DEPARTMENT OF THE ATTORNEY GENERAL

DAVID Y. IGE
GOVERNOR

DOUGLAS S. CHIN
ATTORNEY GENERAL

For Immediate Release
September 11, 2017

News Release 2017-117

HAWAII FILES SUPREME COURT BRIEF ON THE MERITS IN THE TRAVEL BAN CASE

HONOLULU – Today Hawaii filed its brief on the merits before the United States Supreme Court in *Hawaii v. Trump*. The Trump Administration filed its opening Supreme Court brief on the merits on August 10, 2017.

Hawaii's brief states in part:

> On March 6, 2017, the President issued an executive order that exceeds his authority under the immigration laws and transgresses the boundaries of the Establishment Clause. In defending that order, the President claims authority "parallel to Congress's" to make "federal law" with respect to immigration, insists that the courts owe him complete "deference [as] the Executive," and declares his decisions wholly "immune from judicial control."
>
> That breathtaking assertion of presidential power is irreconcilable with our constitutional framework. Our Framers crafted a Constitution predicated on the understanding that the "accumulation of all powers legislative, executive and judiciary in the same hands, * * * may justly be pronounced the very definition of tyranny." The Federalist No. 47, p. 324 (James Madison) (Jacob Cooke ed., 1961). In issuing Executive Order No. 13,780 and then defending it in the courts, the President has named himself legislator, executive, and judge. The result is precisely the encroachment on individual liberties the Framers feared: The Order has sown chaos in our immigration system, separated our families, and infringed on the sovereignty of our States. It has also impeded the operations of our universities, our charities, and the tourism industry on which so many livelihoods depend.
>
> In short, "this wolf comes as a wolf." Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). It falls to this Court to reestablish our

> constitutional separation of powers, and to reassert the bulwarks that protect our most sacred liberties.

Oral arguments before the United States Supreme Court will occur on October 10, 2017 in Washington, D.C.

A copy of Hawaii's Supreme Court brief on the merits is attached.

# # #

For more information, contact:
Joshua A. Wisch
Special Assistant to the Attorney General
Phone: (808) 586-1284
Email: Joshua.A.Wisch@hawaii.gov
Web: http://ag.hawaii.gov
Twitter: @ATGHIgov

No. 16-1540

IN THE
Supreme Court of the United States

DONALD J. TRUMP, *et al.*,
Petitioners,
v.
STATE OF HAWAII, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF FOR RESPONDENTS

DOUGLAS S. CHIN
Attorney General of the State of Hawaii
CLYDE J. WADSWORTH
Solicitor General of the State of Hawaii
DEIRDRE MARIE-IHA
DONNA H. KALAMA
KIMBERLY T. GUIDRY
ROBERT T. NAKATSUJI
Deputy Attorneys General
DEPARTMENT OF THE ATTORNEY GENERAL, STATE OF HAWAII
425 Queen Street
Honolulu, HI 96813
Counsel for the State of Hawaii

NEAL KUMAR KATYAL
Counsel of Record
COLLEEN E. ROH SINZDAK
MITCHELL P. REICH
ELIZABETH HAGERTY
SUNDEEP IYER*
HOGAN LOVELLS US LLP
555 Thirteenth St., NW
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com

THOMAS P. SCHMIDT
SARA SOLOW
ALEXANDER B. BOWERMAN
HOGAN LOVELLS US LLP

Counsel for Respondents

*Admitted only in Maryland; supervised by firm members

QUESTIONS PRESENTED

1. Whether the challenges to § 2(c) of Executive Order No. 13,780 became moot on June 14, 2017, or whether the case is otherwise nonjusticiable.

2. Whether Executive Order No. 13,780 exceeds the President's statutory authority under the Immigration and Nationality Act.

3. Whether Executive Order No. 13,780 violates the Establishment Clause.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

IN THE
Supreme Court of the United States

No. 16-1540

DONALD J. TRUMP, *et al.*,
Petitioners,
v.
STATE OF HAWAII, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF FOR RESPONDENTS

INTRODUCTION

On March 6, 2017, the President issued an executive order that exceeds his authority under the immigration laws and transgresses the boundaries of the Establishment Clause. In defending that order, the President claims authority "parallel to Congress's" to make "federal law" with respect to immigration, Br. 64, 72; insists that the courts owe him complete "deference [as] the Executive," Br. 66; and declares his decisions wholly "immune from judicial control," Br. 23.

That breathtaking assertion of presidential power is irreconcilable with our constitutional framework. Our Framers crafted a Constitution predicated on the understanding that the "accumulation of all

powers legislative, executive and judiciary in the same hands, * * * may justly be pronounced the very definition of tyranny." The Federalist No. 47, p. 324 (James Madison) (Jacob Cooke ed., 1961). In issuing Executive Order No. 13,780 and then defending it in the courts, the President has named himself legislator, executive, and judge. The result is precisely the encroachment on individual liberties the Framers feared: The Order has sown chaos in our immigration system, separated our families, and infringed on the sovereignty of our States. It has also impeded the operations of our universities, our charities, and the tourism industry on which so many livelihoods depend.

In short, "this wolf comes as a wolf." *Morrison* v. *Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). It falls to this Court to reestablish our constitutional separation of powers, and to reassert the bulwarks that protect our most sacred liberties.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Pertinent constitutional, statutory, and regulatory provisions are reproduced in an addendum to this brief. Add. pp. 1a-46a.

STATEMENT

A. Constitutional Background

Our Nation was founded by immigrants seeking religious freedoms in a new land. Our Framers therefore recognized the immense power wielded by those who control immigration, and they knew how that power could be misused. In the Declaration of Independence, the colonists cited King George III's

abuse of the immigration power as one reason they sought independence. *See* The Declaration of Independence ¶ 9 (1776). And even in the New World, the Framers saw how some colonies used the immigration power to establish religion. For example, in Virginia, colonists were required to swear an oath of Anglican supremacy as "a precondition to immigration." Michael McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2116 (2003).

Accordingly, the Bill of Rights contains not one but two distinct protections for religious freedom: The Free Exercise Clause protects the individual right to practice the faith of one's choosing, while the Establishment Clause places a restraint on the Government's ability to adopt—or reject—a particular faith. 1 Annals of Cong. 758 (1789) (statement of James Madison).

The Constitution also ensures that the President may not exercise the sort of unreviewable "prerogative" over immigration "exercised by George III." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring). It lodged in Congress the sources of the immigration authority: the "power '[t]o establish [a] uniform Rule of Naturalization,' U.S. Const., Art. I, § 8, cl. 4, [the] power '[t]o regulate Commerce with foreign Nations', *id.*, cl. 3, and [a] broad authority over foreign affairs." *Toll* v. *Moreno*, 458 U.S. 1, 10 (1982). It provided as well that "*Migration* or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited *by the Congress* prior to the Year one thousand eight hun-

dred and eight." U.S. Const. art. I, § 9, cl. 1 (emphasis added). There is no similar restriction on the President, reflecting the Framers' belief that the power to "prohibit[]" "[m]igration" would reside in the Legislative, rather than the Executive, Branch. *See Arizona* v. *United States*, 567 U.S. 387, 422-423 (2012) (Scalia, J., concurring in part and dissenting in part).

The Nation's early history confirms as much. When Congress enacted the Alien and Sedition Acts in 1798, it delegated to the President the power to expel alien enemies from the United States during a declared war or a threat of invasion. 1 Stat. 577 (1798) (codified at 50 U.S.C. §§ 21-24). Some, including Thomas Jefferson and James Madison, doubted that even Congress had the ability to control immigration on this scale. *See* Sarah H. Cleveland, *Powers Inherent in Sovereignty*, 81 Tex. L. Rev. 1, 89-92 (2002). But no one suggested that the immigration power rests with the President, or that the Acts' delegations were superfluous in light of his inherent constitutional powers. Indeed, there were many complaints that the Alien and Sedition Acts, even though limited to time of war, placed too "extraordinary a power in the hands of the President." 8 Annals of Cong. 1983 (1798) (statement of Albert Gallatin).

Historically, this Court has also viewed immigration as Congress's domain. Reviewing judicial treatment of the immigration power near the end of the nineteenth century, the Court observed that "all the cases in this [C]ourt" hold that the power to restrict immigration "belongs exclusively to Congress." *Head Money Cases*, 112 U.S. 580, 591 (1884).

In short, our Framers—fresh from their experience with immigration abuses and religious persecution at the hands of a king—sought to protect the new Nation from the same fate both by adopting the Bill of Rights and by placing the immigration power in the hands of a "deliberate and deliberative" body: Congress. *INS* v. *Chadha*, 462 U.S. 919, 959 (1983).

B. Factual Background

1. As a presidential candidate, Donald Trump made preventing Muslim immigration a central plank of his platform. On December 7, 2015, he called for "a total and complete shutdown of Muslims entering the United States." J.A. 1050. Explaining the rationale for this promise three months later, he stated: "I think Islam hates us ***. [W]e can't allow people coming into this country who have this hatred of the United States *** [a]nd of people that are not Muslim." J.A. 1132. He later elaborated: "[W]e're having problems with the Muslims, and we're having problems with Muslims coming into the country." J.A. 220.

Mr. Trump also stated that he wished to limit the admission of Muslim refugees. He complained as early as July 2015 that "Islamic" refugees from Syria were being admitted to the United States, but "Christian" refugees were not. J.A. 1011-1012. In June 2016, he said his opponent would "admit[] hundreds of thousands of refugees from the Middle East" who would "try[] to take over our children and convince them *** how wonderful Islam is." J.A. 1015 & n.19.

As the campaign progressed, Mr. Trump sometimes couched his promised Muslim ban in different terms,

characterizing it as a restriction on immigration from countries "where there's a proven history of terrorism." J.A. 1014. But when asked in July 2016 whether this approach represented a "rollback" of the Muslim ban, he disagreed, stating: "In fact, you could say it's an expansion." J.A. 1015. Mr. Trump explained that he used different terminology because "[p]eople were so upset when I used the word Muslim. Oh, you can't use the word Muslim." *Id.*

In October 2016, Mr. Trump further explained the link between the policies: The "Muslim ban," he said, had "morphed into a[n] extreme vetting from certain areas of the world." J.A. 1133. When asked on December 21, 2016, now as President-Elect, whether he would "rethink" his "plans to *** ban Muslim immigration," his answer was: "You know my plans. All along, I've been proven to be right." J.A. 182.

2. On January 27, 2017, seven days after taking office, President Trump signed Executive Order No. 13,769 ("EO-1"), entitled "Protecting the Nation From Foreign Terrorist Entry Into the United States." 82 Fed. Reg. 8977 (Feb. 1, 2017). As he signed it, he read the title, looked up, and said: "We all know what that means." J.A. 126.

EO-1 imposed an immediate, 90-day ban on entry by nationals of seven "overwhelmingly Muslim" countries. J.A. 1130. It also suspended the U.S. Refugee Admissions Program for 120 days and lowered the cap on annual refugee admissions. J.A. 1019. The suspension included a carve-out for refugees who were "religious minorit[ies]" in their home countries. *Id.* In an interview the day EO-1 was

signed, President Trump explained this exception was designed to "help" Christians, asserting that in the past "[i]f you were a Muslim [refugee] you could come in, but if you were a Christian, it was almost impossible." J.A. 1020.

One of President Trump's advisors, Rudolph Giuliani, explained the connection between EO-1 and the "Muslim ban" promised during the campaign. In a television interview the day after EO-1 was signed, Mr. Giuliani recounted: "When [Donald Trump] first announced it, he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'" J.A. 1020.

EO-1 spurred confusion and chaos. Numerous lawsuits were filed, and within a week, a Washington district court enjoined EO-1's enforcement nationwide. *Washington* v. *Trump*, 2017 WL 462040, at *2-3 (W.D. Wash. Feb. 3, 2017). The Ninth Circuit denied the Government's request to stay the district court's injunction. *Washington* v. *Trump*, 847 F.3d 1151, 1169 (9th Cir. 2017) (per curiam).

3. The Government did not appeal the Ninth Circuit's decision; instead, it decided to issue a "revised" Executive Order. J.A. 1028. But the revisions would be minor. In the words of presidential advisor Stephen Miller, the revised Order would "have the same basic policy outcome" as the first, and any changes would address "very technical issues that were brought up by the court." *Id.*

During a February press conference, President Trump himself explained his intentions with respect to the revised Order, stating: "I keep my campaign promises, and our citizens will be very happy when

they see the result." J.A. 183. At the time, President Trump's regularly updated campaign website continued to feature his earlier call for a "total and complete shutdown of Muslims entering the United States," a statement that was not removed until minutes before the Fourth Circuit oral argument. *See* J.A. 179-180 & n.5. Meanwhile, on February 24, 2017, a draft Department of Homeland Security report concluded that "country of citizenship is unlikely to be a reliable indicator of potential terrorist activity." J.A. 1051.

4. On March 6, 2017, the White House issued its revised Order. Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) ("EO-2"). It was largely unchanged from the first. Section 2(c) now bans nationals of six (rather than seven) countries, all with populations that are between 90.7% and 99.8% Muslim. J.A. 1130. Most nationals of these countries may escape the ban only by obtaining a wholly discretionary, "[c]ase-by-case waiver." EO-2 § 3(a)-(c). EO-2 also instructs the Secretary of Homeland Security to conduct a "worldwide review" to determine whether the President's ban should be extended to "additional countries." *Id.* § 2(a)-(b), (d)-(g).

EO-2 also retains EO-1's refugee ban. Section 6(a) suspends all "travel of refugees into the United States" as well as all "decisions on applications for refugee status" for 120 days. Section 6(b) lowers the cap on refugees that may be admitted to the United States in 2017 from 110,000 to 50,000.

5. Like its predecessor, EO-2 was enjoined, this time before it could be enforced. Since then, the President has made several statements regarding

the new Order.

Just hours after the Hawaii District Court issued its nationwide injunction, the President complained to a rally of his supporters that EO-2 was just a "watered down version of the first one" and had been "tailor[ed]" at the behest of "the lawyers." C.A. S.E.R. 84. He added: "I think we ought to go back to the first one and go all the way, which is what I wanted to do in the first place." *Id.*

On June 5, 2017, days after the Government filed its stay application in this Court, President Trump echoed these sentiments in a series of tweets championing the "original Travel Ban." He decried how the "Justice Dep[artment]" had submitted a "watered down, politically correct version *** to S.C." He urged the Justice Department to seek "an expedited hearing of the watered down Travel ban before the Supreme Court," and to "seek [a] much tougher version."[1]

During the pendency of this case, President Trump has also repeated specific campaign statements about Muslim immigrants and refugees. On the night EO-2 was enjoined, President Trump said that it is "very hard" for Muslims to assimilate into Western culture. C.A. S.E.R. 95.[2] That same month, President Trump said, again, that Muslim refugees

---

[1] Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017, posts uploaded between 6:25 and 6:44 a.m.), https://twitter.com/realdonaldtrump.

[2] *See also* Johnson & Hauslohner, *'I think Islam hates us': A timeline of Trump's comments about Islam and Muslims*, Wash. Post (May 20, 2017), https://goo.gl/JyNDMY.

had been favored over Christians, and that his Administration would help Christians.[3]

C. Procedural History

1. Respondents are the State of Hawaii and Dr. Ismail Elshikh, the imam of a mosque in Hawaii. In March, they obtained a temporary—and subsequently a preliminary—injunction, barring the Government from "implementing Sections 2 and 6 of the Executive Order across the Nation." J.A. 1141, 1163. The Government appealed and moved for a stay pending appeal. On June 12, the Ninth Circuit issued a unanimous decision holding that the travel and refugee bans contained in EO-2 violate multiple provisions of the Immigration and Nationality Act ("INA"). It affirmed the injunction on the bans, but lifted the injunction on the provisions ordering a review and upgrade of vetting procedures.

Immediately after the Ninth Circuit ruled, the President issued a memorandum purporting to "clarify" EO-2. J.A. 1441-43. It explains that the "effective date" of each enjoined provision will be "the date and time at which the * * * injunctions are lifted or stayed with respect to that provision," and instructs the pertinent agencies to "jointly begin implementation of each relevant provision * * * 72 hours after all applicable injunctions are lifted or stayed." J.A. 1442.

2. On June 26, this Court granted review in this case and in *Trump* v. *International Refugee Assis-*

---

[3] Scott Johnson, *At the White House with Trump*, PowerlineBlog.com (Apr. 25, 2017), https://goo.gl/ZeXqhY.

tance Project ("*IRAP*"), 137 S. Ct. 2080, 2083 (2017). It also granted a partial stay of the injunctions in the two cases, holding that the bans could be enforced against "foreign nationals who lack any bona fide relationship with a person or entity in the United States." *Id.* at 2087, 2089. The Court observed that it "fully expect[ed] that th[is] relief * * * w[ould] permit the Executive to conclude its internal work and provide adequate notice to foreign governments within the 90-day life of § 2(c)." *Id.* at 2089.

The Government began implementation of the partially enjoined bans on June 29, 2017.

3. On August 7, 2017, respondents filed a motion for leave to add John Doe as a party, which the Court deferred considering until the case is heard on the merits. Order, 16-1540 (Aug. 24, 2017).

SUMMARY OF ARGUMENT

The President has claimed limitless authority to exclude any alien he wishes. And he has used that claim of absolute authority to carry out the Muslim ban he promised, albeit one clumsily masked in an article or two of sheep's clothing. This Court has the power and duty to police these excesses by affirming the injunction on this unlawful and unconstitutional Order.

I. In times of crisis no less than in times of calm, it is this Court's duty to "say what the law is." Yet the Government seeks to insulate its order from judicial scrutiny. It claims that any challenge to the President's statutory violations is barred by a principle of "nonreviewability." But precedent only bars courts from second-guessing Congress's policy choices or individualized exercises of discretion; it does not

prevent the Judiciary from enforcing statutory limits. And because the Establishment Clause prohibits any burden resulting from an establishment of religion, respondents are entitled to review of their constitutional challenge so long as they can point to "real injury" they have experienced as a result of the alleged Establishment Clause violation.

Respondents easily satisfy that criterion. EO-2 infringes Hawaii's sovereignty and inflicts harm on its university, its refugee resettlement programs, and its tourism industry. It also separates Muslim-Americans like Dr. Elshikh and Doe from family members abroad and denigrates their Islamic faith.

That Dr. Elshikh's mother-in-law has received a visa is immaterial; his injury is capable of repetition, and EO-2 continues to tar him as a second-class citizen. Nor did the case become moot on June 14. The bans are currently in effect and likely to be extended. If the Court disagrees, the proper course is to dismiss the case, not vacate the decisions below.

II. The President's Order exceeds his statutory authority. Section 1182(f) does not give the President absolute discretion to determine whom to exclude from the country, and for what reason. The Constitution entrusts that power solely to Congress.

Rather, Section 1182(f) borrows its language nearly verbatim—and thereby takes its meaning—from a series of wartime statutes, proclamations, and regulations that granted the President the power to exclude (1) aliens akin to subversives, war criminals, and the statutorily inadmissible; and (2) aliens who would undermine congressional policy during an exigency. Since the statute's enactment, every

1182(f) order has complied with these limits. The Government's boundless interpretation, in contrast, would overthrow the immigration code and gravely upset the constitutional balance that has prevailed since the Founding.

EO-2 is therefore unlawful. The President does not claim that the 165 million aliens he has excluded are "likely terrorists," who must be viewed as akin to subversives, war criminals, and the statutorily inadmissible. Br. 47. Nor does he seek to protect congressional policy during an exigency. Rather, he responds to chronic conditions that Congress has repeatedly addressed. And instead of advancing Congress's policies, he subverts them, looking at "the same information" as Congress and reaching a different "judgment." Br. 48.

EO-2 also violates 8 U.S.C. §§ 1152(a)(1)(A) and 1157(a). It openly engages in nationality discrimination in the "issuance of an immigrant visa." *Id.* § 1152(a)(1)(A). And it lowers the refugee cap mid-year, in plain violation of Section 1157(a).

III. EO-2 violates the Establishment Clause. That Clause bars the Government from acting with the purpose of excluding members of a particular faith from the political community. EO-2 was enacted to serve precisely that unconstitutional object.

The Government nonetheless maintains that, so long as the President articulates a facially neutral rationale, any further analysis is off-limits. The precedent says just the opposite: An Executive officer receives deference in the immigration context only if his rationale is "facially legitimate *and bona fide*." Deference is unavailable where respondents

have offered extensive evidence that would lead a reasonable observer to believe the President is pursuing an unconstitutional purpose. And deference is particularly inappropriate when the President is exercising broad policymaking power usually reserved for Congress.

Under the correct analysis, the constitutional violation is plain. The text, operation, and history of EO-2, as well as the public statements of its author before and after EO-2's implementation, all demonstrate that the President acted with the unconstitutional purpose of excluding Muslims.

No principle justifies shutting the Court's eyes to this clear showing. The Court need not engage in "judicial psychoanalysis," but simply examine the objective indicia of intent that any neutral observer would consider. In this case, that includes the repeated campaign statements that the Administration itself rekindled after the inauguration. But even if it did not, there is more than enough post-inauguration material—from the President's official statements to the gross mismatch between EO-2's asserted rationales and its operation—to make the Establishment Clause violation plain.

IV. The injunction should be upheld in full.

ARGUMENT

I. RESPONDENTS' CLAIMS ARE JUSTICIABLE.

The Constitution assigns the Judicial Branch the "duty * * * to say what the law is." *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803). That duty sometimes compels courts to confront sensitive issues they "would gladly avoid." *Zivotofsky ex rel.*

Zivotofsky v. *Clinton*, 566 U.S. 189, 194-195 (2012). But it is a task that is vital to our constitutional democracy.

Especially "in times of conflict," the Judiciary must ensure that "national-security concerns [do] not become a talisman used to ward off inconvenient claims." *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1862 (2017). Although the political branches are entitled to a degree of deference in cases that "implicate[] sensitive and weighty interests of national security and foreign affairs," this Court's "precedents, old and new, make clear that concerns of national security and foreign relations do not warrant abdication of the judicial role." *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 33-34 (2010).

The Government ignores those precedents, asserting that neither the statutory nor the constitutional challenges to EO-2 may be heard. That is wrong, and accepting the Government's position risks handing the Executive Branch the authority to switch statutes and the Constitution "on or off at will." *Boumediene* v. *Bush*, 553 U.S. 723, 765 (2008).

A. Respondents' Statutory Claims Are Reviewable.

1. Individuals aggrieved by a legal violation may bring a cause of action to enjoin "violations of federal law by federal officials." *Armstrong* v. *Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015); *see* 5 U.S.C. § 702. It is well-settled that in adjudicating such claims, the Judiciary may, if necessary, determine whether "the President [has] act[ed] in contravention of the will of Congress." *Dames & Moore* v. *Regan*, 453 U.S. 654, 669 (1981) (citing *Youngstown*,

343 U.S. at 637-638 (Jackson, J., concurring)). Thus, in *Dames & Moore*, the Court reviewed whether a presidential order nullifying attachments and suspending claims against Iran complied with the limits on the President's statutory authority. 453 U.S. at 669-688. Similarly, in *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), the Court evaluated whether "[t]he President * * * violate[d]" various provisions of the INA by invoking his authority under 8 U.S.C. § 1182(f) to "suspend the entry of undocumented aliens from the high seas." 509 U.S. at 160.[4]

Respondents' claim is no different. Just as in *Sale*, respondents contend that the President has exceeded the limits of his authority under Section 1182(f). *See* Part II.B, *infra*. They also argue that he has violated express restrictions set forth in 8 U.S.C. §§ 1152(a)(1)(A) and 1157(a). *See* Part II.C, *infra*. Resolving these statutory claims—and ensuring that the President remains within his lawful authority—is "a familiar judicial exercise," one this Court has never doubted it may undertake. *Zivotofsky*, 566 U.S. at 196.

2. The Government nonetheless claims that this Court is powerless to review the President's compliance with the law—indeed, that the President may openly defy the immigration laws and escape judicial scrutiny. No case supports that proposition. The

[4] In *Sale*, the Government argued extensively that the plaintiffs' claims were unreviewable. U.S. Br. 13-18 (No. 92-344); Oral Arg. Tr., 1993 WL 754941, at *16-22. No Justice accepted that argument.

Government's principal authorities say only that courts generally cannot review whether *Congress* acted "unreasonably" in imposing an entry restriction. *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588 (1952); *see Fiallo* v. *Bell*, 430 U.S. 787, 798-799 (1977). That principle flows from the fact that Congress has plenary power over immigration, and that courts are ill-equipped to second-guess Congress's "policy choices." *Fiallo*, 430 U.S. at 793. Reviewing whether the President acts within the scope of his statutory authority implicates neither concern; it vindicates, not undermines, Congress's immigration power.

The Government also appeals to several cases in which courts have declined to review individual exclusion decisions. Yet those cases simply hold that courts will not scrutinize how an immigration officer "exercis[ed] the *discretion* entrusted to him by Congress." *U.S. ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 544 (1950) (emphasis added); *see Nishimura Ekiu* v. *United States*, 142 U.S. 651, 660 (1892) (declining to review exercise of "discretionary power"); *Saavedra Bruno* v. *Albright*, 197 F.3d 1153, 1158 & n.2 (D.C. Cir. 1999) (deeming review improper because officers had "complete discretion"). They make plain, in contrast, that courts may review whether immigration officers exceeded their statutory authority; indeed, the Government's favored case, *Knauff*, considered whether the exclusion at issue violated two federal statutes. 142 U.S. at 544-547; *see id.* at 550-552 (Jackson, J., dissenting) (concluding that the statutes were violated and the alien should be ordered admitted).

The Government also observes that "the Presi-

dent's decisions are not 'reviewable for abuse of discretion.'" Br. 42 (quoting *Franklin* v. *Massachusetts*, 505 U.S. 788, 800-801 (1992)). That principle has no application here. The essence of respondents' argument is that Congress did *not* vest the President with complete discretion to exclude aliens whenever he wishes. Rather, Congress imposed limits on the President's power—ones critical to the separation of powers, and which the President has grossly exceeded. This Court can and does review whether "the President has violated a statutory mandate" in this manner. *Dalton* v. *Specter*, 511 U.S. 462, 474 (1994) (citing *Dames & Moore*, 453 U.S. at 667).

B. Respondents' Constitutional Claims Are Reviewable.

The Government does not dispute that this Court may review constitutional challenges to exclusion decisions where plaintiffs assert a violation of their "*own* constitutional rights." Br. 26 (describing *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972), and *Kerry* v. *Din*, 135 S. Ct. 2128 (2015)). Respondents' Establishment Clause challenge matches that description and is therefore reviewable.

1. The Establishment Clause prohibits laws "respecting an establishment of religion." U.S. Const. amend. I. Unlike the other clauses of the First Amendment, it does not preclude the Government from interfering with the rights of a particular individual. Instead, it "deem[s] religious establishment antithetical to the freedom of all." *Lee* v. *Weisman*, 505 U.S. 577, 591 (1992). By barring policies that establish or disavow a particular faith, the Clause protects every citizen from the threat of

"political tyranny and subversion of civil authority." *McGowan* v. *Maryland*, 366 U.S. 420, 430 & n.7 (1961) (citing James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785)).

More than that, the Clause "protect[s] *States* * * * from the imposition of an established religion by the Federal Government." *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 678 (2002) (Thomas, J., concurring) (emphasis added); *Van Orden* v. *Perry*, 545 U.S. 677, 730 n.32 (2005) (Stevens, J., dissenting). Although that protection may have been broader before the incorporation of the Establishment Clause against the States, *Town of Greece* v. *Galloway*, 134 S. Ct. 1811, 1836 (2014) (Thomas, J., concurring), at a minimum the Clause continues to protect a State's right to make laws preventing any establishment of religion. *Id*.

Accordingly, so long as plaintiffs—whether individuals or States—allege that the Government has taken an action that establishes a favored or disfavored religion, they allege a violation of their *own* right to be free from federal establishments. *McGowan*, 366 U.S. at 430-431. And so long as they can also point to a resulting injury that satisfies the requirements of Article III, their claim is reviewable. *Id.*; *see Ariz. Christian Schs. Tuition Org.* v. *Winn*, 563 U.S. 125, 145 (2011) ("If an establishment of religion is alleged to cause real injury to particular individuals, the federal courts may adjudicate the matter."); *cf. Bond* v. *United States*, 564 U.S. 211, 222-224 (2011).

Respondents easily meet those criteria. EO-2 establishes a disfavored faith, *see* Part III.B, *infra*, and

Hawaii and the individual plaintiffs have suffered numerous injuries as a result of the unconstitutional establishment, *see* Part I.C., *infra*.

2. The Government adopts a far more restrictive view. It suggests that States may *never* bring an Establishment Clause challenge. But that assertion is flatly contradicted by the Clause's historic role in protecting a State's sovereign right to be free from federal establishment, *see Town of Greece*, 134 S. Ct. at 1836 (Thomas, J., concurring), and by this Court's recognition that States are owed "special solicitude in [the] standing analysis" when the Federal Government impinges on their sovereign rights, *Massachusetts* v. *EPA*, 549 U.S. 497, 520 (2007).

As to individuals, the Government claims they may bring Establishment Clause challenges only when a government action burdens or targets their own religious practice. That cramped understanding inappropriately transposes precedent from the Free Exercise Clause context, *see* Br. 29 (citing *McGowan*'s free-exercise holding), and would make the two Clauses largely redundant. It also cannot be squared with this Court's holding that *any* establishment is an infringement on the "freedom of *all*," *Lee*, 505 U.S. at 591 (emphasis added). Moreover, even under this cramped view, respondents' claims are reviewable because EO-2 burdens the individual plaintiffs' own religion by separating Muslim-Americans from their family members and denigrating their faith.

Equally unavailing is the Government's assertion that a plaintiff cannot allege an Establishment Clause violation unless she can point to an injury that is religious in nature. That limit runs headlong

into *McGowan*, where this Court held that plaintiffs who "allege only economic injury to themselves" and not "any infringement of their own religious freedoms" nonetheless have Establishment Clause standing. 366 U.S. at 429; *see Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703, 709-710 (1985) (retail store may challenge Sabbath-employment law); *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116, 117-118 (1982) (restaurant may challenge law giving church veto over liquor-license applications); *see also Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968). And again, given the religious injuries to Dr. Elshikh and Doe, such a limit could not bar review even if it existed.

Nor must the plaintiffs' injuries result from a law that operates directly on them. In *McGowan's* companion case, *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 366 U.S. 582 (1961), the Court held that a department store could claim that a Sunday-closing law violated its own Establishment Clause rights, even though the direct victims of the penalties were the store's *employees*. *Id*. at 585, 592. What mattered was that the unconstitutional laws inflicted concrete injuries on the store, just as this unconstitutional order inflicts concrete injuries on respondents.

C. Respondents Have Standing.

Apart from its unconvincing arguments about Establishment Clause injury, the Government makes little effort to contest respondents' Article III standing. And rightly so: Both Section 2(c) and Section 6 inflict "concrete hardship" on respondents, *IRAP*, 137 S. Ct. at 2089, and none of their claims have become moot during the pendency of this case.

1. The State of Hawaii has suffered three injuries traceable to EO-2. First, EO-2 inhibits prospective students and faculty from attending the State's university. This summer, Hawaii made at least 11 offers of admission to students from the six countries covered by Section 2(c), and three accepted. J.A. 1183-1184. The University has also received three applications from affected students for the term beginning in January 2018.[5] And the University is slated to host a speaker from Syria this September.[6] As long as EO-2 is in effect, it will "constrain[] [the University's] recruitment efforts," "deter[] prospective" candidates from applying, and frustrate educational planning. J.A. 1184. These effects will, in turn, deprive the State of "tuition and educational benefits." J.A. 1185.

Second, EO-2 prevents Hawaii from resettling refugees within its borders. Hawaii has settled three refugees in fiscal year 2017, and at least twenty since 2010. While EO-2's refugee ban and cap are in place, the State cannot carry out its resettlement policies, and will be injured in its capacity as sovereign. J.A. 1185-1186 (citing *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982)). Moreover, refugees pay taxes and contribute to Hawaii's economy, and the State receives financial assistance from the Federal Government for each

---

[5] *International students told #YouAreWelcomeHere*, Univ. of Haw. News (Aug. 25, 2017), https://goo.gl/XnJoSt.

[6] *Fall 2017 Faculty Speaker Series*, Int'l Cultural Studies Graduate Certificate Program, Univ. of Haw., Mãnoa, https://goo.gl/Yy8wGd.

refugee it admits. *See* 45 C.F.R. pt. 400; *Refugee and Entrant Assistance Program*, State of Haw., Office of Cmty. Servs. (Aug. 18, 2017), https://goo.gl/U8fs2K.

Third, EO-2 reduces tourism. The number of visitors to Hawaii from the Middle East has fallen markedly since EO-2's issuance. J.A. 1120-1121, 1151; *see* Answering Br. 20 & n.6, C.A. Dkt. 217; *Visitor Arrivals from Middle East & Africa*, Haw. Tourism Auth., https://goo.gl/mGvqEF. That has diminished tax revenue and economic benefits, inflicting further pocketbook harm on the State.

2. a. Dr. Elshikh also has Article III standing to challenge EO-2. Several members of Dr. Elshikh's family reside in Syria, one of the targeted countries. At the time EO-2 was issued, his Syrian mother-in-law was seeking an immigrant visa. J.A. 1180-1182. EO-2 barred her from doing so. *Id.* Such "prolong[ed] * * * separation" from a relative unquestionably constitutes injury-in-fact. *Legal Assistance for Vietnamese Asylum Seekers* ("*LAVAS*") v. *Dep't of State*, 45 F.3d 469, 471 (D.C. Cir. 1995) (Sentelle, J.), *vacated on other grounds*, 519 U.S. 1 (1996) (per curiam).

Dr. Elshikh has also suffered an "intangible" but no less "concrete" injury from EO-2's violation of the Establishment Clause. *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1549 (2016). By effectuating the President's promised Muslim ban, EO-2 denigrates Dr. Elshikh's faith and makes him an "outsider[]" in his "political community." *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 309 (2000); *see* J.A. 1033-1035, 1274-1277.

As this Court has repeatedly recognized, when a

Government establishment of religion "directly affect[s]" a person, the resulting spiritual or dignitary harm is cognizable. *Sch. Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 224 n.9 (1963). Observing a "benediction" at one's middle school graduation, *Lee*, 505 U.S. at 584-585, "encounter[ing]" the Ten Commandments on "Capitol grounds," *Van Orden*, 545 U.S. at 682-683 (plurality op.), and taking "'offens[e]'" at a prayer during a "town board meeting[]," *Town of Greece*, 134 S. Ct. at 1817, are all intangible injuries sufficient for standing.

The Government counters that this spiritual or dignitary harm is not cognizable under *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982). That misunderstands Dr. Elshikh's injury. In *Valley Forge*, the plaintiffs challenged a land transfer that gave a *preference* to a certain religious group. *Id.* at 468, 487; *see In re Navy Chaplaincy*, 534 F.3d 756, 760 (D.C. Cir. 2008) (challenge to retirement system that "favor[ed] Catholic chaplains"). There is a marked difference between challenging a government action that confers a *benefit* on someone *else*—a generalized grievance shared by all who do not receive the preference—and challenging an Order that imposes special burdens on the challenger on account of his religion—the kind of direct, personalized injury that traditionally supports standing. The *Valley Forge* plaintiffs merely experienced "psychological" harm from the "observation of conduct with which [they] disagree[d]." 454 U.S. at 485. Here, by contrast, Dr. Elshikh has been "singled out for special burdens on the basis of [his] religious calling." *Locke* v. *Davey*, 540 U.S. 712, 731 (2004) (Scalia, J.,

dissenting). That "indignity * * * is so profound that the concrete harm produced can never be dismissed as insubstantial." *Id*.

b. Dr. Elshikh's claims did not become moot when his mother-in-law received a visa following this Court's grant of certiorari. EO-2 continues to denigrate his religion and inflict spiritual and dignitary harm on him, his family, and his mosque. Furthermore, several members of Dr. Elshikh's family remain in Syria and remain barred from entry. *See* Amicus Br. of Dr. Elshikh at 1, 7, No. 17-1351 (4th Cir. Apr. 19, 2017). There is therefore a "reasonable" possibility he will be "subject[] to the alleged illegality" again. *FEC* v. *Wis. Right to Life, Inc.*, 551 U.S. 449, 463 (2007); *see City of Erie* v. *Pap's A.M.*, 529 U.S. 277, 287-288 (2000) (shuttered business "still ha[d] a concrete stake in the outcome of this case" because 72-year-old owner "could again decide to operate a nude dancing establishment").

What is more, a finding of mootness would make review of EO-2 nearly impossible. The entry bans' slated duration was 90 or 120 days. This litigation has extended for several months more. Any plaintiff with a visa interview impending when the suit began was likely to obtain a visa and gain entry by the time this Court reached the merits. The Court has previously refused to allow late-breaking, unavoidable developments to shield government action from scrutiny. *See, e.g.*, *Dunn* v. *Blumstein*, 405 U.S. 330, 333 n.2 (1972) ("[a]lthough appellee can now vote, the problem to [other] voters posed by the Tennessee residence requirements" was still present); *S. Pac. Terminal Co.* v. *ICC,* 219 U.S. 498, 515 (1911) (similar); *Honig* v. *Doe*, 484 U.S. 305, 330 (1988)

(Rehnquist, C.J., concurring) ("the test of mootness" should be "relax[ed]" where "the events giving rise to the claim of mootness have occurred after our decision to grant certiorari"). Indeed, in *Mandel*, this Court heard the case on the merits even though Mandel had already delivered his lecture by telephone. 408 U.S. at 759.

In any event, John Doe is in the precise circumstance Dr. Elshikh was before his mother-in-law entered. He is separated from his son-in-law, and EO-2 purports to block his son-in-law's entry. Decl. ¶ 11. The Court should grant respondents' pending motion to add Doe as a party and remove any conceivable mootness concern.

D. This Case Did Not Become Moot On June 14, 2017.

1. Respondents agree with the Government that the case did not become moot on June 14, 2017. The President's June 14 memorandum made clear that he would enforce the bans if the injunctions were lifted. J.A. 1442. Indeed, the bans are *currently* in place and preventing people from entering the country every day. That ongoing harm renders the controversy very much alive.

Similarly, the fact that the travel and refugee bans have initial 90-day and 120-day terms does not itself render this case moot. EO-2 envisions that the bans will be extended, *see* EO-2 § 2(d)-(f), and the Government has relied on the premise that the President may revise the Order's "temporal scope" whenever he wishes. Br. 37. If the Government does, in fact, cease banning entry, the parties can address mootness in supplemental briefing.

2. If the Court finds this case moot, it should not vacate the decision below, as the Government requests. "It is [the Government's] burden, as the party seeking relief[,] *** to demonstrate *** equitable entitlement to the extraordinary remedy of vacatur." *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 26 (1994). The Government falls short.

"The principal condition" in determining whether to vacate a decision "is whether the party seeking relief from the judgment below caused the mootness by voluntary action." *Id*. at 24. Here, the Government's voluntary actions are the principal cause of any mootness. When the Government petitioned for certiorari, it declined to seek expedited consideration, even though it has often done so in similar cases. *See, e.g.*, *Dames & Moore*, 453 U.S. at 660; *United States* v. *Nixon*, 418 U.S. 683, 686-690 (1974). By contenting itself with an October argument, the Government willingly incurred months of delay. The Government has not been "frustrated by the vagaries of circumstance," but by its own litigation choices. *Bonner Mall*, 513 U.S. at 25. It is not entitled to the "extraordinary remedy of vacatur." *Id*. at 26.

Moreover, since vacatur is a form of "equitable relief," this Court's disposition "must also take account of the public interest." *Id*. Both EO-2 itself, and the Government's sweeping arguments in its defense, make clear that the President intends to continue to wield his immigration powers aggressively. It is important that precedents delineating the limits of those powers be left in place.

II. EO-2 VIOLATES THE INA.

Where both statutory and constitutional claims are at issue, the Court "considers [the statutory] argument" first. *Bond* v. *United States*, 134 S. Ct. 2077, 2088 (2014). The President claims that 8 U.S.C. § 1182(f) gives him absolute discretion to exclude any aliens he wishes, for any reason. But the operative language of Section 1182(f) carried a settled meaning at the time of the provision's enactment, which conferred substantially more limited authority. EO-2 exceeds the limits of that authority, and violates two other express statutory restrictions. The injunction may be affirmed on that basis alone.

A. Section 1182(f) Grants The President A Flexible But Not Limitless Power.

1. *This Court has not interpreted immigration laws to confer unlimited discretion.*

The Constitution entrusts "[p]olicies pertaining to the entry of aliens *** exclusively to Congress." *Arizona*, 567 U.S. at 409 (quoting *Galvan* v. *Press*, 347 U.S. 522, 531 (1954)). For more than a century, Congress has implemented its immigration power principally through an "extensive and complex" statutory code—one that "specifie[s]" in considerable detail the "categories of aliens who may not be admitted to the United States." *Id.* at 395.

Congress has also afforded the President a measure of "flexibility" to "adapt[] *** the congressional policy" to new or exigent circumstances. *Knauff*, 338 U.S. at 543. Immigration policy frequently "'implicate[s] our relations with foreign powers' and require[s] consideration of 'changing political and economic circumstances.'" *Jama* v. *Immigration &*

Customs Enf't, 543 U.S. 335, 348 (2005). Because of his characteristic speed and decisiveness, the President can respond to such "changeable and explosive" circumstances more "swiftly" than they can be "acted upon by the legislature." *Zemel* v. *Rusk*, 381 U.S. 1, 17 (1965).

In delegating the President authority over a field as variable as immigration, Congress "must of necessity paint with a brush broader than it customarily wields." *Id.*; *see Knauff*, 338 U.S. at 543. But that "does not mean that * * * it can grant the Executive totally unrestricted freedom of choice." *Zemel*, 381 U.S. at 17. The Framers lodged the immigration power with Congress to protect liberty. Congress cannot—and assuredly does not—delegate that power wholesale to the Executive. *Id.*; *see Carlson* v. *Landon*, 342 U.S. 524, 543-544 (1952).

Accordingly, this Court has consistently refused to read broadly worded immigration provisions as limitless grants of discretion. *See Bond*, 134 S. Ct. at 2090 ("[c]ourts [must] be certain * * * before finding that federal law overrides the usual constitutional balance"). Instead, the Court has carefully construed their statutory language in light of the relevant "factual background," "the statutory context," and previous enactments of a similar character to "derive * * * meaningful content" for the authority conferred. *Knauff*, 338 U.S. at 543.

Kent v. *Dulles*, 357 U.S. 116 (1958), is illustrative. There, the Court considered the President's authority to "designate and prescribe [passport rules] for and on behalf of the United States." *Id.* at 123. The Court acknowledged that this power was "expressed

in broad terms." *Id.* at 127. But it refused to "impute to Congress * * * a purpose to give [the President] unbridled discretion." *Id.* at 128. Rather, the Court observed that the Executive had consistently exercised its discretion under predecessor statutes "quite narrowly," to prohibit passports in only two well-defined circumstances. *Id.* at 127-128. When Congress recodified the operative language in 1952, these were therefore the "only" grounds for refusal "which it could fairly be argued were adopted by Congress in light of prior administrative practice." *Id.* at 128; *see Zemel*, 381 U.S. at 17-18 ("reaffirm[ing]" that the statute "must take its content from history").

The Court has repeatedly "read significant limitations into other immigration statutes." *Zadvydas* v. *Davis*, 533 U.S. 678, 689 (2001). In *Mahler* v. *Eby*, 264 U.S. 32 (1924), the Court held that a statute granting an officer authority to deport aliens he "finds * * * [are] undesirable residents of the United States" needed to be read in light of "previous legislation of a similar character," which gave the words "the quality of a recognized standard." *Id.* at 36, 40. Likewise, in *United States* v. *Witkovich*, 353 U.S. 194 (1957), the Court held that the Attorney General's apparently "unbounded authority to require whatever information he deems desirable of aliens" authorized only those demands consistent with the "purpose of the legislative scheme." *Id.* at 199-200. Similar cases abound. *See Zadvydas*, 533 U.S. at 689, 696-699; *INS* v. *Nat'l Ctr. for Immigrants' Rights*, 502 U.S. 183, 191-194 (1991); *Carlson*, 342 U.S. at 543-544.

2. Section 1182(f) confers the authority set forth in predecessor statutes and Executive policies.

These principles dictate the appropriate reading of Section 1182(f). Like other grants of authority in the immigration laws, this provision is "expressed in broad terms." *Kent*, 357 U.S. at 125. It permits the President to "suspend the entry of all aliens or of any class of aliens" whose entry he "finds * * * would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f). But these words do not give the President "unbridled discretion" to halt the Nation's immigration system at will. *Kent*, 357 U.S. at 128. Rather, the text is borrowed almost verbatim—and so takes its meaning—from a series of wartime statutes, proclamations, and regulations that permitted the President to exclude only (1) aliens akin to subversives, war criminals, and the statutorily inadmissible; and (2) aliens whose admission would undermine congressional policy during an exigency in which it was impracticable for Congress to act. Every prior President has applied the statute in this manner. And this interpretation accords with the balance of authority in immigration law that has prevailed since the Founding.

a. The language of Section 1182(f) originated in 1918, during World War I. President Wilson had requested that Congress grant him a set of wartime powers over immigration, including the authority to exclude "renegade Americans or neutrals * * * reasonably suspected of aiding Germany's purposes." H.R. Rep. No. 65-485, at 2-3 (1918). Yet because Congress could not "foresee the different means which may be adopted by hostile nations to secure

military information or spread propaganda and discontent," and because it was "obviously impracticable to appeal to Congress for further legislation in each new emergency," Congress sought to give the President authority that would enable him to respond "[s]wift[ly]" to new threats. *Id.* at 3.

It therefore enacted a statute providing, as relevant, that "when the United States is at war, if the President shall find that the public safety requires * * *, and shall make public proclamation thereof," he may impose "restrictions and prohibitions * * * upon the departure of persons and their entry into the United States." Act of May 22, 1918, § 1(a), 40 Stat. 559, 559. The statute also gave the President a related suite of wartime powers, including the authority to set passport rules. *Id.* §§ 1(b)-(g), 2. President Wilson invoked his new authority by issuing a proclamation that excluded aliens whose entry he deemed "*prejudicial to the interests of the United States*," including foreign agents and other subversives. Proc. 1473, § 2 (1918) (emphasis added); *see, e.g.*, 58 Cong. Rec. 7303 (1919).

In June 1941, President Roosevelt asked Congress to broaden this statutory authority. Foreign agents were already "engaged in espionage and subversive activities" within the United States. 87 Cong. Rec. 5048 (1941) (statement of Ruth Shipley, Director, Passport Division, Dep't of State). Yet because some of their activities did not threaten "public safety," the President requested that the statute be amended to restrict departure and entry "whenever * * * the President shall deem that *the interests of the United States* require" it. H.R. Rep. No. 77-754, at 1 (1941) (emphasis added).

Members of both houses of Congress initially balked at this language. They objected that the phrase "interests of the United States" appeared to "give the President unlimited power, under any circumstances, to make the law of the United States," 87 Cong. Rec. 5326 (statement of Sen. Taft), or to "override the immigration laws," *id.* at 5050 (statement of Rep. Jonkman). The sponsors, however, assured them that the bill "would only operate against those persons who were committing acts of sabotage or doing something inimical to the best interests of the United States, under the act as it was in operation during [World War I]." *Id.* at 5049 (statement of Rep. Eberharter); *see id.* at 5052 (statement of Rep. Johnson). The State Department offered a similar "assurance" that "the powers granted in the bill would not be used except for the objective" of "suppress[ing] subversive activities." *Id.* at 5386 (statement of Sen. Van Nuys); *see id.* at 5048 (statement of Director Shipley). Congress enacted the proposed language as written. Act of June 21, 1941, 55 Stat. 252.

The Administration followed through on its assurance. By delegation from the President, the relevant agencies issued regulations listing several "[c]lasses of aliens whose entry" was deemed "prejudicial to the interests of the United States." 6 Fed. Reg. 5929, 5931 (1941); *see* Proc. 2523, § 3 (1941). Those classes consisted of three specific groups: (1) spies, saboteurs, and others engaged in subversive activities against the United States or its allies, 22 C.F.R. § 58.53(b)-(h) (1945); (2) aliens who were statutorily inadmissible, *id.* § 58.53(a); and (3) "war criminal[s]" and similar violators of international law, *id.*

§ 58.53(j).[7] In addition, the regulations permitted the exclusion of "[a]ny alien[s] * * * in whose case circumstances of a similar character may be found to exist, which render the alien's admission prejudicial to the interests of the United States, which it was the purpose of the act of June 21, 1941 * * * to safeguard." *Id.* § 58.53(k).

These regulations remained in force until the formal conclusion of World War II in 1952. *See Knauff*, 338 U.S. at 546. That year, Congress reenacted the President's statutory authority without change as 8 U.S.C. § 1185(a)—thereby extending the same suite of powers he had been granted in 1918 and 1941 for use in times of war or national emergency. Immigration and Nationality Act of 1952, Pub. L. 82-414, § 215.[8] For the first time, Congress also authorized the President to exercise a share of that authority in peacetime: Borrowing the language of the wartime statutes, proclamations, and regulations almost verbatim, Congress enacted Section 1182(f), which permits the President to exclude "any aliens" or any "class of aliens" whose entry he finds "detrimental to the interests of the United States." *Id.* § 212(e).[9]

---

[7] Pursuant to the Alien Enemies Act, the regulations were expanded to include "enemy aliens" aged fourteen or older. 22 C.F.R. § 58.53(i) (1945); *see* 50 U.S.C. § 21.

[8] In 1978, Congress substantially curtailed the authority over entry and departure granted by Section 1185, and made the statute applicable outside of war and national emergency. *See* Foreign Relations Authorization Act, Fiscal Year 1979, Pub. L. 95-426, § 707(a) (1978).

[9] The drafters of Section 1182(f) offered almost no explanation for this provision—itself a telling indication that it did not

The upshot of this history is clear. In 1918, President Wilson deemed various subversives "prejudicial to the interests of the United States"; in 1941, Congress received assurance that the phrase "interests of the United States" would be applied only to aliens similar to those excluded by President Wilson; and from 1941 to 1952 Presidents Roosevelt and Truman applied those words as promised, deeming only subversives, war criminals, and the statutorily inadmissible to be categorically "prejudicial to the interests of the United States." It follows that when Congress "transplanted" this same language to Section 1182(f), it brought "the old soil with it," conveying the meaning it had carried for decades. *Sekhar* v. *United States*, 133 S. Ct. 2720, 2724 (2013); *see Mahler*, 264 U.S. at 40.

This inference is particularly strong in light of *Kent* and *Zemel*. The provision at issue in those cases was enacted as part of the same statutes in 1918 and 1941, and permanently codified as Section 1185(b) in 1952. *See Kent*, 357 U.S. at 128. Like here, the Executive engaged in consistent "administrative practice" during the intervening period. *Id.* If that statute "must take its content from history," *Zemel*, 381 U.S. at 17, then Section 1182(f) must, as well.

---

substantially depart from settled practice. In a single cryptic statement on the House floor, however, one of the bill's principal sponsors stated that Section 1182(f) granted power outside war and national emergency because it was "absolutely essential" that the President have authority in other circumstances, like an epidemic or economic crisis, in which "it is impossible for Congress to act." 98 Cong. Rec. 4423 (1952) (statement of Rep. Walter).

Accordingly, Section 1182(f) permits the President to exclude aliens on the two grounds established by Executive practice. First, the President may exclude "class[es] of aliens" akin to those specifically codified in the wartime regulations: subversives, war criminals, and the statutorily inadmissible. 22 C.F.R. § 58.53(a)-(j) (1945). Second, he may exclude "any aliens" whose admission would undermine "the purpose of the" underlying federal statutes, *id.* § 58.53(k)—a flexible power that permits him to respond "[s]wift[ly]" to threats that it is "impracticable" for Congress to address, H.R. Rep. No. 65-485, at 3.

b. Presidential practice since 1952 strongly supports this interpretation. Of the dozens of exclusion orders issued since then, every one, without exception, has been consistent with the power just described. *See Dames & Moore*, 453 U.S. at 686 (explaining that "systematic, unbroken, executive practice * * * may be treated as a gloss" on presidential power).

Nearly every order has fallen within the three classes specifically listed in the wartime regulations. *See* Cong. Research Serv., *Executive Authority to Exclude Aliens: In Brief* 6-10 (2017), https://goo.gl/2KwIfV (listing orders). The largest share has excluded aliens seeking to subvert the United States or its allies or support its adversaries. *See, e.g.*, Exec. Order No. 13,712 (2015). Several orders have excluded aliens who committed serious violations of international law. *See, e.g.*, Exec. Order No. 13,606 (2012). And a few have barred aliens who were statutorily inadmissible. *See* Exec. Order No. 12,807 (1992).

Only a single order falls outside of these three classes, and it constituted an exercise of the second part of the President's power: to protect congressional policy during exigencies. In 1986, shortly after finding that Cuba had breached an immigration agreement and was actively "facilitating illicit migration to the United States," President Reagan restricted the entry of Cuban nationals "pending the restoration of normal migration procedures." Proc. 5517 (1986). This order responded to a clear exigency: a dynamic and fast-breaking diplomatic crisis that Congress was plainly ill-suited to address. And it sought to further a longstanding congressional policy in favor of normalizing relations with Cuba "on a reciprocal basis." Foreign Relations Authorization Act, Fiscal Year 1978, Pub. L. 95-105, § 511 (1977).

c. The constitutional backdrop reinforces this reading. Interpreting the statute in light of the wartime laws and regulations preserves the separation of immigration powers: Congress retains the exclusive authority to set policy in the normal course, while the President may act to advance that policy in "changeable and explosive" circumstances in which Congress cannot "swiftly" act. *Zemel*, 381 U.S. at 17. It is profoundly unlikely that Congress wished Section 1182(f) to confer a power that would "upset the Constitution's balance," *Bond*, 134 S. Ct. at 2093, while dramatically "depart[ing] from historical practice in immigration law," *INS* v. *St. Cyr*, 533 U.S. 289, 305 (2001).

3. The Government's interpretation of Section 1182(f) would overthrow the statutory scheme and raise constitutional concerns.

The Government nonetheless maintains that Section 1182(f) grants the President absolute discretion to determine "whether," "when," "for how long," "on what basis," "on what terms," and "who[m]" to exclude from the United States. Br. 39-40. That cannot be.

Text does not dictate this reading: "[I]nterests of the United States" had a settled meaning at the time Congress enacted the statute. Nor does history support it; every prior order since 1952 has hewed to the limits set forth in the wartime regulations. This Court typically reacts with "a measure of skepticism" when the Executive "claims to discover in a long-extant statute an unheralded power" of such breadth. *Util. Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2444 (2014).

Furthermore, the Government's interpretation would upend the statutory scheme. The INA is an "extensive and complex" statutory code that sets countless rules governing admission. *Arizona*, 567 U.S. at 395. Under the Government's reading, the President could erase these laws at will: He could revive national-origin quotas, end the family-preference system, or exclude employees of U.S. companies. *Cf.* 8 U.S.C. §§ 1152(a), 1153(a)-(b). Indeed, he could abolish the immigration system entirely, by announcing that he views the entry of "*all* aliens" detrimental to the Nation. *Id.* § 1182(f). Congress does not vest the Executive with authority to "transform [a statute's] carefully described limits

into mere suggestions." *Gonzales* v. *Oregon*, 546 U.S. 243, 260-261 (2006).

More fundamentally, the authority the Government claims would be irreconcilable with the separation of powers. It would gravely upset the balance between Congress and the President that has prevailed for more than two centuries. *See supra* pp. 3-5. And it would vest the President with a power of staggering breadth, with no intelligible principle to guide its exercise. So vast and formless a delegation would raise the most serious constitutional concerns. *See Zemel*, 381 U.S. at 17; *Mahler*, 264 U.S. at 40.

The Government asserts that the President can be given this unfettered discretion because it involves his "inherent executive power." Br. 40. That is incorrect.[10] The sole authority on which the Government rests that claim, *Knauff*, merely held that the Attorney General could exclude a German during "the national emergency of World War II" without holding a hearing in which the Government would have been required to disclose classified information. 338 U.S. at 544. In dicta, Justice Minton stated that "[t]he exclusion of aliens" is "inherent in the executive power to control the foreign affairs of the nation," *id.* at 542, relying on further dicta from *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). This Court, however, has since repudiated *Curtiss-Wright*'s suggestion "that the President has

[10] Because the President does not invoke his war powers, the Court need not consider whether he has inherent exclusion authority in time of war. *See Kent*, 357 U.S. at 128 (making similar reservation); 50 U.S.C. § 21.

broad, undefined powers over foreign affairs." *Zivotofsky ex rel. Zivotofsky* v. *Kerry*, 135 S. Ct. 2076, 2089-2090 (2015). And *Knauff*'s statement is flatly irreconcilable with this Court's subsequent explanation that Congress's authority to set immigration policy is "complete," *Fiallo*, 430 U.S. at 792, and "exclusive," *Arizona*, 567 U.S. at 409.

B. EO-2 Exceeds The President's Authority Under Section 1182(f).

EO-2 falls well outside the limits of the President's authority under Section 1182(f).

1. EO-2 plainly does not exclude aliens akin to any of the classes listed in the wartime regulations—the heartland of the President's power. The President does not claim that every national from six countries and all refugees are statutorily inadmissible or akin to "war criminal[s]." Nor does he claim they are all terrorists—a type of "subversive" to whom the President's 1182(f) authority unquestionably extends. Indeed, the Government expressly repudiates that characterization: "The President," it explains, "did *not* determine that all nationals of the six countries are likely terrorists." Br. 47; *see id.* at 49-50.

2. EO-2 also does not fall within the President's residual authority to protect congressional policy during an exigency in which Congress cannot easily act.

a. The Government does not contend that its order responds to an exigency—and properly so. The asserted factual predicates for EO-2 are years or decades old. By the Government's admission, EO-2 responds to chronic conditions in six countries, some of them dating back to 1979, that allegedly increase

the risk that a terrorist may obtain admission. EO-2 § 1(e). It also cites potential gaps in the refugee program evidenced by refugees convicted of terrorism in 2013 and 2014. *Id.* § 1(h).

This Court need not examine the seriousness or veracity of these claims—although, as the Ninth Circuit explained, they furnish little basis for the Order. It suffices to conclude that Congress is fully capable of addressing them. Indeed, it has enacted numerous statutes doing so. It has tightened the terrorism bar and imposed new vetting requirements. *See infra* p. 42 n.12. Most recently, in December 2015, Congress looked at the "same information" concerning the six targeted countries and responded by exempting them from the Visa Waiver Program. Br. 48; *see* Consolidated Appropriations Act, 2016, Pub. L. 114-113, div. O, tit. II, § 203 (2015) (codified at 8 U.S.C. § 1187(a)(12)).

EO-2, in other words, does not respond to a "changeable and explosive" situation that "cannot be * * * acted upon by the legislature." *Zemel*, 381 U.S. at 17. It addresses (or at least purports to) the classic stuff of legislative action: long-term problems, systemic inefficiencies, and the basic design of a federal program. EO-2 is thus wholly unlike President Reagan's Cuba order, which responded to a dynamic diplomatic situation Congress could not easily address, or a hypothetical order seeking to prevent an imminent terrorist threat of which the President has actionable intelligence. *See* Br. 48. EO-2 seeks to respond to circumstances that Con-

gress can address, and repeatedly has. Section 1182(f) does not vest the President with that power.[11]

b. Furthermore, EO-2 does not seek to further congressional policy. Instead, it embodies the President's express disagreement with, and rejection of, the intricate system Congress designed for identifying, vetting, and excluding potential terrorists.

The terrorist-screening system Congress designed has three relevant parts. First, Congress has enacted a comprehensive "terrorism bar," codified at 8 U.S.C. § 1182(a)(3)(B), that "establish[es] specific criteria for determining terrorism-related inadmissibility." *Din*, 135 S. Ct. at 2140 (Kennedy, J., concurring). Second, Congress has established detailed vetting rules, under which aliens must produce extensive information and documents showing that they are not terrorists. 8 U.S.C. §§ 1202(b)-(d), 1361. Since September 11, 2001, Congress has repeatedly strengthened these rules, including by enhancing document security, upgrading screening, and increasing information-gathering.[12] Third, Congress

[11] The Government's opening brief announces a new rationale: that EO-2 serves as a bargaining-chip to "persuade foreign countries to supply needed information." Br. 45. That is not a justification the President gave in the Order. And it would exceed (and effectively vitiate) the limits on his authority. *Every* exclusion policy has diplomatic implications, and Congress is fully capable of determining whether it wishes to afford the President the sort of leverage the Government's brief seeks. *See Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363, 375 (2000).

[12] *See, e.g.*, Consolidated Appropriations Act, 2016, Pub. L. 114-113, div. O, tit. II, § 202; Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. 110-53, §§ 701-731;

has ensured that aliens from high-risk countries are vetted through this system, by excluding them from the Visa Waiver Program. 8 U.S.C. § 1187(a)(12).

EO-2 rejects each pillar of this scheme. It excludes hundreds of millions of aliens who unquestionably do not satisfy the criteria Congress set for terrorism-related inadmissibility. *See* Br. 47. It deems Congress's vetting scheme insufficient because immigration officers lack "needed information," Br. 45—even though the law already requires immigration officers to exclude aliens if there is insufficient information to determine whether they are terrorists. *See* 8 U.S.C. §§ 1201(g), 1202(b)-(d), 1204. And it flips Congress's judgment in 2015 on its head: Rather than allowing individuals from the targeted countries to travel to the United States so long as they go through rigorous vetting procedures, it concludes that *no* vetting is capable of determining whether they are terrorists.

In place of Congress's system, the President established his own. EO-2 sets its own standard of admission, §§ 2(c), 6(a), its own vetting requirements, § 2(d)-(f), and its own warren of exceptions and waivers, § 3(a)-(c). It looks, in fact, much "like a statute," *Youngstown*, 343 U.S. at 588—just not the one Congress wrote. *Cf. Hamdan* v. *Rumsfeld*, 548 U.S. 557, 620-625 (2006).

In the end, then, it comes down to this: The President "look[ed] at the *same* information relied upon by

---

Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458, §§ 7203-7210, 7218; Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. 107-173.

* * * Congress," and made a *different* "judgment as to how much risk to tolerate." Br. 48. It is difficult to find a clearer admission of executive lawlessness. Congress expressed its will in the statutes it enacted. The President ignored those statutes and supplanted them with his own policy. If our system of separation of powers means anything, it is that the President cannot openly "contraven[e] * * * the will of Congress" in this manner. *Dames & Moore*, 453 U.S. at 669.

C. EO-2 Violates Sections 1152(a)(1)(A) and 1157(a).

EO-2 also entails two remaining statutory violations, both of which can be quickly demonstrated.

1. Section 1152(a)(1)(A) provides that "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of * * * nationality." As Judge Sentelle has written, "Congress could hardly have chosen more explicit language": It "unambiguously directed that no nationality-based discrimination shall occur." *LAVAS*, 45 F.3d at 473. Section 2(c) flouts that command. It provides that aliens cannot receive immigrant visas or enter the country if they are "nationals" of six listed countries.

The Government claims (at 52) that Section 2(c) is lawful because it discriminates in "entry," not visa issuance. But the sole purpose of a visa is to enable entry. The Government discriminates in the "issuance of * * * visa[s]" if it issues visas to disfavored nationals but deprives them of operative effect, just as a company discriminates in the "hiring of employees" if it hires African-Americans only for jobs that

receive no pay. Moreover, as the Government acknowledges, its interpretation would mean that it may deny aliens entry based on nationality, and then deny those aliens visas because they are "inadmissible," thereby rendering "the statutory right * * * a nullity." *Dada* v. *Mukasey*, 554 U.S. 1, 16 (2008).

The Government also argues (at 55) that Section 1182(f) takes precedence over Section 1152(a)(1)(A). Every applicable canon of interpretation says otherwise. Section 1152(a)(1)(A) is more specific, later-in-time, and includes a number of detailed exceptions that do not include 1182(f). Reading Section 1152(a)(1)(A) by its terms does not work an implied repeal. It is just part of the "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination." *United States* v. *Fausto*, 484 U.S. 439, 453 (1988).

Nor does past practice support the Government's position. The order in *Sale* applied to all unlawful entrants by sea, not just Haitians. 509 U.S. at 160; *see* Proc. 4865 (1981). President Carter's Iran order was not issued pursuant to Section 1182(f), did not specify what "limitations" could be imposed on Iranians, and did not ban entry. Exec. Order No. 12,172 (1979). President Reagan merely retaliated against Cuba's breach of an immigration agreement by declining to uphold our end of the bargain. *See* Proc. 5517. And Presidents have excluded foreign government officials because they participated in war crimes and atrocities, not because of their nationality. *See* Br. 53.

Further, the Government's constitutional concerns are misplaced. "Discrimination" is a well-established

term in the law that does not extend to restrictions narrowly tailored to a compelling interest. The need to prevent a "grave threat" of terrorism, Br. 54, would undoubtedly qualify. *LAVAS*, 45 F.3d at 473.

Because EO-2 contravenes Section 1152(a)(1)(A), the injunction must be upheld at least as to aliens seeking immigrant visas. But this violation also reinforces the unlawfulness of Section 2(c) as a whole. Congress enacted Section 1152(a)(1)(A) in 1965 to abolish nationality and racial classifications from the admission system. In doing so, it made plain that it considers "discrimination against a particular race or group" an "impermissible basis" for exclusion. *Wong Wing Hang* v. *INS*, 360 F.2d 715, 719 (2d Cir. 1966) (Friendly, J.). This Court accordingly held in *Jean* v. *Nelson*, 472 U.S. 846 (1985), that immigration officers generally must implement grants of "broad statutory discretion * * * without regard to race or national origin." *Id.* at 857. The President's departure from that statutory policy further confirms that Section 2(c) cannot stand.

2. Finally, EO-2's refugee cap violates 8 U.S.C. § 1157(a). That statute provides that "the number of refugees who may be admitted * * * in any fiscal year * * * shall be such number as the President determines, before the beginning of the fiscal year and after appropriate consultation." *Id.* § 1157(a)(2). In September 2016, President Obama authorized the admission of 110,000 refugees for this fiscal year. 81 Fed. Reg. 70,315 (2016). Section 6(b) altered that cap mid-year, by providing that only 50,000 refugees may be admitted. This change plainly did not comply with the statute's timing requirement, and so is unlawful.

The Government's sole defense is that Section 1157(a) refers to the number that "may be" admitted, not the number that "must be" admitted. Br. 60-62. But Section 6(b) does alter the number that "may be" admitted: Previously, refugee officials *could* make admissions beyond 50,000; now, they are *prohibited* from doing so. In ordinary usage, and in practical effect, the number who "may be" admitted changed.

III. EO-2 VIOLATES THE ESTABLISHMENT CLAUSE.

If this Court holds that Congress has lawfully delegated to the President the exceptionally broad policymaking powers he claims, it must assess whether he exercised those powers in compliance with the Constitution. Indeed, judicial review of respondents' constitutional challenge becomes particularly important. By placing the immigration power in the hands of a "deliberate and deliberative" body, *Chadha*, 462 U.S. at 959, the Framers introduced structural "safeguard[s] [for] individual liberty." *NLRB* v. *Noel Canning*, 134 S. Ct. 2550, 2559 (2014) (quoting *Clinton* v. *City of N.Y.*, 524 U.S. 417, 449-450 (1998) (Kennedy, J., concurring)). If the President may act alone to make "federal law," Br. 72, he operates free of those safeguards, and this Court becomes the primary protector of the liberties set out in the Bill of Rights.

The Government argues the opposite, contending that the Judiciary must defer to the President rather than adjudicate this challenge. The Government is wrong. Deference does not apply, and under the appropriate analysis, EO-2 must be invalidated, because it was enacted for the impermissible purpose

of fulfilling the President's promised "Muslim ban."

A. The Judiciary Must Ensure That The President Has Not Acted With An Unconstitutional Purpose.

According to the Government, this Court's opinions in *Mandel* and *Din* dramatically limit the Judiciary's role in policing the political branches' compliance with the Constitution. The Government contends that those precedents prohibit the courts from reviewing the constitutionality of an Executive policy whenever the Executive has offered a plausible national security rationale. And the Government claims that prohibition applies even where the President has publicly and repeatedly asserted that he is in fact pursuing an unconstitutional objective. Thus, as the Government has admitted, under its view, the President may announce a desire to ban Jews, and then bar all immigration from Israel by citing national security concerns. Oral Argument at 1:55:20 to 1:58:00, *IRAP* v. *Trump*, No. 17-1351 (4th Cir. May 8, 2017) ("*IRAP* Oral Argument").

That is not the law, and *Mandel* and *Din* do not suggest otherwise. Those cases involved assertions that the Government had provided an inadequate explanation for an exclusion that burdened constitutional rights. *See Mandel*, 408 U.S. at 760 (claiming the Government failed to identify a "rational reason or basis in fact" for burdening plaintiffs' First Amendment right to hear a professor speak); *Din*, 135 S. Ct. at 2131 (claiming the Government had not offered an "adequate explanation" for burdening plaintiff's Due Process right to be with her husband). In both cases, the Government had offered a justifi-

cation for the challenged exclusion. The *Mandel* majority and Justice Kennedy's controlling concurrence in *Din* both recognized that adjudicating the constitutional claims would require "look[ing] behind" those justifications in order to assess their factual basis and weigh their adequacy. *Mandel*, 408 U.S. at 770. They held that deference was the preferable course as long as the Government's asserted rationale was "facially legitimate" and "*bona fide*." *Din*, 135 S. Ct. at 2140.

Mandel and *Din* do not demand deference here for at least three reasons.

First, unlike the plaintiffs in *Mandel* and *Din*, respondents do not simply challenge the adequacy of the Government's explanation for an alien's exclusion; they contend that the Government imposed the exclusions for an *unconstitutional purpose*. It is one thing to say that the Court need not demand a compelling or complete explanation for an exclusion that burdens constitutional rights; it is quite another to say that the Court should ignore a charge that the Government is acting for a reason that itself violates the Constitution. And because neither *Mandel* nor *Din* involved a credible claim of an unconstitutional purpose,[13] they certainly cannot stand for the proposition that deference is required in the face of such a claim.

---

[13] Professor Mandel was excluded under a statute barring the admission of Communists, but as the case came before the Court, no one challenged the constitutionality of excluding aliens on that basis. *Mandel*, 408 U.S. at 767.

Second, the *Mandel* and *Din* courts made clear that even when a plaintiff challenges the adequacy of an explanation, deference is not automatic. Rather, the Court will "look behind" the rationale in the face of an "affirmative showing of bad faith." *Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring). That makes sense: As the Government points out, courts are generally "ill equipped" to determine the factual basis and adequacy of a national security rationale. *Reno* v. *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999). It is therefore prudent for courts to avoid an inquiry into the "sensitive facts" behind a stated explanation, *Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring), unless plaintiffs present a strong reason why that inquiry is necessary. An "affirmative showing of bad faith" provides that strong reason. *Id.* And here, respondents have made such a showing because they have presented ample evidence that, through EO-2, the President is pursuing an unconstitutional purpose to exclude Muslims.

The Government argues that this evidence cannot qualify as the "affirmative showing of bad faith" necessary to overcome *Mandel*. It points to Justice Marshall's *Mandel* dissent, where he chastised the majority for failing to "look behind" the Government's asserted reason for the exclusion, because "the briefest peek" would have revealed it was a "sham." 408 U.S. at 778 (Marshall, J., dissenting). But Justice Marshall was not directing the majority to evidence suggesting the Executive had pursued another, unconstitutional purpose in excluding Professor Mandel. He meant only that the rationale was a "sham" because there was "no basis in the present record" to support it. *Id.*

It is no surprise that the *Mandel* majority rejected Justice Marshall's request to "peek" at the underlying record: A standard designed to prevent courts from unnecessarily analyzing the "sensitive facts" supporting a national security rationale would hardly serve its purpose if courts had to assess those facts to decide whether deference applies. But respondents rely on no such "peek" in *this* case. They rely on readily available evidence that the President was pursuing an unconstitutional purpose. The Executive has no special institutional competence for assessing that form of evidence, which was entirely absent in *Mandel* and *Din*. Rather, it is firmly within the Judiciary's wheelhouse to evaluate whether respondents' publicly available evidence would convince a neutral observer that the President sought to effectuate a Muslim ban.

Third, *Mandel* and *Din* do not apply to broad Executive policymaking. Those cases involved the exclusion of an individual alien. When the Executive applies the immigration laws on a case-by-case basis, he exercises his traditional constitutional role. The Executive therefore may be entitled to something akin to prosecutorial discretion. *Cf. AAADC*, 525 U.S. at 491. But when the Executive purports to make "federal law," Br. 72—a role constitutionally reserved to Congress—this Court's review must be more searching.

The Government disputes that, suggesting *Mandel* has been applied to statutes and should similarly be applied when the President is exercising a delegated power "parallel to Congress's." Br. 64. But unlike legislating, Executive policymaking occurs without

the structural safeguards of a diverse decision-making body or bicameralism and presentment. *See Chadha*, 462 U.S. at 957-958; *see also Salazar* v. *Buono*, 559 U.S. 700, 727 (2010) (Alito, J., concurring) ("our country's religious diversity is well represented" in Congress). The presence of those safeguards ameliorates the threat to individual liberty posed by recognizing *Congress's* "plenary power" over immigration. And their absence in Executive policymaking provides another reason that courts cannot award the President the massive deference he claims.

B. EO-2 Was Enacted For The Unconstitutional Purpose of Excluding Muslims.

Cleared of the Government's artificial obstacles to review, the evaluation of the Establishment Clause claim is straightforward. EO-2 excludes nationals of six overwhelmingly Muslim nations and all refugees at a time when the leading refugee crisis involves Muslims. *See* J.A. 1161 n.6. The exclusion was not an incidental effect of the Order, but rather its "primary purpose." *Edwards* v. *Aguillard*, 482 U.S. 578, 593 (1987); *cf. United States* v. *Windsor*, 133 S. Ct. 2675, 2693 (2013) (finding constitutional violation where discrimination was "more than an incidental effect of the federal statute"; "[i]t was its essence"). There can be no doubt that a policy so designed and conceived violates the Establishment Clause.

1. The Establishment Clause bars Government policies "respecting an establishment of religion." At a minimum, that prohibition forecloses the practic-

es—like faith-based immigration restrictions—that were used before the Founding to establish State religions. *See McConnell*, *supra*, at 2116-2117; *Town of Greece*, 134 S. Ct. at 1819 (recognizing importance of history in interpreting Establishment Clause). But this Court has made clear that the Clause goes further, precluding other Government actions that "coerce [the Nation's] citizens" in matters of faith. *Town of Greece*, 134 S. Ct. at 1824-26. And it has recognized that coercion occurs when the Government "allocate[s] benefits and burdens" based on a citizen's religion or "denigrate[s]" a particular faith. *Id.* at 1824, 1826.

A policy designed to exclude Muslims plainly runs afoul of each of these Establishment Clause strictures: It prevents members of a minority faith from entering the country; it imposes special burdens on American adherents to that faith by excluding family and friends who remain overseas; and it denigrates Islam by signaling that the Government considers Muslims a threat.

2. The Government does not deny any of this. It has admitted that banning Muslims would be unconstitutional. *IRAP* Oral Argument at 29:35 to 30:00. Thus, the only question is whether the evidence demonstrates that a "reasonable observer" would view EO-2 as enacted for that unconstitutional purpose. *Town of Greece*, 134 S. Ct. at 1825. And the answer is plainly yes.

a. In assessing how a reasonable observer would understand the purpose of a Government action, "an equal protection mode of analysis" applies. *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*,

508 U.S. 520, 540 (1993). A court must analyze the text and operation of EO-2, as well as "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by" the decision-maker. *Id.*; *see McCreary Cty.* v. *ACLU of Ky.*, 545 U.S. 844, 862 (2005) (courts must look to "text, legislative history, and implementation" (quoting *Santa Fe*, 530 U.S. at 308)).

b. EO-2's text and operation indicate that the Order is an unconstitutional "religious gerrymander" designed for the purpose of excluding Muslims. *Lukumi*, 508 U.S. at 535. Notably, the text targets six overwhelmingly Muslim nations, and the fit between its stated purposes and the actual policy is exceedingly poor. *See id.* at 538-542; *Romer* v. *Evans*, 517 U.S. 620, 635 (1996) ("breadth" of "status-based enactment" was "so far removed from [the State's] particular justifications that [it was] impossible to credit them"). For example, EO-2's focus on nationality "could have the paradoxical effect of barring entry by a Syrian national who has lived in Switzerland for decades, but not a Swiss national who has immigrated to Syria during its civil war." J.A. 1203.

The mismatch between the policy and its stated purpose has only gotten worse since this litigation began: The text of EO-2 states that the ban is necessary to relieve administrative burdens and prevent the admission of dangerous individuals while the Government undertakes a review of its vetting system. EO-2 §§ 1(f), 2(c), 6(a). But on June 14 the

President issued a memorandum ordering that the bans run beyond the period of the vetting upgrade they allegedly facilitate, thereby decoupling the bans from their asserted purpose. *See supra* p. 10.

c. Any remaining doubt a neutral observer might have regarding the purpose of EO-2 would be erased by the historical background. On the campaign trail, the President repeatedly announced his desire to enact a Muslim ban and even issued a formal statement to that effect. When it was suggested that would violate the Constitution, he began "talking territory instead of Muslim." J.A. 1133. But he publicly clarified this was not a rollback, but—if anything—"an expansion" of the promised ban. *Id.*

One week after his inauguration, and without consulting the primary national security agencies, J.A. 157-158, 224, the President did exactly what he promised. He issued an Order that overwhelmingly excluded Muslims while speaking in terms of "territory instead of [religion]." At the signing, he looked up at the camera after reading the title and announced: "We all know what that means." J.A. 126. That night, he publicly confirmed that EO-1's refugee provisions were designed to help Christians at the expense of Muslims. And that weekend, one of his chief surrogates gave a television interview explaining that EO-1 started out as the President's Muslim ban.

Even after EO-1 was enjoined by the courts, the President did not announce any retreat from his unconstitutional purpose. To the contrary, his advisors assured the Nation that the President's replacement Order would fulfill the "same basic

policy." J.A. 1028.

And once EO-2 was released, the President made clear that it did just that, publicly describing EO-2 as a "watered down Travel Ban," and suggesting that his only regret was not enacting a much "tougher version." *Supra* p. 9.

3. a. Rather than rebutting this evidence, the Government contends that most of it is off-limits. It asserts (at 72) that the Court should look only at whether the Order is "neutral on its face and in its operation." That narrow analysis would not rescue EO-2. *See* Part III.B.2.b, *supra*. But, more importantly, this Court has explained that purpose in the Establishment Clause context must be assessed based on all the "readily discoverable fact[s]" that an objective observer might consider. *McCreary*, 545 U.S. at 862. After all, the coercion the Establishment Clause is designed to prevent occurs whenever a citizen is made to understand that his Government views his faith as an enemy and is making policy on that basis. *See, e.g.*, J.A. 1274-1278 (Decl. of Dr. Elshikh); Decl. of Amicus Curiae Khizr Khan ¶¶ 25-29, C.A. Dkt. 88. It is irrelevant whether that understanding comes from the text and operation of the policy, or the repeated public statements of the President and his Administration.

The Government worries that examining anything beyond the text and operation will lead to "judicial psychoanalysis" and burdensome discovery that will impede the Executive Branch. Br. 70-72. But those concerns are mitigated by the nature of the inquiry itself. A reasonable observer does not, for example, psychoanalyze a drafter or look at his college term

papers, nor does she have access to privileged Executive Branch discussions. Evidence of that kind is similarly out of bounds for courts.

b. The Government also suggests that campaign statements should be off limits. There is no justification for such a categorical rule. Because campaign statements are often integral to the way that the public understands a policy's purpose, that rule would badly hamstring the Establishment Clause analysis.[14]

The Government observes (at 73-74) that campaign statements may be fleeting or ill-considered, and that candidates often change their positions after taking office. But those are simply reasons that *some* campaign statements may be irrelevant to an analysis of post-inauguration conduct. They are not reasons a court should be barred from considering campaign statements altogether. *See Sprint/United Mgmt. Co.* v. *Mendelsohn*, 552 U.S. 379, 388 (2008) (whether evidence is relevant to discriminatory intent "is fact based and depends on many factors").

The statements here were repeated and public, and they directly foreshadowed the content of a policy that was issued one week after inauguration. Moreover, there was no pre- or even post-inauguration

[14] The Government has previously argued that pre-election assertions of religious animus are "highly probative evidentiary sources in assessing whether [there is] discriminatory intent." U.S. Reply Br. 6, *LeBlanc-Sternberg* v. *Fletcher*, 67 F.3d 412 (2d Cir. 1995), 1994 WL 16181393.

retraction.[15] To the contrary, the statement calling for a complete shutdown of Muslim immigration remained on the President's campaign website for months after he took office, and the President and his Administration have made clear that the Order was intended to fulfill the President's campaign promises. *Supra* pp. 7-8. One may doubt the relevance of campaign statements that lack some or all of these features. But one cannot doubt the probative value of *these* statements.

The Government protests that considering these statements will chill political speech and embroil courts in the "unworkable" task of discerning which campaign statements are relevant. But this Court considered campaign statements more than thirty years ago in *Washington* v. *Seattle Sch. Dist. No. 1*, 458 U.S. 457, 463 (1982), and neither of these horribles came to pass.

c. Further, there is a wealth of *post*-inauguration evidence demonstrating that EO-2's purpose is the exclusion of Muslims. *See supra* pp. 6-10. The Government seeks to defeat that evidence by offering neutral readings of *some* of the President's remarks, and by relying on a "presumption of regularity." Br. 77-78. Even if that presumption applies to this irregular Order, it is easily defeated by the "clear

---

[15] The Government points to a presidential speech "decr[ying] 'the murder of innocent Muslims.'" Br. 75-76. But the President has never renounced his support for a Muslim ban, either in that speech or elsewhere. Rather, shortly after the Ninth Circuit ruling in this case, he suggested a desire to return to a harsher form of the Order currently under review. *Supra* p. 9.

evidence" in this case. *United States* v. *Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926).

The Government conspicuously ignores much of the clearest evidence in this regard. It does not explain, for example, how a neutral observer could adopt an innocent reading of Rudolph Giuliani's statement that EO-1 started out as a "Muslim ban," or of the President's own statement that EO-1 was designed to assist Christian refugees at the expense of Muslims. Nor does it explain how a neutral observer could overlook the President's public pronouncements arguing that EO-2 is just a "watered down" version of that first Order.

4. Finally, the Government repeatedly suggests that respondents have mistaken the President's sincere concerns regarding the threat of terrorism for animus against Islam. *See, e.g.*, Br. 74, 77. But it is the President who has repeatedly conflated a violent fringe element of Islam with Islam as a whole. That conflation is at the heart of the Establishment Clause violation in this case.

Our Framers were well aware that religious persecution is often born not of explicit animus, but of the perceived national security threat posed by a minority religion. At the time of the Founding, England was rife with violent religious plots—both real and imagined. *See, e.g.*, Alan Haynes, *The Gunpowder Plot* (2011). As a consequence, Catholics, Puritans, and other dissenters faced harsh treatment from their government, which viewed non-conformist religious beliefs as a threat to the state. *Id.* at 98-108. Many of those who chafed under this persecution became the United States' first colonists, eager

to avoid the excesses of the oppressive government they were fleeing. McConnell, *supra*, at 2112-2114.

The Religion Clauses therefore speak in absolute terms that foreclose *any* policy that "classif[ies] citizens based on their religious views," no matter the rationale. *Town of Greece*, 134 S. Ct. at 1826. A President may no more set aside that constitutional bar because he believes it is necessary for national security than he may set aside the right to bear arms because he believes gun ownership is a threat to our public safety. In wartime and peace, the Government may not take actions that amount to "disguised religious persecution." *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 644 (1943) (Black, J., concurring).

IV. THE SCOPE OF THE INJUNCTION IS PROPER.

The Government's assertions that the injunctions are overbroad should also be dismissed.

In the Establishment Clause context, when a government policy is motivated by an impermissible "purpose," *all* applications of that policy are tainted, and therefore illegal. *See Santa Fe*, 530 U.S. at 314-317. Accordingly, when a plaintiff with standing launches a successful facial challenge, the policy should be enjoined in full. *See id.* The same goes for a statutory violation: If an Executive Branch policy itself contravenes a statute, it is invalid in all its applications, and should be struck down on its face. *See, e.g.*, *Util. Air Regulatory Grp.*, 134 S. Ct. at 2449.

The Government argues that respondents "conflate[] the scope of [their] legal theory * * * with the

scope of relief," Br. 82, but this Court has been clear that "the scope of injunctive relief is dictated by *the extent of the violation established*, not by the geographical extent of the plaintiff class." *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979) (emphasis added).[16]

Further, awarding the piecemeal relief the Government proposes would be both inadequate and unfair. It would not provide "complete relief" to Dr. Elshikh and Doe, *id*., because of the profound stigmatic harm they have suffered from "the simple enactment of this policy," *Sante Fe*, 530 U.S. at 316. And it would irrationally fragment immigration policy, exempting the refugees that Hawaii intends to resettle but not those bound for Massachusetts, and exempting Dr. Elshikh's mother-in-law but not the relative of another, equally harmed Muslim-American. Congress created a "comprehensive and unified system" of immigration for a reason, *Arizona*, 567 U.S. at 401, and that system should not be splintered by narrow injunctions. *See Texas* v. *United States*, 809 F.3d 134, 187-188 (5th Cir. 2015).

[16] *Califano* was a class action, but in suits seeking a "prohibitory" injunction against a government entity, the "class action designation is largely a formality," because either way "the judgment run[s] to the benefit not only of the named plaintiffs but of all others similarly situated." *Galvan* v. *Levine*, 490 F.2d 1255, 1261 (2d Cir. 1973) (Friendly, J.).

CONCLUSION

For these reasons, the decisions below should be affirmed.

Respectfully submitted,

DOUGLAS S. CHIN
Attorney General of the State of Hawaii
CLYDE J. WADSWORTH
Solicitor General of the State of Hawaii
DEIRDRE MARIE-IHA
DONNA H. KALAMA
KIMBERLY T. GUIDRY
ROBERT T. NAKATSUJI
Deputy Attorneys General
DEPARTMENT OF THE ATTORNEY GENERAL, STATE OF HAWAII
425 Queen Street
Honolulu, HI 96813

Counsel for the State of Hawaii

NEAL KUMAR KATYAL
Counsel of Record
COLLEEN E. ROH SINZDAK
MITCHELL P. REICH
ELIZABETH HAGERTY
SUNDEEP IYER*
HOGAN LOVELLS US LLP
555 Thirteenth St., NW
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com

THOMAS P. SCHMIDT
SARA SOLOW
ALEXANDER B. BOWERMAN
HOGAN LOVELLS US LLP

Counsel for Respondents

*Admitted only in Maryland; supervised by firm members

SEPTEMBER 2017

ADDENDUM

ADDENDUM

CONSTITUTIONAL PROVISIONS INVOLVED

1. **Article I, Section 8 of the Constitution provides in pertinent part**:

The Congress shall have Power

* * * * *

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

* * * * *

2. **The First Amendment provides:**

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

STATUTORY PROVISIONS INVOLVED

1. **8 U.S.C. § 1152(a)(1) provides:**

Numerical limitations on individual foreign states

(a) *Per country level*

(1) *Nondiscrimination*

(A) Except as specifically provided in paragraph (2) and in sections 1101(a)(27), 1151(b)(2)(A)(i), and 1153 of this title, no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence.

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

* * * * *

2. **8 U.S.C. § 1157 provides in pertinent part:**

Annual admission of refugees and admission of emergency situation refugees

(a) *Maximum number of admissions; increases for humanitarian concerns; allocations*

(1) Except as provided in subsection (b), the number of refugees who may be admitted under this section in fiscal year 1980, 1981, or 1982, may not exceed fifty thousand unless the President determines, before the beginning of the fiscal year

and after appropriate consultation (as defined in subsection (e)), that admission of a specific number of refugees in excess of such number is justified by humanitarian concerns or is otherwise in the national interest.

(2) Except as provided in subsection (b), the number of refugees who may be admitted under this section in any fiscal year after fiscal year 1982 shall be such number as the President determines, before the beginning of the fiscal year and after appropriate consultation, is justified by humanitarian concerns or is otherwise in the national interest.

(3) Admissions under this subsection shall be allocated among refugees of special humanitarian concern to the United States in accordance with a determination made by the President after appropriate consultation.

(4) In the determination made under this subsection for each fiscal year (beginning with fiscal year 1992), the President shall enumerate, with the respective number of refugees so determined, the number of aliens who were granted asylum in the previous year.

* * * * *

(e) *"Appropriate consultation" defined*

For purposes of this section, the term "appropriate consultation" means, with respect to the admission of refugees and allocation of refugee admissions, discussions in person by designated Cabinet-level representatives of the President with members of the Committees on the Judiciary of the Senate and of the House of Representatives to review the refugee situation or emergency refugee situation, to project

the extent of possible participation of the United States therein, to discuss the reasons for believing that the proposed admission of refugees is justified by humanitarian concerns or grave humanitarian concerns or is otherwise in the national interest, and to provide such members with the following information:

(1) A description of the nature of the refugee situation.

(2) A description of the number and allocation of the refugees to be admitted and an analysis of conditions within the countries from which they came.

(3) A description of the proposed plans for their movement and resettlement and the estimated cost of their movement and resettlement.

(4) An analysis of the anticipated social, economic, and demographic impact of their admission to the United States.

(5) A description of the extent to which other countries will admit and assist in the resettlement of such refugees.

(6) An analysis of the impact of the participation of the United States in the resettlement of such refugees on the foreign policy interests of the United States.

(7) Such additional information as may be appropriate or requested by such members.

To the extent possible, information described in this subsection shall be provided at least two weeks in advance of discussions in person by designated representatives of the President with such members.

* * * * *

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

Inadmissible aliens

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

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

* * * * *

(3) *Security and related grounds*

(A) *In general*

Any alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in—

(i) any activity (I) to violate any law of the United States relating to espionage or sabotage or (II) to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information,

(ii) any other unlawful activity, or

(iii) any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means,

is inadmissible.

(B) *Terrorist activities*

(i) *In general*

Any alien who—

(I) has engaged in a terrorist activity;

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

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

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

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

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

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

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

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

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

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

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

(ii) *Exception*

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

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

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

(iii) *"Terrorist activity" defined*

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

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

(II) The seizing or detaining, and threatening to kill, injure, or continue to

detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

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

(IV) An assassination.

(V) The use of any—

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

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

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

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

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

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

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

(II) to prepare or plan a terrorist activity;

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

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

(aa) a terrorist activity;

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

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

(V) to solicit any individual—

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

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

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

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

(aa) for the commission of a terrorist activity;

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

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

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

(v) *"Representative" defined*

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

(vi) *"Terrorist organization" defined*

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

(I) designated under section 1189 of this title;

(II) otherwise designated, upon publication in the Federal Register, by the Secretary of State in consultation with or upon the request of the Attorney General or the Secretary of Homeland Security, as a terrorist organization, after finding that the organization engages in

the activities described in subclauses (I) through (VI) of clause (iv); or

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

* * * * *

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

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate. Whenever the Attorney General finds that a commercial airline has failed to comply with regulations of the Attorney General relating to requirements of airlines for the detection of fraudulent documents used by passengers traveling to the United States (including the training of personnel in such detection), the Attorney General may suspend the entry of some or all aliens transported to the United States by such airline.

* * * * *

4. **8 U.S.C. § 1185 provides:**

Travel control of citizens and aliens

(a) *Restrictions and prohibitions*

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

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

(2) for any person to transport or attempt to transport from or into the United States another person with knowledge or reasonable cause to believe that the departure or entry of such other person is forbidden by this section;

(3) for any person knowingly to make any false statement in an application for permission to depart from or enter the United States with intent to induce or secure the granting of such permission either for himself or for another;

(4) for any person knowingly to furnish or attempt to furnish or assist in furnishing to another a permit or evidence of permission to depart or enter not issued and designed for such other person's use;

(5) for any person knowingly to use or attempt to use any permit or evidence of permission to depart or enter not issued and designed for his use;

(6) for any person to forge, counterfeit, mutilate, or alter, or cause or procure to be forged, counterfeited, mutilated, or altered, any permit or evidence of permission to depart from or enter the United States;

(7) for any person knowingly to use or attempt to use or furnish to another for use any false, forged, counterfeited, mutilated, or altered permit, or evidence of permission, or any permit or evidence of permission which, though originally valid, has become or been made void or invalid.

(b) *Citizens*

Except as otherwise provided by the President and subject to such limitations and exceptions as the President may authorize and prescribe, it shall be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid United States passport.

(c) *Definitions*

The term "United States" as used in this section includes the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States. The term "person" as used in this section shall be deemed to mean any individual, partnership, association, company, or other incorporated body of individuals, or corporation, or body politic.

(d) *Nonadmission of certain aliens*

Nothing in this section shall be construed to entitle an alien to whom a permit to enter the United States has been issued to enter the United States, if, upon arrival in the United States, he is found to be inadmissible under any of the provisions of this chapter, or any other law, relative to the entry of aliens into the United States.

(e) *Revocation of proclamation as affecting penalties*

The revocation of any rule, regulation, or order issued in pursuance of this section shall not prevent prosecution for any offense committed, or the imposition of any penalties or forfeitures, liability for which was incurred under this section prior to the revocation of such rule, regulation, or order.

(f) *Permits to enter*

Passports, visas, reentry permits, and other documents required for entry under this chapter may be considered as permits to enter for the purposes of this section.

5. **8 U.S.C. § 1187(a) provides:**

Visa waiver program for certain visitors

(a) *Establishment of program*

The Secretary of Homeland Security and the Secretary of State are authorized to establish a program (hereinafter in this section referred to as the "program") under which the requirement of paragraph (7)(B)(i)(II) of section 1182(a) of this title may be waived by the Secretary of Homeland Security, in consultation with the Secretary of State and in accordance with this section, in the case of an alien who meets the following requirements:

(1) *Seeking entry as tourist for 90 days or less*

The alien is applying for admission during the program as a nonimmigrant visitor (described in section 1101(a)(15)(B) of this title) for a period not exceeding 90 days.

(2) *National of program country*

The alien is a national of, and presents a passport issued by, a country which—

(A) extends (or agrees to extend), either on its own or in conjunction with one or more other countries that are described in subparagraph (B) and that have established with it a common area for immigration admissions, reciprocal privileges

to citizens and nationals of the United States, and

(B) is designated as a pilot program country under subsection (c).

(3) *Passport requirements*

The alien, at the time of application for admission, is in possession of a valid unexpired passport that satisfies the following:

(A) *Machine readable*

The passport is a machine-readable passport that is tamper-resistant, incorporates document authentication identifiers, and otherwise satisfies the internationally accepted standard for machine readability.

(B) *Electronic*

Beginning on April 1, 2016, the passport is an electronic passport that is fraud-resistant, contains relevant biographic and biometric information (as determined by the Secretary of Homeland Security), and otherwise satisfies internationally accepted standards for electronic passports.

(4) *Executes immigration forms*

The alien before the time of such admission completes such immigration form as the Secretary of Homeland Security shall establish.

(5) *Entry into the United States*

If arriving by sea or air, the alien arrives at the port of entry into the United States on a carrier, including any carrier conducting operations under part 135 of title 14, Code of Federal Regulations, or a noncommercial aircraft that is owned or operated

by a domestic corporation conducting operations under part 91 of title 14, Code of Federal Regulations which has entered into an agreement with the Secretary of Homeland Security pursuant to subsection (e). The Secretary of Homeland Security is authorized to require a carrier conducting operations under part 135 of title 14, Code of Federal Regulations, or a domestic corporation conducting operations under part 91 of that title, to give suitable and proper bond, in such reasonable amount and containing such conditions as the Secretary of Homeland Security may deem sufficient to ensure compliance with the indemnification requirements of this section, as a term of such an agreement.

(6) *Not a safety threat*

The alien has been determined not to represent a threat to the welfare, health, safety, or security of the United States.

(7) *No previous violation*

If the alien previously was admitted without a visa under this section, the alien must not have failed to comply with the conditions of any previous admission as such a nonimmigrant.

(8) *Round-trip ticket*

The alien is in possession of a round-trip transportation ticket (unless this requirement is waived by the Secretary of Homeland Security under regulations or the alien is arriving at the port of entry on an aircraft operated under part 135 of title 14, Code of Federal Regulations, or a noncommercial aircraft that is owned or operated by a domestic corporation conducting operations

under part 91 of title 14, Code of Federal Regulations).

(9) *Automated system check*

The identity of the alien has been checked using an automated electronic database containing information about the inadmissibility of aliens to uncover any grounds on which the alien may be inadmissible to the United States, and no such ground has been found.

(10) *Electronic transmission of identification information*

Operators of aircraft under part 135 of title 14, Code of Federal Regulations, or operators of noncommercial aircraft that are owned or operated by a domestic corporation conducting operations under part 91 of title 14, Code of Federal Regulations, carrying any alien passenger who will apply for admission under this section shall furnish such information as the Secretary of Homeland Security by regulation shall prescribe as necessary for the identification of any alien passenger being transported and for the enforcement of the immigration laws. Such information shall be electronically transmitted not less than one hour prior to arrival at the port of entry for purposes of checking for inadmissibility using the automated electronic database.

(11) *Eligibility determination under the electronic system for travel authorization*

Beginning on the date on which the electronic system for travel authorization developed under subsection (h)(3) is fully operational, each alien traveling under the program shall, before applying for admission to the United States, electronically

provide to the system biographical information and such other information as the Secretary of Homeland Security shall determine necessary to determine the eligibility of, and whether there exists a law enforcement or security risk in permitting, the alien to travel to the United States. Upon review of such biographical information, the Secretary of Homeland Security shall determine whether the alien is eligible to travel to the United States under the program.

(12) *Not present in Iraq, Syria, or any other country or area of concern*

(A) *In general*

Except as provided in subparagraphs (B) and (C)—

(i) the alien has not been present, at any time on or after March 1, 2011—

(I) in Iraq or Syria;

(II) in a country that is designated by the Secretary of State under section 4605(j) of Title 50 (as continued in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.)), section 2780 of Title 22, section 2371 of Title 22, or any other provision of law, as a country, the government of which has repeatedly provided support of acts of international terrorism; or

(III) in any other country or area of concern designated by the Secretary of Homeland Security under subparagraph (D); and

(ii) regardless of whether the alien is a national of a program country, the alien is not a national of—

(I) Iraq or Syria;

(II) a country that is designated, at the time the alien applies for admission, by the Secretary of State under section 4605(j) of Title 50 (as continued in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.)), section 2780 of Title 22, section 2371 of Title 22, or any other provision of law, as a country, the government of which has repeatedly provided support of acts of international terrorism; or

(III) any other country that is designated, at the time the alien applies for admission, by the Secretary of Homeland Security under subparagraph (D).

(B) *Certain military personnel and government employees*

Subparagraph (A)(i) shall not apply in the case of an alien if the Secretary of Homeland Security determines that the alien was present—

(i) in order to perform military service in the armed forces of a program country; or

(ii) in order to carry out official duties as a full time employee of the government of a program country.

(C) *Waiver*

The Secretary of Homeland Security may waive the application of subparagraph (A) to an alien if the Secretary determines that such a waiver is in the law enforcement or national security interests of the United States.

(D) *Countries or areas of concern*

(i) *In general*

Not later than 60 days after December 18, 2015, the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall determine whether the requirement under subparagraph (A) shall apply to any other country or area.

(ii) *Criteria*

In making a determination under clause (i), the Secretary shall consider—

(I) whether the presence of an alien in the country or area increases the likelihood that the alien is a credible threat to the national security of the United States;

(II) whether a foreign terrorist organization has a significant presence in the country or area; and

(III) whether the country or area is a safe haven for terrorists.

(iii) *Annual review*

The Secretary shall conduct a review, on an annual basis, of any determination made under clause (i).

(E) *Report*

Beginning not later than one year after December 18, 2015, and annually thereafter, the Secretary of Homeland Security shall submit to the Committee on Homeland Security, the Committee on Foreign Affairs, the Permanent Select Committee on Intelligence, and the

Committee on the Judiciary of the House of Representatives, and the Committee on Homeland Security and Governmental Affairs, the Committee on Foreign Relations, the Select Committee on Intelligence, and the Committee on the Judiciary of the Senate a report on each instance in which the Secretary exercised the waiver authority under subparagraph (C) during the previous year.

* * * * *

6. **8 U.S.C. § 1202 provides:**

Application for visas

(a) *Immigrant visas*

Every alien applying for an immigrant visa and for alien registration shall make application therefor in such form and manner and at such place as shall be by regulations prescribed. In the application the alien shall state his full and true name, and any other name which he has used or by which he has been known; age and sex; the date and place of his birth; and such additional information necessary to the identification of the applicant and the enforcement of the immigration and nationality laws as may be by regulations prescribed.

(b) *Other documentary evidence for immigrant visa*

Every alien applying for an immigrant visa shall present a valid unexpired passport or other suitable travel document, or document of identity and nationality, if such document is required under the regulations issued by the Secretary of State. The immigrant shall furnish to the consular officer with his application a copy of a certification by the appropriate police authorities stating what their

records show concerning the immigrant; a certified copy of any existing prison record, military record, and record of his birth; and a certified copy of all other records or documents concerning him or his case which may be required by the consular officer. The copy of each document so furnished shall be permanently attached to the application and become a part thereof. In the event that the immigrant establishes to the satisfaction of the consular officer that any document or record required by this subsection is unobtainable, the consular officer may permit the immigrant to submit in lieu of such document or record other satisfactory evidence of the fact to which such document or record would, if obtainable, pertain. All immigrant visa applications shall be reviewed and adjudicated by a consular officer.

(c) *Nonimmigrant visas; nonimmigrant registration; form, manner and contents of application*

Every alien applying for a nonimmigrant visa and for alien registration shall make application therefor in such form and manner as shall be by regulations prescribed. In the application the alien shall state his full and true name, the date and place of birth, his nationality, the purpose and length of his intended stay in the United States; his marital status; and such additional information necessary to the identification of the applicant, the determination of his eligibility for a nonimmigrant visa, and the enforcement of the immigration and nationality laws as may be by regulations prescribed. The alien shall provide complete and accurate information in response to any request for information contained in the application. At the discretion of the Secretary of

State, application forms for the various classes of nonimmigrant admissions described in section 1101(a)(15) of this title may vary according to the class of visa being requested.

(d) *Other documentary evidence for nonimmigrant visa*

Every alien applying for a nonimmigrant visa and alien registration shall furnish to the consular officer, with his application, a certified copy of such documents pertaining to him as may be by regulations required. All nonimmigrant visa applications shall be reviewed and adjudicated by a consular officer.

(e) *Signing and verification of application*

Except as may be otherwise prescribed by regulations, each application for an immigrant visa shall be signed by the applicant in the presence of the consular officer, and verified by the oath of the applicant administered by the consular officer. The application for an immigrant visa, when visaed by the consular officer, shall become the immigrant visa. The application for a nonimmigrant visa or other documentation as a nonimmigrant shall be disposed of as may be by regulations prescribed. The issuance of a nonimmigrant visa shall, except as may be otherwise by regulations prescribed, be evidenced by a stamp, or other placed in the alien's passport.

(f) *Confidential nature of records*

The records of the Department of State and of diplomatic and consular offices of the United States pertaining to the issuance or refusal of visas or permits to enter the United States shall be considered confidential and shall be used only for the formulation, amendment, administration, or

enforcement of the immigration, nationality, and other laws of the United States, except that—

(1) in the discretion of the Secretary of State certified copies of such records may be made available to a court which certifies that the information contained in such records is needed by the court in the interest of the ends of justice in a case pending before the court.

(2) the Secretary of State, in the Secretary's discretion and on the basis of reciprocity, may provide to a foreign government information in the Department of State's computerized visa lookout database and, when necessary and appropriate, other records covered by this section related to information in the database—

(A) with regard to individual aliens, at any time on a case-by-case basis for the purpose of preventing, investigating, or punishing acts that would constitute a crime in the United States, including, but not limited to, terrorism or trafficking in controlled substances, persons, or illicit weapons; or

(B) with regard to any or all aliens in the database, pursuant to such conditions as the Secretary of State shall establish in an agreement with the foreign government in which that government agrees to use such information and records for the purposes described in subparagraph (A) or to deny visas to persons who would be inadmissible to the United States.

(g) *Nonimmigrant visa void at conclusion of authorized period of stay*

(1) In the case of an alien who has been admitted on the basis of a nonimmigrant visa and remained

in the United States beyond the period of stay authorized by the Attorney General, such visa shall be void beginning after the conclusion of such period of stay.

(2) An alien described in paragraph (1) shall be ineligible to be readmitted to the United States as a nonimmigrant, except—

(A) on the basis of a visa (other than the visa described in paragraph (1)) issued in a consular office located in the country of the alien's nationality (or, if there is no office in such country, in such other consular office as the Secretary of State shall specify); or

(B) where extraordinary circumstances are found by the Secretary of State to exist.

(h) *In person interview with consular officer*

Notwithstanding any other provision of this chapter, the Secretary of State shall require every alien applying for a nonimmigrant visa—

(1) who is at least 14 years of age and not more than 79 years of age to submit to an in person interview with a consular officer unless the requirement for such interview is waived—

(A) by a consular official and such alien is—

(i) within that class of nonimmigrants enumerated in subparagraph (A) or (G) of section 1101(a)(15) of this title;

(ii) within the NATO visa category;

(iii) within that class of nonimmigrants enumerated in section 1101(a)(15)(C)(iii)[3] of this title (referred to as the "C-3 visa" category); or

(iv) granted a diplomatic or official visa on a diplomatic or official passport or on the equivalent thereof;

(B) by a consular official and such alien is applying for a visa—

(i) not more than 12 months after the date on which such alien's prior visa expired;

(ii) for the visa classification for which such prior visa was issued;

(iii) from the consular post located in the country of such alien's usual residence, unless otherwise prescribed in regulations that require an applicant to apply for a visa in the country of which such applicant is a national; and

(iv) the consular officer has no indication that such alien has not complied with the immigration laws and regulations of the United States; or

(C) by the Secretary of State if the Secretary determines that such waiver is—

(i) in the national interest of the United States; or

(ii) necessary as a result of unusual or emergent circumstances; and

(2) notwithstanding paragraph (1), to submit to an in person interview with a consular officer if such alien—

(A) is not a national or resident of the country in which such alien is applying for a visa;

(B) was previously refused a visa, unless such refusal was overcome or a waiver of ineligibility has been obtained;

(C) is listed in the Consular Lookout and Support System (or successor system at the Department of State);

(D) is a national of a country officially designated by the Secretary of State as a state sponsor of terrorism, except such nationals who possess nationalities of countries that are not designated as state sponsors of terrorism;

(E) requires a security advisory opinion or other Department of State clearance, unless such alien is—

(i) within that class of nonimmigrants enumerated in subparagraph (A) or (G) of section 1101(a)(15) of this title;

(ii) within the NATO visa category;

(iii) within that class of nonimmigrants enumerated in section 1101(a)(15)(C)(iii) of this title (referred to as the "C-3 visa" category); or

(iv) an alien who qualifies for a diplomatic or official visa, or its equivalent; or

(F) is identified as a member of a group or sector that the Secretary of State determines—

(i) poses a substantial risk of submitting inaccurate information in order to obtain a visa;

(ii) has historically had visa applications denied at a rate that is higher than the average rate of such denials; or

(iii) poses a security threat to the United States.

7. **8 U.S.C. § 1361 provides:**

Burden of proof upon alien

Whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not inadmissible under any provision of this chapter, and, if an alien, that he is entitled to the nonimmigrant, immigrant, special immigrant, immediate relative, or refugee status claimed, as the case may be. If such person fails to establish to the satisfaction of the consular officer that he is eligible to receive a visa or other document required for entry, no visa or other document required for entry shall be issued to such person, nor shall such person be admitted to the United States unless he establishes to the satisfaction of the Attorney General that he is not inadmissible under any provision of this chapter. In any removal proceeding under part IV of this subchapter against any person, the burden of proof shall be upon such person to show the time, place, and manner of his entry into the United States, but in presenting such proof he shall be entitled to the production of his visa or other entry document, if any, and of any other documents and records, not considered by the Attorney General to be confidential, pertaining to such entry in the custody of the Service. If such burden of proof is not sustained, such person shall be presumed to be in the United States in violation of law.

8. **50 U.S.C. § 21 provides:**

Restraint, regulation, and removal

Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety.

9. **Act of May 22, 1918, 40 Stat. 559, provides:**

An Act to prevent in time of war departure from or entry into the United States contrary to the public safety.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That when the United States is at war, if the President shall find that the public safety requires that restrictions and prohibitions in addition to those provided otherwise than by this Act be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or Congress, be unlawful—

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

(b) For any person to transport or attempt to transport from or into the United States another person with knowledge or reasonable cause to believe that the departure or entry of such other person is forbidden by this Act;

(c) For any person knowingly to make any false statement in an application for permission to depart from or enter the United States with intent to induce or secure the granting of such permission either for himself or for another;

(d) For any person knowingly to furnish or attempt to furnish or assist in furnishing to another a permit or evidence of permission to depart or

enter not issued and designed for such other person's use;

(e) For any person knowingly to use or attempt to use any permit or evidence of permission to depart or enter not issued and designed for his use;

(f) For any person to forge, counterfeit, mutilate, or alter, or cause or procure to be forged, counterfeited, mutilated, or altered, any permit or evidence of permission to depart from or enter the United States;

(g) For any person knowingly to use or attempt to use or furnish to another for use any false, forged, counterfeited, mutilated, or altered permit, or evidence of permission, or any permit or evidence of permission which, though originally valid, has become or been made void or invalid.

SEC. 2. That after such proclamation as is provided for by the preceding section has been made and published and while said proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter or attempt to depart from or enter the United States unless he bears a valid passport.

SEC. 3. That any person who shall willfully violate any of the provisions of this Act, or of any order or proclamation of the President promulgated, or of any permit, rule, or regulation issued thereunder, shall, upon conviction, be fined not more than $10,000, or, if a natural person, imprisoned for not more than twenty years, or both; and the officer, director, or agent of any corporation who knowingly

participates in such violation shall be punished by like fine or imprisonment, or both; and any vehicle or any vessel, together with its or her appurtenances, equipment, tackle, apparel, and furniture, concerned in any such violation, shall be forfeited to the United States.

SEC. 4. That the term "United States" as used in this Act includes the Canal Zone and all territory and waters, continental or insular, subject to the jurisdiction of the United States.

The word "person" as used herein shall be deemed to mean any individual, partnership, association, company, or other unincorporated body of individuals, or corporation, or body politic.

10. **Act of June 21, 1941, 55 Stat. 252, provides:**

To amend the Act of May 22, 1918 (40 Stat. 559).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first paragraph of section 1 of the Act of May 22, 1918 (40 Stat. 559), is amended to read as follows:

"When the United States is at war or during the existence of the national emergency proclaimed by the President on May 27, 1941, or as to aliens whenever there exists a state of war between, or among, two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this Act be imposed upon the departure of persons from and their entry into the United States, and shall make

public proclamation thereof, it shall, until otherwise ordered by the President or Congress, be unlawful—".

SEC. 2. That section 3 of such Act of May 22, 1918, is amended to read as follows:

"Any person who shall willfully violate any of the provisions of this Act, or of any order or proclamation of the President promulgated, or of any permit, rule, or regulation issued thereunder, shall, upon conviction, be fined not more than $5,000, or, if a natural person, imprisoned for not more than five years, or both; and the officer, director, or agent of any corporation who knowingly participates in such violation shall be punished by like fine or imprisonment, or both; and any vehicle, vessel or aircraft, together with its or her appurtenances, equipment, tackle, apparel, and furniture, concerned in any such violation, shall be forfeited to the United States."

SEC. 2a. That section 1 of such Act of May 22, 1918, is amended to read as follows:

"SEC 4. The term 'United States' as used in this Act includes the Canal Zone, the Commonwealth of the Philippines, and all territory and waters, continental or insular, subject to the jurisdiction of the United States.

"The word 'person' as used herein shall be deemed to mean any individual, partnership, association, company, or other unincorporated body of individuals, or corporation, or body politic."

SEC. 3. That such Act of May 22, 1918, is further amended by adding at the end thereof the following new sections:

"SEC. 5. Nothing in this Act shall be construed to entitle an alien to whom a permit to enter the United States has been issued to enter the United States, if, upon arrival in the United States, he is found to be inadmissible to the United States under this Act or any law relating to the entry of aliens into the United States.

"SEC. 6. The revocation of any proclamation, rule, regulation, or order issued in pursuance of this Act, shall not prevent prosecution for any offense committed or the imposition of any penalties or forfeitures, liability for which was incurred under this Act prior to the revocation of such proclamation, rule, regulation, or order."

EXECUTIVE MATERIALS INVOLVED

---

1. **Proclamation 1473, August 8, 1918, provides in pertinent part:**

Issuance of Passports and Permits to enter or leave the United States.

Whereas by act of Congress approved the 22d day of May, 1918, entitled "An act to prevent in time of war departure from and entry into the United States contrary to the public safety," it is provided as follows:

* * * * *

And whereas other provisions relating to departure from and entry into the United States are contained in section 3, subsection (b), of the trading-with-the-enemy act, approved October 6, 1917, and in section 4067 of the Revised Statutes, as amended by the act of April 16, 1918, and sections 4068, 4069, and 4070

of the Revised Statutes, and in the regulations prescribed in the President's proclamations of April 6, 1917; November 16, 1917; December 11, 1917; and April 19, 1918;

And whereas the act of May 20, 1918, authorizes me to co-ordinate and consolidate executive agencies and bureaus in the interest of economy and more efficient concentration of the Government;

Now, therefore, I, Woodrow Wilson, President of the United States of America, acting under and by virtue of the aforesaid authority vested in me, do hereby find and publicly proclaim and declare that the public safety requires that restrictions and prohibitions in addition to those provided otherwise than by the act of May 22, 1918, above mentioned, shall be imposed upon the departure of persons from and their entry into the United States; and I make the following orders thereunder:

1. No citizen of the United States shall receive a passport entitling him to leave or enter the United States unless it shall affirmatively appear that there are adequate reasons for such departure or entry and that such departure or entry is not prejudicial to the interests of the United States.

2. No alien shall receive permission to depart from or enter the United States unless it shall affirmatively appear that there is reasonable necessity for such departure or entry and that such departure or entry is not prejudicial to the interests of the United States.

3. The provisions of this proclamation and the rules and regulations promulgated in pursuance hereof shall not be held to suspend or supersede in any respect, except as herein expressly provided the

President's proclamations of April 6, 1917; November 16, 1917; December 11, 1917, and April 19, 1918, above referred to; nor shall anything contained herein be construed to suspend or supersede any rules or regulations issued under the Chinese exclusion law or the immigration laws, except as herein expressly provided; but the provisions hereof shall, subject to the provisos above mentioned, be regarded as additional to such rules and regulations. Compliance with this proclamation and the rules and regulations promulgated in pursuance hereof shall not exempt any individual from the duty of complying with any statute, proclamation, order, rule, or regulations not referred to herein.

4. I hereby designate the Secretary of State as the official who shall grant, or in whose name shall be granted, permission to aliens to depart from or enter the United States; I reaffirm sections 25, 26, and 27 of the Executive order of October 12, 1917, vesting in the Secretary of State the administration of the provisions of section 3, subsection (6), of the trading with enemy act; I transfer to the Secretary of State the Executive administration of regulations 9 and 10 of the President's proclamation of April 6, 1917; of regulation 15 of the President's proclamation of November 16, 1917, and of regulations 1 and 2 of the President's proclamation of December 1, 1917, and the executive administration of the aforesaid regulations as extended by the President's proclamation of April 19, 1918, said executive administration heretofore having been delegated to the Attorney General under dates of April 6, 1917; November 16, 1917; December 11, 1917, and April 19, 1918. The Rules and Regulations made by the

Secretary of the Treasury, as authorized by Title II, section 1, of the espionage act approved June 15, 1917, and by the Executive order of December 3, 1917, shall be superseded by this proclamation and the rules and regulations promulgated in pursuance hereof in so far as they are inconsistent therewith.

I hereby direct all departments of the Government to co-operate with the Secretary of State in the execution of his duties under this proclamation and the rules and regulations promulgated in pursuance hereof. They shall upon his request make available to him for that purpose the services of their respective officials and agents. The Secretary of the Treasury, the Secretary of War, the Attorney General, the Secretary of the Navy, the Secretary of Commerce, and the Secretary of Labor shall, at the request of the Secretary of State, each appoint a representative to render to the Secretary of State, or his representative, such assistance and advice as he may desire respecting the administration of this proclamation and of the rules and regulations aforesaid.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done in the District of Columbia, this eighth day of August, in the year of our Lord one thousand nine hundred and eighteen, and of the independence of the United States, the one hundred and forty-third.

By the President: WOODROW WILSON.

2. **Proclamation 2523, November 14, 1941, provides:**

Control of Persons Entering and Leaving the United States

WHEREAS the act of Congress approved on May 22, 1918 (40 Stat. 559), as amended by the act of Congress approved on June 21, 1941 (Public Law 114, 77th Cong., chap. 210, 1st sess., 55 Stat. 252) vests authority in me to impose restrictions and prohibitions in addition to those otherwise provided by law upon the departure of persons from and their entry into the United States when the United States is at war, or during the existence of the national emergency proclaimed by the President on May 27, 1941, or, as to aliens, whenever there exists a state of war between or among two or more states, and when I find that the interests of the United States so require; and

WHEREAS the national emergency proclaimed by me on May 27, 1941 is still existing; and

WHEREAS there unhappily exists a state of war between or among two or more states and open hostilities engage a large part of the Eastern Hemisphere; and

WHEREAS the exigencies of the present international situation and of the national defense require that restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from and their entry into the United States, including the Panama Canal Zone, the Commonwealth of the Philippines, and all territory and waters, continental

or insular, subject to the jurisdiction of the United States:

NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, acting under and by virtue of the authority vested in me as set forth above, do hereby find and publicly proclaim and declare that the interests of the United States require that restrictions and prohibitions, in addition to those otherwise provided by law, shall be imposed upon the departure of persons from and their entry into the United States, including the Panama Canal Zone, the Commonwealth of the Philippines, and all territory and waters, continental or insular, subject to the jurisdiction of the United States; and I make the following rules, regulations, and orders which shall remain in force and effect until otherwise ordered by me:

(1) After the effective date of the rules and regulations hereinafter authorized, no citizen of the United States or person who owes allegiance to the United States shall depart from or enter, or attempt to depart from or enter, the United States, including the Panama Canal Zone, the Commonwealth of the Philippines, and all territory and waters, continental or insular, subject to the jurisdiction of the United States, unless he bears a valid passport issued by the Secretary of State or, under his authority, by a diplomatic or consular officer of the United States, or the United States High Commissioner to the Philippine Islands, or the chief executive of Hawaii, of Puerto Rico, of the Virgin Islands, of American Samoa, or of Guam, or unless he comes within the provisions of such exceptions or fulfils such conditions as may be prescribed in rules and regulations

which the Secretary of State is hereby authorized to prescribe in execution of the rules, regulations, and orders herein prescribed. Seamen are included in the classes of persons to whom this paragraph applies.

(2) No alien shall depart from or attempt to depart from the United States unless he is in possession of a valid permit to depart issued by the Secretary of State or by an officer designated by the Secretary of State for such purpose, or unless he is exempted from obtaining a permit, in accordance with rules and regulations which the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to prescribe in execution of the rules, regulations, and orders herein prescribed; nor shall any alien depart from or attempt to depart from the United States at any place other than a port of departure designated by the Attorney General or by the Commissioner of Immigration and Naturalization or by an appropriate permit-issuing authority designated by the Secretary of State.

No alien shall be permitted to depart from the United States if it appears to the satisfaction of the Secretary of State that such departure would be prejudicial to the interests of the United States as provided in the rules and regulations hereinbefore authorized to be prescribed by the Secretary of State, with the concurrence of the Attorney General.

(3) After the effective date of the rules and regulations hereinafter authorized, no alien shall enter or attempt to enter the United States unless he is in possession of a valid unexpired permit to enter issued by the Secretary of State, or by an appropriate officer designated by the Secretary of State, or is exempted from obtaining a permit to

enter in accordance with the rules and regulations which the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to prescribe in execution of these rules, regulations, and orders.

No alien shall be permitted to enter the United States if it appears to the satisfaction of the Secretary of State that such entry would he prejudicial to the interests of the United States as provided in the rules and regulations hereinbefore authorized to be prescribed by the Secretary of State, with the concurrence of the Attorney General.

(4) No person shall depart from or enter, or attempt to depart from or enter, the United States without submitting for inspection, if required to do so, all documents, articles, or other things which are being removed from or brought into the United States upon or in connection with such person's departure or entry, which are hereby made subject to official inspection under rules and regulations which the Secretary of State in the cases of citizens, and the Secretary of State with the concurrence of the Attorney General in the cases of aliens, is hereby authorized to prescribe.

(5) A permit to enter issued to an alien seaman employed on a vessel arriving at a port in the United States from a foreign port shall be conditional and shall entitle him to enter only in a case of reasonable necessity in which the immigration authorities are satisfied that such entry would not be contrary to the interests of the United States; but this shall not be deemed to supersede the provisions of Executive Order 8429, dated June 5, 1940 concerning the documentation of seamen.

(6) The period of validity of a permit to enter or a permit to depart, issued to an alien, may be terminated by the permit-issuing authority or by the Secretary of State at any time prior to the entry or departure of the alien, provided the permit-issuing authority or the Secretary of State is satisfied that the entry or departure of the alien would be prejudicial to the interests of the United States which it was the purpose of the above-mentioned acts to safeguard.

(7) Except as provided herein or by rules and regulations prescribed hereunder, the provisions of this proclamation and the rules and regulations issued in pursuance hereof shall be in addition to, and shall not be held to repeal, modify, suspend, or supersede any proclamation, rule, regulation, or order heretofore issued and now in effect under the general statutes relating to the immigration of aliens into the United States; and compliance with the provisions of this proclamation or of any rule or regulation which may hereafter be issued in pursuance of the act of May 22, 1918, as amended by the act of June 21, 1941, shall not be considered as exempting any individual from the duty of complying with the provisions of any statute, proclamation, rule, regulation, or order heretofore issued and now in effect.

(8) I direct all departments and agencies of the Government to cooperate with the Secretary of State in the execution of his authority under this proclamation and any subsequent proclamation, rule, regulation, or order promulgated in pursuance hereof. They shall upon request make available to the Secretary of State for that purpose the services of their respective officials and agents. I enjoin upon all

officers of the United States charged with the execution of the laws thereof the utmost diligence in preventing violations of the act of May 22, 1918, as amended by the act of June 21, 1941, and in bringing to trial and punishment any persons who shall have violated any provisions of such acts.

(9) Paragraph 6, part 1, of Executive Order 8766, issued June 3, 1941, is hereby superseded by the provisions of this proclamation and such regulations as may be prescribed hereunder.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

DONE at the city of Washington this 14th day of November, in the year of our Lord nineteen hundred and forty-one, and of the Independence of the United States of America the one hundred and sixty-sixth.

By the President: FRANKLIN D. ROOSEVELT

3. **22 C.F.R. § 58.53 (1945) provides:**

Classes of aliens whose entry is deemed to be prejudicial to the public interest.

The entry of an alien who is within one of the following categories shall be deemed to be prejudicial to the interests of the United States for the purposes of §§ 58.41-58.63:

(a) Any alien who belongs to one of the classes specified in the act of October 16, 1918, as amended. (40 Stat. 1012; 41 Stat. 1008-9; 54 Stat. 673; 8 U.S.C. 137.)

(b) Any alien who is a member of, affiliated with, or may be active in the United States in connection

with or on behalf of, a political organization associated with or carrying out policies of any foreign government opposed to the measures adopted by the Government of the United States in the public interest, or in the interest of national defense, or in the interest of the common defense of the countries of the Western Hemisphere, or in the prosecution of the war.

(c) Any alien in possession of, or seeking to procure, unauthorized secret information concerning the plans, preparations, equipment, or establishments for the national defense of, or the prosecution of the war by, the United States.

(d) Any alien engaged in activities designed to obstruct, impede, retard, delay, or counteract the effectiveness of the measures adopted by the Government of the United States for the defense of the United States or for the defense of any other country, or the prosecution of the war.

(e) Any alien engaged in activities designed to obstruct, impede, retard, delay, or counteract the effectiveness of any plans made or steps taken by any country of the Western Hemisphere in the interest of the common defense of the countries of such Hemisphere.

(f) Any alien engaged in organizing, teaching, advocating, or directing any rebellion, insurrection, or violent uprising against the United States.

(g) Any alien engaged in a plot or plan to destroy materials, or sources thereof, vital to the defense of, or the prosecution of the war by, the United States, or to the effectiveness of the measures adopted by the United States for the defense of any other country.

(h) Any alien whose admission would endanger the public safety as provided in any Executive order issued in pursuance of the act of Congress approved June 20, 1941 (ch. 209, 55 Stat. 252; 22 U.S.C., Sup., 228, 229).

(i) Any alien enemy: *Provided,* That this excluding provision shall not apply to aliens who

(1) Present valid permits to enter issued on or after November 14, 1941, or are exempted under these regulations from presenting permits to enter and are found to be otherwise admissible under these regulations; or

(2) Before September 1, 1939, became and still are citizens or subjects of any foreign country at war with Japan and who have not, since September 1, 1939, and before May 8, 1945, returned to any enemy or enemy-controlled territory; or

(3) Are under 14 years of age; or

(4) Are excepted from the excluding provisions of this section in the discretion of the permit-issuing authority or of the Secretary of State.

(j) Any alien found to be, or charged with being, a war criminal by the appropriate authorities of the United States or one of its co-belligerents, or an alien who has been guilty of, or who has advocated or acquiesced in activities or conduct contrary to civilization and human decency on behalf of the Axis countries during the present World War.

(k) Any alien who is not within one or more of the classes defined in paragraphs (a) to (j), inclusive, but in whose case circumstances of a similar character may be found to exist, which render the alien's

admission prejudicial to the interests of the United States, which it was the purpose of the act of June 21, 1941 (55 Stat. 252) to safeguard.