No.

In the Supreme Court of the United States

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

v.

STATE OF HAWAII, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Constitution and Acts of Congress confer on the President broad authority to prohibit or restrict the entry of aliens outside the United States when he deems it in the Nation's interest. Exercising that authority after a worldwide review by multiple government agencies of whether foreign governments provide sufficient information to screen their nationals, the President issued Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 27, 2017). In accordance with the recommendation of the Acting Secretary of Homeland Security following the multi-agency review, the Proclamation suspends entry, subject to exceptions and case-by-case waivers, of certain categories of aliens abroad from eight countries that do not share adequate information with the United States or that present other risk factors. The district court issued a preliminary injunction barring enforcement of the Proclamation's entry suspensions worldwide, except as to nationals of two countries. The court of appeals affirmed, except as to persons without a credible claim of a bona fide relationship with a person or entity in the United States. The courts concluded that the Proclamation likely violates the Immigration and Nationality Act.

The questions presented are:

1. Whether respondents' challenge to the President's suspension of entry of aliens abroad is justiciable.

2. Whether the Proclamation is a lawful exercise of the President's authority to suspend entry of aliens abroad.

3. Whether the global injunction is impermissibly overbroad.

PARTIES TO THE PROCEEDING

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

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

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

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PETITION FOR A WRIT OF CERTIORARI

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

OPINIONS BELOW

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

JURISDICTION

The judgment of the court of appeals was entered on December 22, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Pertinent constitutional, statutory, and regulatory provisions are reproduced in the appendix to this petition. App. 107a-172a.

STATEMENT

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

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

A. Legal Framework

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

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

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

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

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

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

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

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

Section 1185(a)(1) of Title 8 further grants the President broad authority to adopt "reasonable rules, regulations, and orders" governing entry or removal of aliens, "subject to such limitations and exceptions as [he] may prescribe."

B. The Second Executive Order And Proclamation

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

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

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

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

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

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

a. DHS, in consultation with the Department of State and the Office of the Director of National Intelligence (ODNI), undertook "to identify whether, and if so what, additional information will be needed from each foreign country to adjudicate an application by a national of that country for a visa, admission, or other benefit under the INA * * * in order to determine that the individual is not a security or public-safety threat." Procl. § 1(c). DHS, in consultation with the State Department and ODNI, developed a "baseline" for the information required from foreign governments. *Ibid.* That baseline incorporated three components:

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

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

Ibid.

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

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

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

c. The President evaluated the Acting Secretary's recommendations in consultation with multiple Cabinet members and other government officials. Procl. § 1(h)(i) and (ii). The President considered a number of factors, including each country's "capacity, ability, and willingness to cooperate with our identity-management and information-sharing policies and each country's risk factors," as well as "foreign policy, national security, and counterterrorism goals." *Id.* § 1(h)(i).

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

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

that would be most likely to encourage cooperation given each country's distinct circumstances, and that would, at the same time, protect the United States until such time as improvements occur." *Id.* § 1(h)(i). The President determined that these particular restrictions are "necessary to prevent the entry of those foreign nationals about whom the United States Government lacks sufficient information to assess the risks they pose to the United States," and "to elicit improved identity-management and information-sharing protocols and practices from foreign governments." *Ibid.*

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

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

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

C. Procedural History

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

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

and that the Proclamation likely exceeds the President's authority under 8 U.S.C. 1182(f) and 1185(a)(1) because, in the court's view, entry restrictions are "a poor fit" for the national-security and foreign-relations objectives the Proclamation identified, App. 94a-95a. The court also concluded that the Proclamation's entry restrictions likely violate 8 U.S.C. 1152(a)(1)(A), which bars "discriminat[ing]" or granting a "preference or priority" in the "issuance of an immigrant visa because of" an alien's "nationality." The court "decline[d] to reach" respondents' other claims. App. 92a. The government then consented to conversion of the TRO into a preliminary injunction. App. 68a-69a.

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

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

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

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

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

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

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

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

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

D. Related Litigation

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

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

REASONS FOR GRANTING THE PETITION

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

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

I. THE DECISION BELOW IS WRONG

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

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

A. Respondents' Statutory Claims Are Not Justiciable

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a. Section 1182(f) grants the President exceedingly broad discretion, authorizing him to suspend the entry of "any class" of aliens, or "all" aliens, "as immigrants or nonimmigrants," for such time as he "deem[s] necessary," or to restrict their entry as he "deem[s] to be appropriate," "[w]henever" he "finds" that their entry would be "detrimental to the interests of the United States." 8 U.S.C. 1182(f). The President expressly made that finding in the Proclamation. He stated that, "absent the measures set forth in [the Proclamation], the immigrant and nonimmigrant entry into the United

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

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

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

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

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

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

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

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

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

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

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

to protect national security and conduct foreign relations.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. The Global Injunction Against The Proclamation Is Vastly Overbroad

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

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

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

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

II. THE DECISION BELOW IS IN NEED OF REVIEW

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

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

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

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

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 2018