) . The President's defense of these interests warrants the utmost deference, particularly where, as here, he acts based on a "[p]redictive judgment" regarding specific national-security risks. *Dep't of the Navy v. Egan*, 484 U.S. 518, 529 (1988); *see HLP*, 561 U.S. at 33-35.

The injunction also causes irreparable injury by invalidating an action taken at the height of the President's authority. "[T]he President has unique responsibility" over "foreign and military affairs." *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993). Rules "concerning the admissibility of aliens" also "implement[] an inherent executive power." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950). And because "the President act[ed] pursuant to an express * * *

authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083-84 (2015).

The district court's injunction overriding the President's judgment thus necessarily imposes irreparable harm. Even a single State "suffers a form of irreparable injury" "[a]ny time [it] is enjoined by a court from effectuating statutes enacted by representatives of its people." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers); *see, e.g.*, *O Centro Espirita Beneficiente Uniao de Vegetal v. Ashcroft*, 314 F.3d 463, 467 (10th Cir. 2002). *A fortiori*, this injunction imposes irreparable injury on the President and the public given "the singular importance of [his] duties" to the entire Nation. *Nixon v. Fitzgerald*, 457 U.S. 731, 751 (1982).

B. A Brief Stay Pending Expedited Appeal Would Not Impose Any Substantial Harm On Plaintiffs

Plaintiffs, by contrast, would suffer no cognizable harm, much less irreparable injury, from a stay. The only concrete, cognizable harm plaintiffs allege is that the Proclamation will prevent family members from entering the United States. But delay in entry alone does not amount to irreparable harm, particularly for the brief period while the Court considers the appeal on the merits. Moreover, visa processing times vary widely, and until the aliens abroad meet otherwise-applicable visa requirements and seek and are denied a waiver, they have not received final agency

action, and plaintiffs' claimed harms are too "remote" and "speculative" to merit injunctive relief. *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1992).

II. The Government Is Likely To Prevail On The Merits

A. Plaintiffs' Claims Are Not Justiciable

1. It is a bedrock separation-of-powers principle that "the power to exclude or expel aliens [is] a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). "[I]t is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." *Knauff*, 338 U.S. at 543.

Courts have distilled from this deeply rooted principle of nonreviewability the rule that the denial or revocation of a visa for an alien abroad "is not subject to judicial review * * * unless Congress says otherwise." *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999). Congress has not provided for judicial review of decisions to exclude aliens abroad, *e.g.*, 6 U.S.C. § 236(f), and has forbidden "judicial review" of visa revocations (subject to a narrow exception inapplicable to aliens abroad), 8 U.S.C. § 1201(i).

Furthermore, the conclusion is "unmistakable" from history that "the immigration laws 'preclude judicial review' of []consular visa decisions." *Saavedra*

Bruno, 197 F.3d at 1160. The lone time the Supreme Court held that certain aliens (only those physically present in the United States) could seek review of exclusion orders under the Administrative Procedure Act (APA), Congress abrogated the ruling and limited those aliens to the habeas remedy. *See id.* at 1157-62. Because even an alien present in the United States cannot invoke the APA to obtain review, *a fortiori* neither can aliens abroad nor U.S. citizens acting at their behest. *See* 5 U.S.C. §§ 701(a)(1), 702(1).

In holding to the contrary, the district court invoked *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986), *aff'd by an equally divided Court*, 484 U.S. 1 (1987). Opinion 38-39. As the D.C. Circuit subsequently recognized in *Saavedra Bruno*, however, *Abourezk* "rested in large measure" on an INA provision that was subsequently amended to "make[] clear that district courts do not have general jurisdiction over claims arising under the immigration laws and that their jurisdiction extends only to actions brought by the government." 197 F.3d at 1164.[1]

The district court also stated that the principle of nonreviewability of the exclusion of aliens applies only to a challenge to "individual visa decisions by consular officers," not to a Presidential proclamation restricting entry of nationals from eight countries. Opinion 36-37. Although the principle is applied most

[1] The district court also invoked *Sale*, *supra*, but the Supreme Court there rejected plaintiffs' claims on the merits without addressing reviewability.

frequently to challenges to decisions by consular officers adjudicating visa applications, it makes no sense to limit review in that context while permitting review of the President's decision to restrict entry of classes of aliens. Consular nonreviewability is grounded in the "firmly established principle" that the power to exclude aliens is "inherent in sovereignty, necessary for maintaining normal international relations and defending the country," and to "be exercised exclusively by the political branches of government." *Saavedra Bruno*, 197 F.3d at 1158-59. Those considerations apply with greater force to broad policy decisions made by the President as compared to individualized decisions by a consular official. *See Harisiades v. Shaughnessy*, 342 U.S. 580, 584-91 (1952) (relying on these considerations in rejecting broad challenges to immigration statute).

2. Although Congress has not expressly authorized judicial review of Executive decisions to exclude aliens abroad, it has not "clear[ly]" "preclude[d] judicial review" for persons asserting violations of their own constitutional rights. *Webster v. Doe*, 486 U.S. 592, 603 (1988). The exclusion of aliens typically raises no constitutional questions because aliens abroad lack any constitutional rights regarding entry. *See Knauff*, 338 U.S. at 542. However, the Supreme Court has twice engaged in limited judicial review when a U.S. citizen contended that the denial of a visa to an alien abroad violated the citizen's *own* constitutional rights. *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (alleged First Amendment right to

receive information); *Kerry v. Din*, 135 S. Ct. 2128 (2015) (alleged due process right to reunite with spouse).

But plaintiffs here lack standing to bring an Establishment Clause challenge to the exclusion of aliens abroad. Putting aside that plaintiffs have identified no visa application that has yet been denied based on the Proclamation, plaintiffs' claimed injury resulting from the exclusion of aliens is not cognizable because it does not stem from an alleged infringement of their own constitutional rights.

In *McGowan v. Maryland*, 366 U.S. 420 (1961), the Supreme Court held that individuals who are indirectly injured by alleged religious discrimination against others generally may not sue, because they have not suffered violations of their own rights. *Id*. at 429-30. The plaintiffs, employees of a store subject to a Sunday-closing law, lacked standing to challenge the law on free-exercise grounds because they "d[id] not allege any infringement of their own religious freedoms," *id.* at 429, and had standing for an Establishment Clause challenge *only* because they suffered "direct * * * injury, allegedly due to the [law's] imposition on them of the tenets of the Christian religion," *id*. at 430-31. Here, plaintiffs are not directly subject to the Proclamation and thus are not asserting violations of their own constitutional rights. They instead allege indirect injuries from the Proclamation's application to others—the individual plaintiffs' family members and the organizational plaintiffs' clients—who themselves have no constitutional rights. Contrary to the district court's

conclusion, Opinion 32, plaintiffs' alleged third-party injuries are insufficient to invoke the limited review for first-party constitutional claims afforded in *Mandel* and *Din*.

The district court also reasoned that the Proclamation injures plaintiffs by sending a message of "hostility to Muslims." Opinion 33. This "message" injury is not cognizable either; the Supreme Court has "ma[de] clear" that "the stigmatizing injury often caused by racial [or other invidious] discrimination * * * accords a basis for standing only to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct." *Allen v. Wright*, 468 U.S. 737, 755 (1984). The same rule applies to Establishment Clause claims. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485-86 (1982). To be sure, a plaintiff may suffer a cognizable injury where he himself has been "subjected to unwelcome religious exercises" or "forced to assume special burdens to avoid them." *Id.* at 486-487 n.22. But the Proclamation says nothing about religion and does not subject plaintiffs to any religious exercise.

The D.C. Circuit correctly has rejected the notion that a putative Establishment Clause plaintiff may "re-characterize[]" an abstract injury flowing from "government *action*" directed against others as a personal injury from "a governmental *message* [concerning] religion" directed at the plaintiff. *In re Navy Chaplaincy*, 534 F.3d 756, 764 (2008) (Kavanaugh, J.), *cert. denied*, 556 U.S. 1167

(2009). Permitting that approach would "eviscerate well-settled standing limitations" in cases like *Valley Forge*. *Id*.

In its now-vacated ruling addressing EO-2, this Court relied on the *combination* of EO-2's purported message and its adverse effect on one plaintiff in delaying the entry of his spouse to find standing. *See IRAP*, 857 F.3d at 583-86 & n.11. That reasoning, however, erroneously conflated the question whether an individual has suffered *an injury-in-fact* from an alleged Establishment Clause violation with the question whether the violation was of the individual's *own Establishment Clause rights*. Under the Supreme Court's decisions, a plaintiff must allege a violation of his own constitutional rights to invoke the limited review afforded by *Mandel*. Because plaintiffs have not done so, their constitutional claims are not reviewable.

B. The Proclamation Does Not Violate 8 U.S.C. § 1152(a)(1) or the Establishment Clause

The government is likely to prevail on the merits of its appeal because the district court erred in holding that the Proclamation's entry-restrictions likely contravene 8 U.S.C. § 1152(a)(1) and the Establishment Clause.

1. The President's Proclamation was issued pursuant to his inherent Article II authority to exclude aliens, *see Knauff*, 338 U.S. at 543, and his broad statutory authority under 8 U.S.C. §§ 1182(f) and 1185(a)(1). Section 1182(f) authorizes the President to "suspend the entry of all aliens or any class of aliens as immigrants or

nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate," whenever he finds that their entry "would be detrimental to the interests of the United States." Section 1185(a) similarly authorizes the President to restrict the entry of aliens into the United States, or to set "such reasonable rules, regulations, and orders," and "such limitations and exceptions as the President may prescribe." By their plain terms, these provisions confirm the expansive discretion afforded to the President to restrict entry of aliens. *See Abourezk*, 785 F.2d at 1049 n.2; *Allende v. Shultz*, 845 F.2d 1111, 1117-1118 & n.13 (1st Cir. 1988). The Supreme Court has deemed it "perfectly clear that [Section] 1182(f) * * * grants the President ample power to establish a naval blockade that would simply deny illegal Haitian migrants the ability to disembark on our shores." *Sale*, 509 U.S. at 187.

Historical practice likewise confirms the breadth of, and deference owed to, the President's exercise of authority under Sections 1182(f) and 1185(a)(1). For decades, Presidents have restricted entry pursuant to those statutes based on nationality. *See* Opinion 45-46 (discussing President Carter's 1979 exclusion of Iranians in response to the Iran Hostage Crisis and President Reagan's 1986 decision to bar entry to Cuban nationals in retaliation for Cuba's suspension of an immigration agreement and facilitation of illegal migration to the United States). Courts found no impediment to upholding these actions. *See, e.g.*, *Nademi v. INS*, 679 F.2d 811, 813-14 (10th Cir. 1982); *Yassini v. Crosland*, 618 F.2d 1356, 1362 (9th

Cir. 1980).

Here, the President acted within his authority under Sections 1182(f) and 1185(a) by restricting the entry of aliens from eight countries that share information inadequately or present other risk factors, both to improve information-sharing and to protect against the risks of insufficient information until such improvements occur.

2. The district court nevertheless held that the entry restrictions violate 8 U.S.C. § 1152(a)(1), which prohibits discrimination on the basis of nationality in the "issuance of an immigrant visa." But as the district court itself previously (and correctly) recognized, "barring *entry* to the United States based on nationality pursuant to the President's authority under § 1182(f) does not appear to run afoul of the provision in § 1152(a) barring discrimination *in the issuance of immigrant visas*." *IRAP*, 241 F. Supp. 3d at 554 (emphasis added). Rather than reading Section 1152(a) to conflict with Sections 1182(f) and 1185(a), the provisions should be read in harmony, *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976). The statutory provisions operate in different spheres: Sections 1182(f) and 1185(a) limit the universe of individuals eligible to receive visas, and Section 1152(a) prohibits discrimination on the basis of nationality within that universe of eligible individuals. Reading them to conflict would render invalid prior proclamations by President Reagan and President Carter.

Harmonizing the statutes is particularly appropriate where the President is imposing restrictions on the entry of aliens to influence foreign governments' behavior. As the Ninth Circuit acknowledged in *Hawaii*, the President may permissibly distinguish among "classes of aliens on the basis of nationality" when warranted "as retaliatory diplomatic measures responsive to government conduct directed at the United States." 859 F.3d at 772 n.13. This Court has upheld nationality-based restrictions in similar circumstances. *See Malek-Marzban v. INS*, 653 F.2d 113, 116 (4th Cir. 1981). Construing Section 1152(a)(1) to disable the President from taking action against the nationals of a foreign state for foreign affairs or nationality-security reasons would also raise serious constitutional concerns.

The district court itself acknowledged that Sections 1182(f) and 1185(a) empower the President to deny entry based on nationality, Opinion 58-60, and further that such denial is permissible in some circumstances notwithstanding Section 1152(a)(1). Opinion 45. It distinguished past Presidential actions on the ground that they were of "limited duration, such as during a specific urgent national crisis or public health emergency." Opinion 45-46 (discussing President Reagan's Cuban entry restriction and President Carter's Iranian entry restriction). That distinction, however, has no textual basis in Section 1152(a). Nor is it supported by the underlying facts; if anything, those prior suspensions were more indefinite in scope than the Proclamation. President Reagan directed that the suspension of entry

of Cuban immigrants under Section 1182(f) "shall remain in effect until the Secretary of State, in consultation with the Attorney General, determines that normal migration procedures with Cuba have been restored." 51 Fed. Reg. 30,470, 30,471 (Aug. 22, 1986). Although President Carter's Order in response to the Iranian hostage crisis did not itself deny or revoke visas, he explained upon its issuance that the State Department would "invalidate all visas issued to Iranian citizens" and would not reissue visas or issue new visas "except for compelling and proven humanitarian reasons or where the national interest of our own country requires." Jimmy Carter, *Sanctions Against Iran: Remarks Announcing U.S. Actions* (Apr. 7, 1980), http://www.presidency.ucsb.edu/ws/?pid=33233; *see also See* 44 Fed. Reg. 67,947 (Nov. 26, 1979). The Proclamation, by contrast, requires periodic review of the continuing need for the restrictions and establishes a process for recommending that they be terminated if the countries "have improved their identity-management and information-sharing protocols and procedures" or the interests of the United States no longer require the suspensions and restrictions on entry. Procl. § 4.

3. The district court also erred in holding that the Proclamation's entry restrictions violate the Establishment Clause. The Proclamation is constitutional regardless of whether the Court applies *Mandel*'s limited standard of review that there need only be a "facially legitimate and bona fide reason" for excluding aliens abroad, 408 U.S. at 770, or the primary "secular purpose" standard applicable in the

domestic context under Establishment Clause precedent, *e.g.*, *McCreary County v. ACLU of Kentucky*, 545 U.S. 844, 862 (2005). Both the process by which the Proclamation was issued, and its substance, foreclose any suggestion that it was the product of bad faith or religious animus.

The Proclamation is the result of a months-long worldwide review and process of diplomatic engagement combining the efforts of multiple government agencies and recommendations from the Secretary of DHS to the President regarding whether and what entry restrictions were necessary to address the inadequacies identified and to encourage countries to cooperate with the United States to address those inadequacies. The President acted in accordance with these recommendations. Neither plaintiffs nor the district court have even suggested, let alone demonstrated, that the Cabinet secretaries and numerous other government officials involved in the review process that culminated in those recommendations were acting in bad faith or harbored anti-Muslim animus.

Furthermore, the Proclamation neither mentions nor draws any distinction based on religion, and its "operation," *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993), confirms that it is religion-neutral. The Proclamation establishes entry restrictions that are tailored to the particular information-sharing deficiencies and terrorism risks in each nation. Of the seven countries from which EO-2 and its predecessor suspended entry, the Proclamation

omits two Muslim-majority countries (Sudan and Iraq). The President concluded that Sudan met the Secretary of DHS's baseline and that, although Iraq fell below the baseline, entry restrictions were not warranted in light of "the close cooperative relationship between the United States and the democratically elected government of Iraq, the strong United States diplomatic presence in Iraq, the significant presence of United States forces in Iraq, and Iraq's commitment to combating the Islamic State of Iraq and Syria (ISIS)." Procl. § 1(g). The Proclamation added entry restrictions for three new countries, two of which are non-Muslim-majority (Venezuela and North Korea) and the third of which has an approximately 48% non-Muslim population (Chad). *See* CIA, The World Factbook: Africa: Chad, https://www.cia.gov/library/publications/the-world-factbook/geos/cd.html. The five other Muslim-majority countries included were all previously identified by Congress or the Executive Branch as posing terrorism-related concerns. *See* 8 U.S.C. § 1187(a)(12).

Moreover, the Proclamation tailors the entry restrictions to the particular country, allowing students and exchange visitors from Iran, while restricting only business and tourist non-immigrant entry for nationals of Libya, Yemen, and Chad, and imposing no exclusions on non-immigrant entry for Somali nationals. This particular selection of countries and restrictions is nonsensical as a supposed "Muslim ban," but is readily explicable as a tailored means of encouraging

individual countries to improve inadequate information-sharing and of protecting against security risks in the interim.

The district court nevertheless reasoned that the process preceding the Proclamation could not "cure[] any taint from EO-2" because "the outcome of the DHS Review was at least partially pre-ordained." Opinion 76. That conclusion is fundamentally at odds with EO-2's provisions governing that review, which direct the Secretary of DHS to establish the criteria by which to identify "*whether, and if so what*, additional information will be needed from each foreign country," EO-2 § 2(a) (emphasis added), and to provide a list of any "countries recommended for inclusion in a Presidential proclamation that would prohibit the entry of *appropriate categories* of foreign nationals of countries that have *not provided the information requested*," *id.* § 2(e) (emphasis added). Nothing in those provisions cabined the independent judgment of the Secretary of DHS—whose good-faith has *never* been called into question—in deciding whether and which countries to recommend for appropriate entry restrictions.

The district court also inferred anti-Muslim bias because the Proclamation supposedly treats countries with similar deficiencies differently, in a manner that is asserted to have "a disproportionate impact on majority-Muslim nations" and to manifest animus rather than "flow from the objective factors considered in the review." Opinion 78. But the seemingly different treatment is instead explained by

different circumstances, as outlined in the Proclamation. For example, although Somalia generally satisfies the information-sharing baseline, it not only "has significant identity-management deficiencies" but "stands apart from other countries in the degree to which its government lacks command and control of its territory." Procl. § 2(h). Likewise, although Venezuela's "government is uncooperative in verifying whether its citizens pose national security or public-safety threats," it "has adopted many of the baseline standards identified by the Secretary of Homeland Security" and the United States has "alternative sources for obtaining information to verify the citizenship and identify of nationals from Venezuela." *Id.* § 2(f). These country-specific differences, rather than animus, are the self-evident basis for the differing treatment.

The district court also stated that the country-based entry restrictions in the Proclamation are "unprecedented," distinguishing prior country-based entry bans on the basis that they applied to "a single nation" "in response to a specific diplomatic dispute." Opinion 79. But the President determined that each of the eight countries presented specific risks requiring nationality-based entry restrictions, just as the Iran and Cuba restrictions were the result of specific problems relating to those countries. The fact that particular countries refuse to share adequate information to enable consular officials to discover if their nationals justifies nationality-based restrictions that are commensurate with the problem.

Finally, the district court held that the President's prior campaign statements bear on the Proclamation because the President has never repudiated them. Opinion 81. But neither *McCreary* nor the other cases relied on by the district court hold that religiously neutral government action must remain subject to the taint of prior conduct or statements absent an affirmative statement of disavowal. To the contrary, in *McGowan*, the Supreme Court held that a Sunday closing law's secular exemptions were sufficient to prove that the law no longer was motivated by its traditional religious purpose of observing the Sabbath, even though the law still contained expressly religious references. 366 U.S. at 445. Here, the process of review and recommendation by government officials whose motives have never been questioned, and the limited restrictions and express exclusions for Muslim-majority nations, make clear that the Proclamation implements a good-faith, secular national-security objective. Yet under the district court's approach, until the President issues a disavowal of sufficient (and unknowable) sincerity and force, he is unable to regulate immigration from Muslim-majority countries despite known and identified risks to our national security. That is not, and should not be, the law.

C. The Global Injunction Is Improper

At a minimum, the district court erred because Article III and equitable principles require that the injunction be limited to redressing plaintiffs' own cognizable, irreparable injuries. *Lewis v. Casey*, 518 U.S. 343, 357 (1996); *Madsen*

v. Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994). The global injunction is overbroad, notwithstanding the district court's exclusion of "[i]ndividuals lacking a credible claim of a bona fide relationship with a person or entity in the United States." Order 2. Although the Supreme Court so narrowed the injunctions against EO-2, *see Trump*, 137 S. Ct. at 2088-89, the Court did not conclude that similar relief was required in all circumstances, and carefully tailored its stay to the equities in the case. This case is very different for the reasons described, and the equitable balancing requires following the ordinary rule of plaintiff-specific relief.

CONCLUSION

For these reasons, defendants respectfully request that, pending final disposition of the appeal, this Court stay the preliminary injunction, in whole or at least as to all aliens except those identified aliens whose exclusion would impose a cognizable, irreparable injury on plaintiffs. In addition, defendants respectfully request that, pending a ruling on a stay pending appeal, the Court grant an immediate administrative stay.

Respectfully submitted,

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OCTOBER 2017

CERTIFICATE OF COMPLAINCE

I hereby certify that this motion complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-volume limitations of Fed. R. App. P. 27(d)(2)(A). This motion contains 5,196 words, excluding the parts of the motion excluded by Fed. R. App. P. 27(d)(2) and 32(f).

/s/ Sharon Swingle
Sharon Swingle

CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2017, I electronically filed the foregoing motion 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.

/s/ Sharon Swingle
Sharon Swingle