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HAWAII OPPOSES REQUEST FOR TRAVEL BAN 3.0 TO TAKE FULL EFFECT

HONOLULU – Today Hawaii filed its response with the United States Supreme Court to the Trump Administration's request to stay the injunction on Travel Ban 3.0 imposed by Hawaii federal district court Judge Derrick K. Watson.

Hawaii's response states in part:

> Less than six months ago, this Court considered and rejected a stay request indistinguishable from the one the Government now presses. Then, too, the lower courts had enjoined the President's travel ban . . . [a]nd then, too, the Government sought a stay based on a generalized appeal to national security that paled in comparison to the profound and irreparable harms detailed by the State of Hawaii and the individual plaintiffs—the prolonged separation of families, the impairment of the State's university, and the damage to the public as a whole inflicted by a radical departure from the status quo that had existed for decades.
> . . .
>
> [T]he justification for that dramatic relief [of a stay] has only weakened. In place of a temporary ban on entry, the President has imposed an indefinite one, deepening and prolonging the harms a stay would inflict.

A copy of Hawaii's responsive filing is attached.

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No. 17A-550

IN THE

Supreme Court of the United States

DONALD J. TRUMP, *et al.*,
Applicants,

v.

STATE OF HAWAII, *et al.*,
Respondents.

RESPONSE TO APPLICATION FOR STAY PENDING APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND PENDING FURTHER PROCEEDINGS IN THIS COURT

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RULE 29.6 DISCLOSURE STATEMENT

The Muslim Association of Hawaii, Inc. has no parent corporations. It has no stock, and hence, no publicly held company owns 10% or more of its stock.

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INTRODUCTION

Less than six months ago, this Court considered and rejected a stay request indistinguishable from the one the Government now presses. Then, too, the lower courts had enjoined the President's travel ban on the grounds that it violated 8 U.S.C. § 1152(a)(1)(A) and exceeded the limits on the President's authority under 8 U.S.C. §§ 1182(f) and 1185(a). And then, too, the Government sought a stay based on a generalized appeal to national security that paled in comparison to the profound and irreparable harms detailed by the State of Hawaii and the individual plaintiffs—the prolonged separation of families, the impairment of the State's university, and the damage to the public as a whole inflicted by a radical departure from the status quo that had existed for decades.

Faced with these circumstances, this Court made the "equitable judgment" that the injunctions should remain in effect for foreign nationals who had a "bona fide relationship with a person or entity in the United States." *Trump* v. *Int'l Refugee Assistance Project* (*"IRAP"*), 137 S. Ct. 2080, 2087-88 (2017) (per curiam). Excluding those aliens, the Court explained, would impose "concrete burdens" on respondents and "parties similarly situated to them." *Id.* at 2087. The Court found that the equities tipped in favor of a stay only where the foreign nationals "ha[d] no connection to the United States at all," and enforcing the travel ban would not "alleviat[e] obvious hardship to anyone." *Id.* at 2088.

The Government now asks this Court to overrule that equitable determination, dutifully adhered to by the court below, and grant the complete stay

that this Court declined to award it six months ago. But the justification for that dramatic relief has only weakened. In place of a temporary ban on entry, the President has imposed an indefinite one, deepening and prolonging the harms a stay would inflict. The Government's national security rationales have also grown more attenuated: The order itself acknowledges that the affected aliens can safely be vetted and granted entry, so long as they seek visas the Government prefers, and the Government's delay in requesting a stay makes plain that no exigency warrants this Court's immediate intervention. What is more, the Government seeks its stay before any court of appeals has ruled on the merits of the latest travel ban, and days before oral argument is scheduled in two separate appeals.

Most importantly, the President's third travel ban, like his first and his second, is irreconcilable with the immigration laws and the Constitution. It openly "discriminat[es] * * * because of * * * nationality" in the teeth of an unambiguous statutory prohibition. 8 U.S.C. § 1152(a)(1)(A). It exceeds the limits on the President's power to "suspend * * * entry" that have been recognized for nearly a century. *Id.* §§ 1182(f), 1185(a). And it continues the same policy of excluding Muslims that multiple courts previously held unconstitutional.

National security "must not become a talisman used to ward off inconvenient claims." *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1862 (2017). This Court has already struck the equitable balance that governs this appeal, and the President's claim to unlimited power over immigration remains without merit. The Government's application for a stay should be rejected.

STATEMENT

1. This Court is well familiar with the background of this case. Seven days after taking office, the President issued an executive order entitled "Protecting the Nation From Foreign Terrorist Entry Into The United States," Exec. Order No. 13,769 (Jan. 27, 2017) ("EO-1"), which purported to temporarily ban entry by nationals of seven overwhelmingly Muslim countries and all refugees. EO-1 §§ 3, 5. Before EO-1 could take effect, a district court enjoined it. Add. 8. The Government sought an emergency stay, which the Ninth Circuit denied. *Washington* v. *Trump*, 847 F.3d 1151, 1156 (9th Cir. 2017) (per curiam).

Rather than continue its defense of EO-1—an order sufficiently indefensible that the Government declines even to mention it in its stay application—the President issued a new order, bearing the same title and imposing nearly the same bans. Exec. Order No. 13,780 (Mar. 6, 2017) ("EO-2"). EO-2 barred entry by nationals of six overwhelmingly Muslim countries for 90 days, excluded all refugees for 120 days, and capped annual refugee admissions at 50,000. *Id.* §§ 2(c), 6(a)-(b). It also established a process to identify "additional countries" for "inclusion in a Presidential proclamation that would prohibit the entry of appropriate categories of foreign nationals." *Id.* § 2(e).

Before EO-2 could take effect, the District Court enjoined the order's travel and refugee bans. *Hawaii* v. *Trump*, 245 F. Supp. 3d 1227 (D. Haw. 2017). The Ninth Circuit largely affirmed, holding that the order exceeded the President's authority under 8 U.S.C. §§ 1182(f) and 1185(a) and unlawfully discriminated on

the basis of nationality in violation of 8 U.S.C. § 1152(a)(1)(A). *Hawaii* v. *Trump*, 859 F.3d 741, 770-779 (9th Cir. 2017) (per curiam).

This Court granted certiorari in this case and a parallel Fourth Circuit suit, and partially stayed the injunction pending disposition of the cases. *IRAP*, 137 S. Ct. at 2086-88. Applying its "equitable judgment," the Court found that, if enforced, EO-2 would impose "concrete burdens" on "people or entities in the United States who have relationships with foreign nationals abroad." *Id.* at 2087. But "[t]he equities * * * do not balance the same way" with respect to aliens "who have no connection to the United States at all": Excluding those aliens would "appreciably injure [the Government's] interests" in enforcing EO-2 "without alleviating obvious hardship to anyone else." *Id.* at 2088. Accordingly, the Court stayed the injunction as to foreign nationals who lacked "a credible claim of a bona fide relationship with a person or entity in the United States." *Id*.

The Government did not seek expedited review (despite its repeated claims of national security urgency), and two weeks before the scheduled oral argument, EO-2's travel ban expired. This Court removed the consolidated cases from its oral argument calendar, and after the refugee ban expired on October 24, it dismissed the case as moot. *Trump* v. *Hawaii*, No. 16-1540, 2017 WL 4782860, at *1 (U.S. Oct. 24, 2017). "Following [its] established practice in such cases," this Court vacated the Ninth Circuit's judgment but "express[ed] no view on the merits." *Id.*

2. The same day that EO-2's travel ban expired, the President issued a proclamation entitled "Enhancing Vetting Capabilities and Processes for Detecting

Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats," Proc. 9645 (Sept. 24, 2017) ("EO-3"). Despite the changed nomenclature, EO-3 is a direct descendant of EO-1 and EO-2. The very first line identifies it as an outgrowth of EO-2. EO-3 pmbl. And EO-3 continues, and makes indefinite, substantially the same travel ban that has been at the core of all three orders.

In particular, Section 2 of EO-3 continues to ban all immigration from five of the six overwhelmingly Muslim countries covered by EO-2: Iran, Libya, Syria, Yemen, and Somalia. *Id.* § 2(b)-(c), (e), (g)-(h). EO-3 also bans all immigration from a sixth Muslim-majority country, Chad. *Id.* § 2(a). Additionally, the order prohibits all non-immigrant visas for nationals of Syria, all non-immigrant visas except student and exchange visas for nationals of Iran, and all business and tourist visas for nationals of Libya, Yemen, and Chad. *Id.* § 2(a)-(c), (e), (g).

EO-3 also imposes token restrictions on two non-Muslim countries. It prohibits business and tourist travel by a small set of Venezuelan government officials. *Id.* § 2(f). And it bans entry from North Korea—a country that sent fewer than 100 nationals to the United States last year, and that was already subject to extensive entry bans. *See* C.A. E.R. 90; Exec. Order No. 13,810 § 1(a)(iv) (Sept. 21, 2017) (barring entry by all "North Korean person[s]").

EO-3 immediately went into effect for nationals who were subject to EO-2 and not protected by the District Court's partially stayed injunction. EO-3 § 7(a). The order was slated to go into full effect on October 18, 2017. *Id.* § 7(b).

3. On October 10, 2017, the State of Hawaii and Dr. Ismail Elshikh moved to file a Third Amended Complaint challenging EO-3 and adding three new plaintiffs: two John Does and the Muslim Association of Hawaii, Inc. C.A. E.R. 70-76, 379. The State explained that EO-3, like its predecessors, would impair the University of Hawaii's retention and recruitment of students and faculty, C.A. E.R. 91-94, 252-255, 257-268; harm the State's tourism industry, C.A. E.R. 94-95, 224-234; and impair its sovereign prerogatives in enforcing its nondiscrimination laws, C.A. E.R. 95-96. The individual Plaintiffs—two American citizens and a lawful permanent resident—explained that EO-3 would impede them from reuniting with close family members who have pending visa applications. C.A. E.R. 238, 269, 272-273. And the Association stated that EO-3 would inflict associational and financial harms and stigmatize its members. C.A. E.R. 99-100, 217-219. Plaintiffs sought a temporary restraining order ("TRO") enjoining the provisions of EO-3 banning entry from every targeted country except Venezuela and North Korea. *See* C.A. E.R. 379.[1]

On October 17, 2017, the District Court granted a TRO. Add. 44. It found that Plaintiffs' injuries gave them standing to challenge EO-3, and it "ha[d] little trouble" rejecting the Government's arguments regarding ripeness, reviewability, and statutory standing. Add. 14-29. On the merits, the District Court held that

[1] As Plaintiffs explained in their motion, "North Korean person[s]" are already excluded under a separate sanctions order that is not part of this challenge, Exec. Order No. 13,810 § 1(a)(iv), and the current state of relations with North Korea presents the sort of exigent circumstance previously found to justify a suspension on entry, *see infra* pp. 17, 32. The President's decision to apply the ban only to certain Venezuelan officials meaningfully distinguishes that country's treatment.

EO-3 likely exceeds the limits on the President's suspension authority under Sections 1182(f) and 1185(a) because its "findings are inconsistent with and do not fit the restrictions that the order actually imposes." Add. 29-37. The court also held that EO-3 does "what Section 1152 prohibits" by "singling out immigrant visa applicants seeking entry to the United States on the basis of nationality." Add. 37-39. Thus, after finding that "the equities tip in Plaintiffs' favor," the court issued "[n]ationwide relief." Add. 41-42.[2] The parties then jointly stipulated that the TRO should be converted to a preliminary injunction. D. Ct. Dkt. 389.

On October 24, a full week after the District Court granted the TRO, the government appealed to the Ninth Circuit and sought a stay pending appeal. The Ninth Circuit granted that request in part, staying the preliminary injunction "except as to 'foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States.'" Add. 1 (quoting *IRAP*, 137 S. Ct. at 2088). The Government filed its stay application in this Court one week later.

ARGUMENT

The Supreme Court "rarely grant[s]" a stay before the lower court has decided the merits. *Heckler* v. *Lopez*, 463 U.S. 1328, 1330 (1983) (Rehnquist, J., in chambers). In order to obtain this extraordinary relief, the Government must

[2] The Government did not request that any injunction be limited to aliens with a "bona fide relationship" with U.S. entities and persons, and so the District Court did not consider that limitation. The same day that the District Court issued its decision, the District Court for the District of Maryland concluded that EO-3 violated Section 1152(a)(1)(A) and the Constitution and largely enjoined EO-3's implementation. *IRAP, et al.* v. *Trump, et al.*, No. TDC-17-0361, 2017 WL 4674314 (D. Md. Oct. 17, 2017), *appeal docketed*, No. 17-2240 (4th Cir. Oct. 23, 2017).

demonstrate "a significant possibility that the judgment below will be reversed" and "a likelihood of irreparable harm * * * if the judgment is not stayed." *Barnes* v. *E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan,* 501 U.S. 1301, 1302 (1991) (Scalia, J., in chambers). The Court must also "balance the equities," and find that "the relative harms to [the] applicant" outweigh those to the "respondent" and "the public at large." *Id.* at 1305; *see IRAP*, 137 S. Ct. at 2087.

The Government cannot meet this demanding standard. On the merits, EO-3 violates the plain text of Section 1152(a)(1)(A), exceeds the limits on the President's suspension power that have been recognized for nearly a century, and contravenes the Establishment Clause. Moreover, the lower court's stay strikes precisely the same equitable balance that this Court did earlier this year. The Government has identified no change that tips that balance in its favor. To the contrary, EO-3's indefinite duration deepens the hardship it imposes on Plaintiffs and "similarly situated" persons and entities, while the numerous exceptions contained in the order itself, and the Government's delays in putting it into effect, make clear that an injunction would not appreciably injure the Government's interests.

I. This Court Is Unlikely To Vacate The Injunction.

A. Plaintiffs' Challenge Is Reviewable.

1. Plaintiffs' Article III standing is beyond serious dispute; indeed, the Government does not contest the point. The State of Hawaii, "as the operator of the University of Hawai'i system, will suffer proprietary injuries" because of EO-3's impact on current and prospective students, faculty, and speakers. Add. 15. The

individual Plaintiffs will be impeded from reuniting with close family members who have applied for visas. Add. 17-21. And the Muslim Association of Hawaii will lose members, visitors, and revenue. Add. 21-24. Each of these harms is actual and imminent, directly traceable to EO-3, and redressable by EO-3's invalidation.

The Government contends (at 23) that "respondents' challenges are not ripe because they" depend on "contingent future events." That is not true. EO-3 subjects respondents' relatives and associates to an immediate ban on entry. The prospect that a government official might decide, in his unreviewable discretion, to waive that ban in an individual case does not eliminate that harm. *See Gratz* v. *Bollinger*, 539 U.S. 244, 262 (2003) (holding that the "denial of equal treatment resulting from the imposition of [a] barrier" is itself a cognizable injury, regardless of whether it results in the "ultimate inability to obtain [a] benefit"). That is particularly so because, as the District Court held, Add. 22, EO-3 presently hampers the State's recruitment of students and faculty and deters individuals from joining or remaining members of the University and the Association. C.A. E.R. 218-219, 253-255; *see* C.A. E.R. 241-245 (explaining that plans for speaking engagements have already been affected).

2. Plaintiffs' statutory challenges are reviewable through two well-established routes. First, this Court has equitable authority to enjoin "violations of federal law by federal officials," including the President. *Armstrong* v. *Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015); *see Dames & Moore* v. *Regan*, 453 U.S. 654, 669 (1981); *Chamber of Commerce of U.S.* v. *Reich*, 74 F.3d 1322, 1327-28 (D.C.

Cir. 1996) (Silberman, J.). Second, the Administrative Procedure Act ("APA") authorizes the Court to "set aside" agency action at the behest of an "aggrieved" individual. 5 U.S.C. §§ 702, 706(2). Both routes are available to respondents: They allege that the President violated the INA by promulgating EO-3, and they seek to enjoin agency officials from carrying out the President's commands.

a. The Government nonetheless renews its argument (at 19-21) that the doctrine of consular nonreviewability renders courts powerless to review the President's compliance with the immigration laws. No case supports that remarkable proposition. The Government's authorities state that courts will not scrutinize how an immigration officer "exercis[ed] the *discretion* entrusted to him by Congress" when "exclud[ing] *a given alien*." *U.S. ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 543-544 (1950) (emphases added); *see Saavedra Bruno* v. *Albright*, 197 F.3d 1153, 1158 & n.2 (D.C. Cir. 1999) (deeming review improper because officers had "complete discretion" over visa issuance and revocation). There is no question, however, that courts may review whether executive officials have exceeded their authority under the immigration laws, particularly when setting sweeping policies. In *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), for example, the Court reviewed whether "[t]he President *** violate[d]" various INA and treaty provisions by invoking his authority under 8 U.S.C. § 1182(f) to "suspend[] the entry of undocumented aliens from the high seas." *Id.* at 158, 160.[3] Likewise, in *Knauff*,

[3] In *Sale*, the Solicitor General argued at length that the plaintiffs' claims were barred by the doctrine of consular nonreviewability. U.S. Br. 13-18 (No. 92-344);

this Court considered whether entry regulations promulgated by the Attorney General under a precursor of Section 1182(f) were "'reasonable' as they were required to be by the 1941 Act" and whether their application was consistent with the War Brides Act. 338 U.S. at 544-547.

The Government cites a handful of statutes to support its claim of nonreviewability, but if anything they show the opposite. The provisions foreclose review of a targeted class of immigration decisions: They provide, for instance, that courts may not review a consular officer's decision, "in his discretion, [to] *revoke* [a] visa," 8 U.S.C. § 1201(i) (emphasis added), or scrutinize "final order[s] of *removal*" outside a petition for review, *id.* § 1252(a) (emphasis added). The statutes say nothing to prevent courts from reviewing whether sweeping immigration policies violate the immigration laws—still less do they satisfy the "heavy burden" of "show[ing] that Congress 'prohibit[ed] all judicial review' of the [Executive]'s compliance with a legislative mandate." *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1651 (2015) (quoting *Dunlop* v. *Bachowski*, 421 U.S. 560, 567 (1975)).

The Government asserts (at 21) that "permitting review of a statutory challenge to the President's decision" would "invert the constitutional structure." But the Constitution gives *Congress* "exclusive[]" authority to set immigration policy. *Arizona* v. *United States*, 567 U.S. 387, 409 (2012) (quoting *Galvan* v. *Press*, 347 U.S. 522, 531 (1954)); *see Fiallo* v. *Bell*, 430 U.S. 787, 798-799 (1977) (declining

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Oral Arg. Tr., 1993 WL 754941, at *16-22 (Mar. 2, 1993). Not one Justice accepted the argument, and the Court reviewed the plaintiffs' claims on the merits.

to review a "congressional decision" to exclude a class of aliens, because such decisions remain "solely for the responsibility of the Congress"). The President, in contrast, must take care that Congress's laws are faithfully executed. U.S. Const. art. II, § 3. The notion that the Judiciary cannot prevent the President from transgressing the limits of his authority—no matter how brazen the statutory violation—contravenes our Constitution's fundamental separation of powers.

b. The Government further contends (at 22-23) that judicial review is unavailable because Defendants have not taken "final agency action." 5 U.S.C. § 704. Not so. For one thing, the President has made the final decision to promulgate EO-3. Although the President is not an "agency," the Court retains equitable authority to enjoin actions taken by the President in excess of his statutory authority. *Chamber of Commerce*, 74 F.3d at 1327-28; *see, e.g.*, *Dames & Moore*, 453 U.S. at 667. "[N]othing in the subsequent enactment of the APA" disturbed that authority. *Chamber of Commerce*, 74 F.3d at 1328.

Moreover, the Departments of State and Homeland Security have made a final decision to "enforce the President's directive," and Plaintiffs may obtain "[r]eview of the legality of [the President's] action" that way. *Franklin* v. *Massachusetts*, 505 U.S. 788, 828 (1992) (Scalia, J., concurring); *see id.* at 803 (majority opinion). Both agencies began enforcing portions of EO-3 on September 24, and expanded that enforcement after the Ninth Circuit partially stayed the District Court's injunction on November 13. Moreover, both agencies have issued

detailed guidance instructing officers how to implement EO-3.[4] Defendants have thus "consummat[ed]" their decision to implement the order, and are inflicting real "legal consequences" as a result. *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997).

The Government protests (at 22-23) that these actions are not "final" because agencies have not yet "denied a visa" to "the aliens whose entry respondents seek." But as this Court has made clear, plaintiffs may challenge an agency action that "give[s] notice" of the agency's enforcement plans, even if no "particular action [has been] brought against a particular [entity]." *U.S. Army Corps of Eng'rs* v. *Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016).

c. The Government is also incorrect in asserting (at 23) that respondents lack a "judicially cognizable interest" in challenging EO-3. The INA contains numerous provisions designed to facilitate the admission of students and scholars, *see* 8 U.S.C. § 1101(a)(15)(F), (H), (J), (O), promote family unification, *id.* § 1153(a), and enable entry by "member[s] of a religious denomination," *id.* § 1101(15)(R), (27)(C). Plaintiffs fall at least "arguably within the zone of interests * * * protected" by these provisions, and EO-3 intrudes on those interests. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 567 U.S. 209, 224 (2012). Nothing more is required to satisfy the "lenient" requirements for statutory standing. *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377, 1388-89 (2014); *see Legal Assistance for Vietnamese Asylum Seekers ("LAVAS")* v. *Dep't of State*, 45 F.3d 469,

[4] *See* U.S. Dep't of State, *Court Order on Presidential Proclamation on Visas* (Nov. 13, 2017), https://goo.gl/HoNiNz; U.S. Dep't of Homeland Sec., *Fact Sheet: The President's Proclamation* (Sept. 24, 2017), https://goo.gl/gaiEpi.

471 (D.C. Cir. 1995) (Sentelle, J.) (authorizing family members to challenge violation of Section 1152(a)(1)(A)).

d. Finally, the Government claims (at 23-24) that the challenged actions are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). The essence of Plaintiffs' argument, however, is that Congress did *not* vest the President with full discretion to exclude aliens whenever he wishes. *See infra* pp. 14-33. Rather, Congress imposed limits on the President's power—ones which the President has grossly exceeded. Courts can and do review whether "the President has violated a statutory mandate" in this manner. *Dalton* v. *Specter*, 511 U.S. 462, 474 (1994).

B. EO-3 Violates The INA.

The Constitution entrusts "[p]olicies pertaining to the entry of aliens * * * exclusively to Congress." *Arizona*, 567 U.S. at 409 (quoting *Galvan*, 347 U.S. at 531). 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.

EO-3 violates that detailed code three times over. It ignores Section 1152's specific bar on nationality discrimination and exceeds two fundamental statutory limits on the President's authority to exclude under Sections 1182(f) and 1185(a).

1. EO-3 Violates Section 1152(a)(1)(A).

Section 1152(a)(1)(A) provides that "no person shall * * * be discriminated against in the issuance of an immigrant visa because of * * * nationality." 8 U.S.C.

§ 1152(a)(1)(A). As Judge Sentelle has explained, "Congress could hardly have chosen more explicit language" in "unambiguously direct[ing] that no nationality-based discrimination shall occur." *LAVAS*, 45 F.3d at 473.

EO-3 flouts that clear command. It provides that the "nationals" of several targeted countries may not "ent[er] into the United States * * * as immigrants." EO-3 § 2. And it bars those disfavored nationals from being "issu[ed] * * * a visa" unless they satisfy the stringent requirements for obtaining a case-by-case waiver. *Id.* §§ 2, 3(c)(iii). It is difficult to conceive of a more flagrant example of "discriminat[ion] * * * because of * * * nationality." 8 U.S.C. § 1152(a)(1)(A).

a. The Government's tortured efforts to show otherwise are nearly self-refuting. The Government asserts (at 30-31) that Section 1152(a)(1)(A) does not prohibit executive officers from "discriminating on the basis of nationality" when determining whether an alien is *eligible* for a visa. There is no textual basis for this distinction, which would for all practical purposes gut the provision. That reading would permit the President to revive the "country-based quota system," U.S. Br. 31, simply by calling it a condition on visa eligibility, or enable consular officers to discriminate based on nationality when exercising their ample discretion to deem aliens ineligible under the provisions of Section 1182(a). That is not what Congress intended: Section 1152(a)(1)(A) includes express exceptions that authorize nationality distinctions when determining whether an alien is eligible for a "special immigrant" visa under Section 1101(a)(27) or an "immediate relative" visa under Section 1151(b)(2)(A)(i). These detailed exceptions would be superfluous if, as the

Government contends, Section 1152(a)(1)(A) does not bar nationality distinctions when determining visa eligibility in the first place.

The Government also claims (at 32) that Sections 1182(f) and 1185(a) supersede the limits in Section 1152(a). Every available canon of statutory interpretation says otherwise. Section 1152(a)(1)(A)'s prohibition of a particular action (nationality discrimination) is considerably more specific than the general authorizations to "suspend * * * entry" or set "reasonable rules" regarding entry. 8 U.S.C. §§ 1182(f), 1185(a). Section 1152(a)(1)(A) was enacted later-in-time than both Section 1182(f) and Section 1185(a).[5] And Section 1152(a)(1)(A) contains several express exceptions, some of surpassing obscurity, that do not include Sections 1182(f) and 1185(a). Reading these provisions in harmony does not effect an implied repeal; it is simply part of the "classic judicial task of reconciling many laws enacted over time." *United States* v. *Fausto*, 484 U.S. 439, 453 (1988).

Nor is there merit to the Government's passing suggestion (at 34) that the President may evade Section 1152(a)(1)(A) by engaging in nationality discrimination at the point of entry rather than at the time of visa issuance. 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.

[5] The Government gestures (at 33) towards the 1978 revisions to Section 1185(a), but nothing in those amendments remotely suggests an intent to repeal or limit Section 1152(a)(1)(A).

b. Finding no foothold in the text, the Government rests considerable weight on the claim that Section 1152(a)(1)(A) would raise constitutional concerns if it prohibited the President from drawing nationality distinctions to prevent an imminent threat of terrorism or when the country is "on the brink of war." U.S. Br. 32. But no party interprets the provision that way. Section 1152(a)(1)(A) bars "discrimination," a well-established term in the law that does not extend to restrictions closely drawn to address a "compelling" exigency. *LAVAS*, 45 F.3d at 473; *see Sekhar* v. *United States*, 133 S. Ct. 2720, 2724 (2013) (a word with a settled legal meaning "brings the old soil with it"). Indeed, Section 1152(a)(1)(A)'s drafters expressly distinguished between nationality distinctions based on "the racial origin of prospective immigrants," which are barred by Section 1152(a)(1)(A), and "those which are designed to keep subversive elements from our shores," which are not. 111 Cong. Rec. 21,782 (1965) (statement of Rep. Matsunaga).[6]

Historical practice confirms this understanding: The only two examples of nationality-based restrictions the Government has identified were tailored to specific exigencies. In 1986, President Reagan restricted entry by some Cuban nationals after Cuba had breached an immigration agreement, lesser sanctions had failed, and Cuban officials had begun "facilitating illicit migration to the United States" and abusing the visa process to "traffick[] in human beings." Proc. 5517 (1986); U.S. Dep't of State Bull. No. 2116, *Cuba: New Migration and Embargo*

[6] In addition, the Alien Enemies Act expressly authorizes the President to exclude "natives" and "citizens" of a country that "threaten[s]" war against the United States. 50 U.S.C. § 21.

Measures 86-87 (Nov. 1986). In 1979, President Carter responded to a severe "international cris[i]s"—the imprisonment of over 50 Americans as hostages—by delegating his authority to impose restrictions on Iranian nationals, and even then his order did not impose restrictions on entry. *Dames & Moore*, 453 U.S. at 669; *see* Exec. Order No. 12,172 § 1-101 (1979). The President's restrictions on "North Korean person[s]" similarly respond to the emergency posed by that country's ongoing efforts to obtain nuclear weapons and missiles capable of striking the United States. Exec. Order No. 13,810 § 1(a)(iv).

It is not difficult to distinguish between these pressing exigencies and the President's desire to "incentivize foreign nations" to provide more information to assist in the visa process. Under any conceivable definition, EO-3 engages in "discrimination * * * because of * * * nationality" and so is unlawful.

2. EO-3 Exceeds The President's Authority Under 8 U.S.C. §§ 1182(f) And 1185(a).

EO-3 also exceeds the limits of the President's authority under Sections 1182(f) and 1185(a). Although these provisions grant broad authority to the President, that authority is not—and, under our constitutional system, cannot be—unlimited. Rather, the statutes impose two essential preconditions that must be satisfied before the President may exclude a "class of aliens" or "all aliens" from the United States. 8 U.S.C. § 1182(f). First, the President must "find[]" that admission of the excluded aliens would be "detrimental." *Id.* Second, the harm the President identifies must be "detrimental to the interests of the United States," *id.*—a phrase that this Court has made clear "derive[s] much meaningful content from the

purpose of the Act, its factual background and the statutory context in which [it] appear[s]." *Knauff*, 338 U.S. at 543 (quoting *Lichter* v. *United States*, 334 U.S. 742, 785 (1948)). EO-3 satisfies neither of these critical requirements.

a. EO-3 does not contain adequate findings.

i. Section 1182(f) authorizes the President to suspend entry only if he "finds" that entry of the prohibited aliens "would be detrimental to the interests of the United States." By its terms, this language does not permit the President to exclude aliens on assertion alone. Rather, he must "find[]" some rational link between the aliens and a "detriment[]" to the United States.

That interpretation accords with precedent and congressional intent. When a statute requires that an officer make "findings," courts invariably have authority to inquire whether there is some "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168 (1962). Indeed, the drafters of Section 1182(f) and its predecessors made clear that they used the word "find" rather than "deem" to ensure that the President would "base his [decision] on some fact," rather than mere "opinion" or "guesses." 87 Cong. Rec. 5051 (1941) (statements of Rep. Jonkman and Rep. Jenkins).

The Government suggests (at 26) that the President may dispense with Section 1182(f)'s "finding" requirement by invoking his authority under Section 1185(a). That is wrong. Section 1185(a) grants the President general authority to prescribe "reasonable rules" regarding entry and departure, whereas Section 1182(f) sets the parameters for the President's power to suspend entry. Under established

canons of statutory interpretation, the President cannot use the more general authority in Section 1185(a) to evade the specific preconditions in Section 1182(f), and no prior President has attempted to do so.[7]

The Government further objects that there is no requirement that the President issue "*detailed* factual findings" or disclose "*classified or sensitive* material." U.S. Br. 26-27 (emphases added). Plaintiffs agree. The President simply must make a finding that "*support*[*s*] *the conclusion* that entry" would be detrimental. Add. 30. For 65 years, Presidents had little difficulty satisfying that criterion. Every order the Government cites excluded aliens because they engaged in self-evidently harmful conduct, such as supporting "subversive activities" against the United States or its allies,[8] committing severe violations of international law,[9] or attempting to enter the country "illegally."[10] Those findings were easily sufficient to demonstrate a link between the claimed exclusion and the problem identified.

ii. EO-3's findings, by contrast, fail to support its sweeping restrictions. The principal reason the order gives for banning every national of six countries is that those nations lack adequate "identity-management and information-sharing

[7] The Government cites President Carter's 1979 order (at 28), but that order did not itself suspend entry, and it responded to a clear exigency. *See supra* p. 18.

[8] Proc. 5887 (1988); *see* Proc. 5829 (1988).

[9] Proc. 8342 (2009) (human trafficking); Proc. 6958 (1996) (sheltering terrorists).

[10] Exec. Order No. 12,807 (1992); *see also* Proc. 8693 (2011) (excluding aliens falling into all three groups).

protocols" to provide "sufficient information to assess the risks" that their nationals pose. EO-3 § 1(h)(i). That finding is wholly inadequate for at least three reasons.

First, the law already addresses the problem the President identifies. Add. 32. "As the law stands, a visa applicant bears the burden of showing that the applicant is eligible to receive a visa," and "[t]he Government already can exclude individuals who do not meet that burden." Add. 33 (internal quotation marks omitted); *see* 8 U.S.C. § 1361. EO-3 fails to identify any respect in which this individualized adjudication process is insufficiently protective. It states only that the targeted countries "have 'inadequate' * * * information-sharing practices." EO-3 § 1(g). But if a foreign government does not provide information necessary to determine whether a national of that country is a terrorist, immigration officers have full authority to deny entry to that individual; that concern provides no logical basis for imposing additional sweeping restrictions.

Second, EO-3 contradicts its stated rationale. Add. 34-35. The Government claims that it "lacks sufficient information to assess the risks" that nationals of the banned countries purportedly pose, EO-3 § 1(h)(i), but the order permits nationals from nearly every banned country to enter on a wide range of nonimmigrant visas, *id.* § 2(a)-(c), (g)-(h). EO-3 fails to explain why the Government is unable to adequately vet aliens seeking entry as business travelers or tourists but not (for example) as crewmembers, exchange visitors, or agricultural workers. *See* U.S. Dep't of State, *Directory of Visa Categories*, https://goo.gl/c1t3P3. The order claims that "mitigating factors" justify these distinctions. EO-3 § 1(h)(iii). Yet none of the

listed factors—such as the possibility of "future cooperation," *id*.—even arguably mitigates the information-sharing deficiencies that supposedly motivate the order, let alone explains the order's distinctions among visa categories.

Moreover, although EO-3 purports to be the product of a neutral review of each country's information-sharing capabilities and identity-management practices, it conspicuously fails to adhere to its own criteria. Add. 33-34. Both Iraq and Venezuela failed to meet the Administration's baseline standards, yet the President declined to impose any entry ban on Iraq and imposed *de minimis* restrictions on Venezuela. *See* EO-3, §§ 1(g), 2(f). Conversely, Somalia satisfied all of the baseline standards, but the President imposed significant restrictions on the country. *Id.* § 2(h). As the District Court explained, these "internal incoherencies * * * markedly undermine" the order's purportedly neutral rationale. Add. 33; *see* Jt. Decl. of Former National Security Officials ¶¶ 5-12 (D. Ct. Dkt. 383-1).

Third, EO-3's nationality-based restrictions are substantially overbroad relative to the concerns the President asserts. Add. 31. The United States does not need information from a foreign government in order to confirm that a child under the age of five is not a terrorist. Nor is it plausible that the banned countries have meaningful information about aliens "who left as children" or "whose nationality is based on parentage alone." *Hawaii*, 859 F.3d at 773. Because the Government offers no reason to believe foreign governments have probative threat information about such individuals, EO-3's blanket bans cannot be justified.

Perhaps recognizing these problems, the President offers an alternative justification for the travel bans: that they serve as a bargaining chip to help "elicit" greater cooperation from the affected governments. EO-3 § 1(h)(i), (iii). That justification does not suffice under the plain text of the statute. Section 1182(f) requires the President to "find[]" that aliens' "*entry* * * * would be *detrimental* to the interests of the United States." The assertion that EO-3 provides an incentive to modify foreign countries' practices is not a finding that the aliens' entry would be "detrimental." Indeed, because every exclusion imposes diplomatic pressure, affirming EO-3 on this ground would effectively nullify the finding requirement.

b. EO-3 does not exclude aliens whose entry would be "detrimental to the interests of the United States."

EO-3 also transgresses a second limit on the President's suspension power: It excludes aliens whose entry is not "detrimental to the interests of the United States" within the meaning of the statute. The Court has long held that broad immigration provisions should not be read as grants of unbounded authority. And every indicia of congressional meaning makes clear that Congress deemed aliens' entry "detrimental to the interests of the United States" only where (1) the aliens *themselves* pose a threat to national security (as in the case of spies, saboteurs, or war criminals); or (2) the aliens threaten congressional policy during an exigency in which Congress cannot practicably act. EO-3 exceeds the limits of that power.

i. This Court has repeatedly made clear that immigration statutes should not be read, "in isolation and literally," to confer "unbounded authority." *United States* v. *Witkovich*, 353 U.S. 194, 199 (1957). In drafting the immigration laws, Congress

"must of necessity paint with a brush broader than that it customarily wields in domestic areas." *Zemel* v. *Rusk*, 381 U.S. 1, 17 (1965). But that does not mean that Congress wishes to "grant the Executive totally unrestricted freedom of choice." *Id*. Rather, broad immigration statutes derive "rational content" from "all relevant considerations," including their history, purpose, context, executive practice, and the Constitution itself. *Witkovich*, 353 U.S. at 199.

Applying this approach, the Court has "read significant limitations into * * * immigration statutes" that appeared unbounded. *Zadvydas* v. *Davis*, 533 U.S. 678, 689 (2001). In *Kent* v. *Dulles*, 357 U.S. 116 (1958), for example, the Court held that a statute granting the President authority to "designate and prescribe [passport rules] for and on behalf of the United States" did not confer "unbridled discretion," but instead authorized the President to deny visas "only" on the two grounds "which it could fairly be argued were adopted by Congress in light of prior administrative practice." *Id.* at 123, 128; *see Zemel*, 381 U.S. at 17-18 ("reaffirm[ing]" this holding); *Haig* v. *Agee*, 453 U.S. 280, 297-298 (1981) (same).[11] Similarly, in *Witkovich*, the Court held that the Attorney General's "seemingly limitless" authority to "require whatever information he deem[ed] desirable of aliens" authorized only those questions relevant to the statute's "purpose" of assessing "deporta[bility]." 353 U.S. at 199-200. Other examples abound. *See, e.g.*, *Zadvydas*, 533 U.S. at 689; *INS* v.

[11] *Kent* noted that a contrary reading might raise First Amendment concerns, but *Zemel* and *Haig* explicitly rejected such arguments and relied on the statute's text and history alone. *See Zemel*, 381 U.S. at 16-17; *Haig*, 453 U.S. at 308.

Nat'l Ctr. for Immigrants' Rights, 502 U.S. 183, 191-194 (1991); *Carlson* v. *Landon*, 342 U.S. 524, 543-544 (1952); *Mahler* v. *Eby*, 264 U.S. 32, 40 (1924).

This interpretive approach applies with particular force to statutes granting authority to act in "the public interest" or "the interests of the United States." The Court has explained that "[i]t is a mistaken assumption" that broad formulations like these make "a mere general reference to public welfare without any standard to guide determinations." *N.Y. Cent. Sec. Corp.* v. *United States*, 287 U.S. 12, 24 (1932). Rather, such words are invariably limited by "ascertainable criteria" derived from "[t]he purpose of the Act, the requirements it imposes, and the context of the provision in question." *Id.* at 24-25; *see Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001) ("[W]e have found an 'intelligible principle' in various statutes authorizing regulation in the 'public interest.'").[12]

ii. Every source of Section 1182(f)'s meaning makes clear that Congress deemed aliens "detrimental to the interests of the United States" only where (1) the aliens themselves threaten national security or (2) the aliens threaten congressional policy in an exigency where Congress cannot practicably act.

Text. When Congress enacts a phrase that "has been given a uniform interpretation by inferior courts or the responsible agency," a later statute "perpetuating the wording is presumed to carry forward that interpretation." Antonin Scalia & Bryan A. Garner, Reading Law 322 (2012); *see Sekhar*, 133 S. Ct.

[12] *See, e.g.*, *United States* v. *Lowden*, 308 U.S. 225, 230 (1939); *Nat'l Broad. Co.* v. *United States*, 319 U.S. 190, 216 (1943); *Gulf States Utils. Co.* v. *Fed. Power Comm'n*, 411 U.S. 747, 757-762 (1973).

at 2724. In *Kent*, *Zemel*, and *Haig*, for instance, the Supreme Court held that a statute enacted in 1918, extended in 1941, and made permanent in 1952 implicitly incorporated two limits evident in the "administrative practice" followed under the predecessor statutes. *Kent*, 357 U.S. at 128; *see Zemel*, 381 U.S. at 17-18; *Haig*, 453 U.S. at 297-298; *see also, e.g.*, *Mahler*, 264 U.S. at 40; *Lichter*, 334 U.S. at 783-784.

The same interpretive rule governs here. Congress first gave the President explicit authority to suspend the entry of aliens in 1918. Act of May 22, 1918, § 1(a), 40 Stat. 559, 559. That year, President Wilson exercised this authority to bar a narrow set of aliens who directly sought to harm national security, including spies, saboteurs, and other subversives. Proc. 1473, § 2 (1918); *see* 58 Cong. Rec. 7303 (1919); H.R. Rep. No. 65-485, at 3 (1918). He described these aliens as "*prejudicial to the interests of the United States*." Proc. 1473, § 2 (emphasis added).

In 1941, on the eve of World War II, Congress incorporated President Wilson's words into law. It amended the 1918 statute to provide that the President could exclude aliens during "war or * * * national emergency" if he found that "*the interests of the United States* require" it. Act of June 21, 1941, 55 Stat. 252, 252-253 (emphasis added). President Roosevelt's administration then issued regulations excluding several "[*c*]*lasses of aliens* whose entry [wa]s deemed to be *prejudicial to the * * * interests of the United States*." 6 Fed. Reg. 5929, 5931 (Nov. 22, 1941); *see* Proc. 2523, § 3 (1941). Just as in President Wilson's order, those "classes" consisted exclusively of aliens who themselves threatened national security, such as spies and saboteurs. 22 C.F.R. § 58.47(b)-(h) (1941); *see also id.* §58.47(a) (excluding aliens

who were already statutorily inadmissible). The regulations also added a catchall category, authorizing the exclusion of "[*a*]*ny alien* * * * 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.* § 58.47(i) (emphasis added). President Truman continued the same practice, marginally extending the regulations to include "war criminal[s]." 10 Fed. Reg. 8997, 9000-01 (July 21, 1945); *see* Proc. 2850 (1949).[13]

Accordingly, when Congress enacted the INA in 1952, it acted against an unbroken practice (spanning two World Wars, six Presidents, and the outbreak of the Korean War and the Cold War) under which only two broad "class[es] of aliens"—those akin to spies, saboteurs, and war criminals, and others "of a similar character" who threatened "the purpose of the act"—were designated as "prejudicial to the interests of the United States." In Section 1185, Congress reenacted without relevant change the wartime statute under which Presidents Wilson, Roosevelt, and Truman had issued these exclusions. Immigration and Nationality Act of 1952, Pub. L. 82-414, § 215(a). And in Section 1182(f), Congress borrowed the operative language of the implementing regulations and proclamations almost verbatim and permitted the President to exclude "class[es] of aliens *** detrimental to the interests of the United States" during times of peace, as well. Absent "evidence of any intent to repudiate the longstanding administrative construction"—of which

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

there is none—it is reasonable to infer that Congress intended these words to convey the limited meaning they carried for decades. *Haig*, 453 U.S. at 297-298.

Purpose. The statute's purpose strongly supports this reading. The drafters of the 1918 statute stated that their "intent[]" was principally to authorize the President to exclude "renegade Americans or neutrals" employed as German "agents." H.R. Rep. No. 65-485, at 2. But they drafted the provision more "broad[ly]" because "[n]o one can 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 [for the President] to appeal to Congress for new legislation in each new emergency." *Id.* at 3.

The drafters of the 1941 statute shared the same limited objectives. President Roosevelt initially requested authority to exclude aliens harmful to "the interests of the United States" so that he could exclude foreign agents "engaged in espionage and subversive activities" prior to the outbreak of war. 87 Cong. Rec. 5048 (1941) (statement of Ruth Shipley, Director, Passport Division, U.S. Dep't of State). Several members of Congress balked at this language, however, because it appeared to "give the President unlimited power, under any circumstances, to make the law of the United States," *id.* at 5326 (statement of Sen. Taft), or to "override the immigration laws," *id.* at 5050 (statement of Rep. Jonkman). The bill's sponsors reassured them that the statute "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) (emphases added); *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 Rep. Van Nuys); *see id.* at 5048 (statement of Director Shipley).

Presidents Roosevelt and Truman fulfilled that promise. *See supra* pp. 26-27. And in 1952, when Congress borrowed the express terms of the wartime regulations to create Section 1182(f), the provision attracted almost no debate. *See Chisom* v. *Roemer*, 501 U.S. 380, 396 & n.23 (1991) ("Congress' silence in this regard can be likened to the dog that did not bark."). The sole explanation by the bill's supporters reaffirmed the statute's longstanding objective: Representative Walter, the House sponsor, stated that Section 1182(f) was "essential" because it would permit the President to suspend entry during an exigency, like an "epidemic" or economic crisis, in which "it is impossible for Congress to act." 98 Cong. Rec. 4423 (1952).

Executive practice. Presidential practice since 1952 provides further support for this reading. *See Dames & Moore*, 453 U.S. at 686 (explaining that "systematic, unbroken, executive practice * * * may be treated as a gloss" on presidential power). Forty-two of the 43 orders issued prior to EO-1 excluded aliens who themselves engaged in conduct harmful to national security. *See* Cong. Research Serv., *Executive Authority to Exclude Aliens: In Brief* 6-10 (2017), https://goo.gl/2KwIfV (listing orders). The sole remaining order, President Reagan's restriction on Cuban nationals, responded to a dynamic and fast-moving diplomatic crisis that, by its

nature, was difficult for Congress to "swiftly" address. *Zemel*, 381 U.S. at 17; *see supra* pp. 17-18. 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).[14]

Statutory context. The surrounding provisions of the INA further reinforce this reading. Section 1182(f) appears after a long and exceptionally detailed list of "[c]lasses of aliens" whom Congress wished to exclude within a yet more comprehensive and finely reticulated immigration code. 8 U.S.C. § 1182(a). Each of the exclusions specified in Section 1182(a) targets aliens who *themselves* engaged in some activity or have some quality that renders their admission harmful to U.S. interests. *See, e.g.*, 8 U.S.C. § 1182(a)(1)(A) (communicable disease); *id.* § 1182(a)(3)(B) (terrorist); *id.* § 1182(a)(4) (public charge). The core of the President's Section 1182(f) power permits him to designate additional categories of the same kind—that is, aliens who *themselves* pose a threat to the "interests of the United States." *See Hall Street Assocs.* v. *Mattel, Inc.*, 552 U.S. 576, 586 (2008) (describing the *noscitur a sociis* canon). His residual authority under that provision "provides a safeguard against the danger posed by any particular case or class of cases that is *not* covered by one of the categories in section 1182(a)," *Abourezk* v. *Reagan*, 785 F.2d 1043, 1049 n.2 (D.C. Cir. 1986) (emphasis added), *aff'd by equally divided Court*, 484 U.S. 1 (1987) (per curiam), but does not permit him to

[14] President Carter's 1979 Iran order did not suspend entry and was not issued pursuant to Section 1182(f). *See supra* p. 20 n.7. But it too involved an "international cris[i]s" requiring swift action. *Dames & Moore*, 453 U.S. at 669.

"effortlessly evade" the statute's "specifically tailored" criteria for inadmissibility. *EC Term of Years Tr.* v. *United States*, 550 U.S. 429, 434 (2007).

The Constitution. Finally, the longstanding limits on the President's Section 1182(f) power are consistent with the President's established and proper role in the constitutional scheme. Section 1182(f) gives the President flexibility to respond to "changeable and explosive" circumstances in which Congress cannot "swiftly" act. *Zemel*, 381 U.S. at 17. But it leaves "exclusively to Congress" the authority to set immigration policy in the ordinary course. *Arizona*, 567 U.S. at 409.

The Government's reading, in contrast, is irreconcilable with the Constitution's separation of powers. It would vest in the President a power of staggering breadth, with no intelligible principle to guide its exercise. The Supreme Court has adopted narrow constructions of far less consequential immigration provisions to avoid rendering them boundless delegations. *See, e.g.*, *Zemel*, 381 U.S. at 17-18; *Carlson*, 342 U.S. at 543-544; *Mahler*, 264 U.S. at 40.

The Government has suggested that the President can be given this limitless discretion because it involves his inherent Article II authority. That is incorrect. The Government relies exclusively on dicta in *Knauff* stating that the power to exclude aliens "is inherent in the executive power to control the foreign affairs of the nation." 338 U.S. at 542 (citing *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)). The Court has since made clear, however, that "[p]olicies pertaining to the entry of aliens" are "entrusted exclusively to Congress." *Galvan*, 347 U.S. at 531. And it has specifically repudiated *Curtiss-Wright*'s suggestion that

"the President has broad, undefined powers over foreign affairs." *Zivotofsky ex rel. Zivotofsky* v. *Kerry*, 135 S. Ct. 2076, 2089 (2015).

iii. EO-3 exceeds the longstanding limits on the President's Section 1182(f) authority. There is no contention that EO-3 excludes aliens who *themselves* threaten national security, such as subversives, spies, and war criminals—the heartland of the exclusion power for the last 99 years. Indeed, the Government has long disclaimed any belief that all 150 million aliens the President is excluding are "potential terrorists" or that they otherwise intend harm to the United States. U.S. Reply Br. 24, *Hawaii* v. *Trump*, No. 17-15589 (9th Cir. Apr. 28, 2017).

Nor does EO-3 fall within the President's residual authority to protect congressional policy where Congress cannot practicably act. *First*, the order does not respond to an exigency of any kind. Rather, it raises concerns about screening and vetting that have existed for years if not decades—ones that Congress has repeatedly enacted legislation specifically to address. *See infra* p. 33 n.15. Unlike President Reagan's Cuba order or the wartime proclamations issued in 1918 and 1941, EO-3 does not respond to a fast-breaking diplomatic crisis, a war, a national emergency, or any other "changeable and explosive" circumstance to which Congress cannot "swiftly" respond. *Zemel*, 381 U.S. at 17.

Second, EO-3 does not follow but instead subverts congressional policy. Congress has established an intricate scheme for identifying and vetting terrorists. That system includes "specific criteria for determining terrorism-related inadmissibility," *Kerry* v. *Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring

in the judgment) (citing 8 U.S.C. § 1182(a)(3)(B)), finely reticulated vetting procedures,[15] and exclusions from the Visa Waiver Program for aliens from countries deemed to present a heightened terrorist threat, 8 U.S.C. § 1187(a)(12).

The President has effectively overridden Congress's scheme and replaced it with his own. EO-3 excludes aliens who do not satisfy any of the criteria set in the statutory terrorism bar. It sidesteps the vetting scheme Congress established. And whereas Congress determined—in the face of similar security concerns—that aliens from five of the targeted countries could be admitted if they underwent vetting through visa procedures, the Order deems such vetting categorically inadequate and imposes a blanket ban. Nothing in the statutes Congress enacted vests the President with such a line-item veto power over our immigration laws.

The President has taken "measures [that are] incompatible with the expressed * * * will of Congress." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). The immigration laws vest the President with broad authority, but that authority must be exercised subject to the limits set by Congress. EO-3 transgresses those limits, and was properly enjoined.

C. EO-3 Violates The Establishment Clause.

EO-3 also contravenes the Establishment Clause. The evidence was overwhelming that EO-2 was promulgated for the unconstitutional purpose of preventing Muslim immigration. *See* Resp. Br. 47-60, *Hawaii* v. *Trump*, No. 16-

[15] *See, e.g.*, Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. 110-53, §§ 701-731; Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. 107-173; 8 U.S.C. §§ 1201-1202, 1221-1226a, 1361.

1540 (U.S. Sept. 11, 2017). In design and effect, EO-3 continues the same unlawful policy. It expressly acknowledges that it emerged as a result of EO-2, and indefinitely continues the bulk of EO-2's entry suspensions. Furthermore, the President has repeatedly explained that the two orders pursue the same aim. *See* Amicus Br. of MacArthur Justice Ctr. 22-27, C.A. Dkt. 45. Nine days before EO-3 was released, for example, the President demanded a "larger, tougher and more specific" ban, reminding the public that he remains committed to a "travel ban" even if it is not "politically correct." C.A. E.R. 88. And on the day EO-3 became public, the President made clear that it *was* the harsher version of the travel ban, telling reporters, "The travel ban: the tougher, the better." *Id.* at 91.

EO-3's neutral trappings cannot erase this record. Although EO-3 purports to have arisen out of a neutral review process, that "neutral" review was in substantial part predetermined by EO-2, and the President himself substantially deviated from the recommendations he received. Moreover, the order operates in a manner at odds with the primary secular rationale it asserts. *See supra* pp. 21-22. And the addition of two non-Muslim countries appears almost entirely symbolic: A prior sanctions order already restricts the entry of North Korea's nationals (who virtually never apply for admission to the United States in any event), and only a small handful of Venezuelan government officials are affected by EO-3. Indeed, one might be forgiven for assuming that these countries were added primarily to improve the Government's "litigating position," rather than to achieve any legitimate substantive goal. *McCreary Cty.* v. *ACLU*, 545 U.S. 844, 871 (2005).

Because an objective observer would still conclude that EO-3's purpose is the fulfillment of the President's unconstitutional promise to enact a Muslim ban, *see* Amicus Br. of Interfaith Orgs. and Clergy Members 8-17, C.A. Dkt. 73, the injunction may be affirmed on that basis as well.

II. The Balance Of The Equities Does Not Favor A Stay.

The balance of the equities counsels strongly against any further stay of the District Court's injunction. This Court has already held as much: In its June 26 Order, the Court declined to disturb the lower courts' determination that EO-2's "concrete burdens" on individuals and the State "outweigh[ed] the Government's interest in enforcing § 2(c)." *IRAP*, 137 S. Ct. at 2087. Accordingly, the Court held that "[t]he injunctions [would] remain in place" for "parties similarly situated to [the individual plaintiffs] and Hawaii," and it forbade the enforcement of the travel bans "against foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States." *Id.* at 2088.

The same equitable considerations govern here. Once more, Plaintiffs have demonstrated that the travel bans inflict profound harms on individuals because of the "delay[ed] entry of their family members," and they have shown that EO-3 "harm[s] the State" by interfering with the University of Hawaii's ability to admit and retain faculty and students. *Compare id*. at 2087, *with* C.A. E.R. 91-100. Meanwhile, the Government sets forth the same interests that were held insufficient to outweigh these harms with respect to EO-2: national security and the protection of presidential power. *Compare* U.S. EO-2 Stay Br. at 33, *with* U.S.

Br. 37-38. Thus, the Ninth Circuit properly refused to issue a stay that would permit the Government to exclude foreign nationals who have a "bona fide relationship with a person or entity in the United States."

1. This Court should similarly refuse the Government's request. The Government has offered nothing close to the showing necessary to override the equitable determination this Court made less than six months ago. The Government has not, for example, strengthened its claims with respect to the national security need for the order. *See Ziglar*, 137 S. Ct. at 1862 (national security "must not become a talisman used to ward off inconvenient claims"). There is an exceedingly poor fit between the order's stated rationales and its operation. *See* Amicus Br. of Cato Institute 10-30, C.A. Dkt. 84. And the order's exceptions for various nonimmigrant visas make clear the Government is capable of admitting the nationals it targets without posing a national security threat. *See supra* pp. 21-22. Further, the Government still has not explained why there is an urgent need to implement an order that usurps Congress's power over immigration to address a set of concerns for which Congress has already legislated. *See supra* pp. 33.[16]

Moreover, the Government's conduct during this litigation belies any claims of an urgent national security interest. *See Ruckelshaus* v. *Monsanto Co.*, 463 U.S.

[16] The only other "harm" the Government points to—the inability to enforce the Executive's dictates—is so lacking in force that this Court did not mention it when it balanced the equities with respect to EO-2. Indeed, if such a "harm" were sufficient, this Court would have to stay every injunction of a regulation. *But see, e.g.*, *Commodity Futures Trading Comm'n* v. *British Am. Commodity Options Corp.*, 434 U.S. 1316, 1320-22 (1977) (Marshall, J., in chambers) (declining Government's request to stay an injunction of a new regulation).

1315, 1318 (1983) (Blackmun, J., in chambers) (the Government's "failure to act with greater dispatch tends to blunt [its] claim of urgency and counsels against the grant of a stay"). The Government did not seek expedited review of EO-2, even though the injunctions there left immigration law precisely where it is now under the lower courts' injunctions. And it has adopted a similarly plodding pace with respect to EO-3, waiting a full week to seek an emergency stay from the Court of Appeals after the District Court entered its TRO, and then waiting another full week before seeking a stay from this Court after the Ninth Circuit entered its partial stay order. This is not how the Government behaves when it believes there is a true national security need. *See, e.g.*, *United States* v. *Washington Post Co.*, 446 F.2d 1327, 1329 (D.C. Cir. 1971) (en banc), *aff'd sub nom. New York Times Co.* v. *United States*, 403 U.S. 713 (1971) (Government sought stay in this Court contemporaneously with its court of appeals merits briefing in the Pentagon Papers case); *Youngstown*, 343 U.S. at 584 (Government sought relief from the circuit court on the same day the district court entered an injunction in the Steel Seizure case).

2. While the Government's case for a stay is, if anything, weaker with respect to EO-3, Plaintiffs' asserted harms are greater. As the District Court found, EO-3 will result in "prolonged separation from family members, constraints to recruiting and retaining students and faculty members" at the State's University, and "the diminished membership of the Association." Add. 40. And, unlike in EO-2 where the travel bans (and thus their attendant harms) were scheduled to end after 90 days, EO-3's bans apply *indefinitely*. As a result, there is no end in sight for

families seeking to reunite. Universities, too, are forced to contend with indefinite restrictions on their ability to engage fully in the international community, both with respect to recruitment and retention of international scholars, and with respect to their participation and hosting of conferences and scholastic activities. The equitable balance therefore tilts even more strongly in respondents' favor now than it did when this Court issued its stay judgment in *IRAP*.

The Government barely contests these harms. Instead, it argues that they are unlikely to befall during the pendency of the appeal. U.S. Br. 37. But that contention did not succeed with respect to the time-limited entry bans in EO-2, and it certainly does not succeed with respect to EO-3's indefinite policies of exclusion. The harms imposed by the order are not remote or speculative; to the contrary, EO-3 has *already* affected plans for scholarly events at the University of Hawaii, Add. 15-16, and it has *already* prompted one of the Association's families to make plans to leave Hawaii "because they cannot receive visits from their family members and friends from the affected countries," Add. 22.

III. The Scope Of The Injunction Is Proper.

The Government asks this Court to further narrow the injunction in some unspecified way in order to tailor the relief to these Plaintiffs. This Court already rejected a similar request with respect to EO-2, *see IRAP*, 137 S. Ct. at 2087-88, and for good reason. As this Court has made clear, "the scope of injunctive relief" must be "dictated by the extent of the violation established." *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979). When an Executive Branch policy contravenes a statute or

the Constitution, it is thus invalid in all its applications and must be struck down on its face. *See, e.g.*, *Util. Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2449 (2014); *Nat'l Mining Ass'n* v. *U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409-10 (D.C. Cir. 1998) (Williams, J.). In particular, "a facial challenge" is a "proper response to the systemic disparity between [a] statutory standard" and an Executive Branch policy. *Sullivan* v. *Zebley*, 493 U.S. 521, 536 n.18 (1990).

The Government's claim that Article III requires a narrower injunction is irreconcilable with these precedents. If accepted, that position would eliminate courts' power to award facial relief at all. It would also render this Court's prior stay order in EO-2 unlawful. No precedent supports this radical proposition; the cases the Government cites merely hold that courts must limit injunctive relief to the policy or provision "that produced the injury in fact that the plaintiff has established." *Lewis* v. *Casey*, 518 U.S. 343, 357 (1996); *see Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (instructing courts to consider whether "the challenged *provisions*" should be enjoined (emphasis added)); *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101, 106 (1983) (considering whether plaintiff has standing to obtain injunction against "the City's [chokehold] *policy*" (emphasis added)). That is precisely what the lower courts did here: They enjoined the provisions of EO-3 that inflict harm on respondents.[17]

A nationwide injunction is particularly appropriate in the immigration realm.

[17] This Court's one-paragraph stay decision in *United States Department of Defense* v. *Meinhold*, 510 U.S. 939 (1993), said nothing about Article III, and involved equitable considerations entirely different than those present here.

More limited relief would contravene the constitutional requirement for a "*uniform* Rule of Naturalization." U.S. Const. art. I, § 8, cl. 4 (emphasis added). Congress created a "comprehensive and unified system" of immigration for a reason. *Arizona*, 567 U.S. at 401. That system should not be splintered by narrow injunctions. *See Texas* v. *United States*, 809 F.3d 134, 187-188 (5th Cir. 2015), *aff'd by equally divided Court*, 136 S. Ct. 2271 (2016) (per curiam).

Moreover, the piecemeal remedy the Government proposes would be both inadequate and impractical. Respondents cannot identify in advance precisely which individuals may wish to enroll in the State's University or join the Association (or who would be chilled from doing so), and targeted relief will not eliminate the profound deterrent effect that EO-3 has on all prospective candidates from the affected countries. Further, as a practical matter, limiting the relief to the individual plaintiffs will lead to dozens if not hundreds of additional suits seeking relief for the countless similarly situated parties throughout the United States. *See, e.g.*, Amicus Br. of State of California *et al.* 5-22, C.A. Dkt. 71-1 (detailing similar harms suffered by fifteen states and the District of Columbia); Amicus Br. of Colleges and Universities 20-32, C.A. Dkt. 87 (explaining harms inflicted on 31 universities and colleges); Amicus Br. of Muslim Justice League *et al.* 9-17, C.A. Dkt. 68 (describing separation and hardship suffered by countless families).

CONCLUSION

The Government's application for a stay should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

As required by Supreme Court Rule 29.5, I, Neal Kumar Katyal, a member of the Supreme Court Bar, hereby certify that one copy of the foregoing Supplemental Brief was served via electronic mail and Federal Express on November 28, 2017 on:

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