U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

October 5, 2017

Honorable Scott S. Harris
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Donald J. Trump, et al. v. International Refugee Assistance Project, et al., No. 16-1436
- and -
Donald J. Trump, et al. v. State of Hawaii, et al., No. 16-1540

Dear Mr. Harris:

This letter is in response to this Court's September 25 order requesting letter briefs addressing "whether, or to what extent, the Proclamation issued on September 24, 2017, may render [these appeals] moot," as well as "whether, or to what extent, the scheduled expiration of Sections 6(a) and 6(b) of Executive Order No. 13780 may render those aspects of case No. 16-1540 moot." The United States respectfully submits that both of these appeals are now or soon will be moot. As a result, pursuant to this Court's "established practice," the Court should "vacate the judgment[s] below and remand with a direction to dismiss." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). Vacatur is especially necessary here, where the lower-court opinions could "spawn[ ] * * * legal consequences" in future cases, *id.* at 42, on critical issues including justiciability and the President's authority to protect national security.

A. The Executive Order And September 24 Proclamation

1. The President's March 6 Executive Order

As explained in our initial brief (at 7-19), these cases involve challenges to Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) (Order). In *Trump* v. *International Refugee Assistance Project*, No. 16-1436 (*IRAP*), the district court preliminarily enjoined Section 2(c) of the Order, which placed a 90-day pause on entry, subject to exceptions, for certain nationals of six countries that Congress or the Executive previously identified as presenting heightened terrorism-related concerns. In *Trump* v. *Hawaii*, No. 16-1540, the district court preliminarily enjoined all of Sections 2 and 6 of the Order. Section 6(a) globally suspended for 120 days decisions on refugee applications, and travel into the United States, under the U.S. Refugee Admission Program (USRAP), subject to exceptions. Section 6(b) limited to 50,000 the number of refugees who could be admitted to the United States in Fiscal Year 2017. On appeal, the Fourth and Ninth Circuits modified but substantially affirmed the injunctions. J.A. 170-385 (*IRAP*); J.A. 1164-1237 (*Hawaii*). This Court partially stayed both injunctions

on June 26, *Trump* v. *International Refugee Assistance Project*, 137 S. Ct. 2080, 2087-2089 (2017) (per curiam), which triggered the Order's effective date, 82 Fed. Reg. 27,965 (June 19, 2017).

For refugees, the Order's cap in Section 6(b) ended on September 30, at the conclusion of Fiscal Year 2017. Gov't Br. 38 n.14. The President has established a new maximum number of refugees to be admitted in Fiscal Year 2018 per 8 U.S.C. 1157. See Memorandum for Sec'y of State, *Presidential Determination on Refugee Admissions for Fiscal Year 2018* (Sept. 29, 2017), https://www.whitehouse.gov/the-press-office/2017/09/29/presidential-memorandum-secretary-state. Section 6(a)'s global suspension on travel and decisions for refugees is set to expire on October 24—120 days after the government was able to put the Order into effect following this Court's stay. During that 120-day period, the Order directed that "the Secretary of State, in conjunction with the Secretary of Homeland Security and in consultation with the Director of National Intelligence, shall review the USRAP application and adjudication processes to determine what additional procedures should be used to ensure that individuals seeking admission as refugees do not pose a threat to the security and welfare of the United States, and shall implement such additional procedures." J.A. 1433.

Section 2(c)'s temporary entry suspension expired on September 24, 90 days after this Court's June 26 stay. Gov't Br. 36. In Section 2(a), the President directed the Secretary of Homeland Security to conduct a global review to determine whether foreign governments provide adequate information about their nationals seeking U.S. visas. The Order directed the Secretary to report his findings to the President, after which nations identified as deficient would have time to alter their practices. In its June 26 order, the Court stated that it "expect[ed]" its stay would "permit the Executive to conclude its internal work and provide adequate notice to foreign governments within the 90-day life of § 2(c)." 137 S. Ct. at 2089.

2. The President's September 24 Proclamation

On September 24, the President issued a Proclamation summarizing the completed review and notice process, as well as his findings and corresponding determinations. Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 27, 2017). The Proclamation describes how, as part of the government's review, the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, determined the information needed from or about foreign governments to enable the United States to assess its ability to make informed decisions about foreign nationals applying for visas. That information had three components: (1) identity-management information, to assess "whether the country issues electronic passports embedded with data to enable confirmation of identity, reports lost and stolen passports to appropriate entities, and makes available upon request identity-related information not included in its passports"; (2) national-security and public-safety information, to determine "whether the country makes available * * * known or suspected terrorist and criminal-history information upon request, whether the country provides passport and national-identity document exemplars, and whether the country impedes the United States Government's receipt of information"; and (3) a national-security and public-safety risk assessment, including such factors as "whether the country is a known or potential terrorist safe haven, whether it is a participant in the Visa Waiver Program * * * that meets all of [the program's] requirements, and whether it regularly fails to receive its nationals subject to final orders of removal from the United States." § 1(c).

After developing these criteria, the Department of Homeland Security, in coordination with the Department of State, collected data on and evaluated every foreign country. Based on the specified criteria, the Secretary of Homeland Security identified 16 countries as "inadequate." § 1(e). Another 31 countries were classified as "at risk" of becoming "inadequate." *Ibid.* These preliminary results were submitted to the President on July 9, as the Order directed. § 1(c). The Department of State then conducted a 50-day engagement period to encourage all foreign governments to improve their performance. These diplomatic efforts yielded significant gains: for example, 29 countries produced travel-document exemplars to combat fraud, and 11 countries agreed to share information on known or suspected terrorists. § 1(f).

After the engagement period ended, the Secretary of Homeland Security submitted a report to the President, per Section 2(e), recommending entry restrictions on certain nationals from seven countries (Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen) that continue to be "inadequate" in providing information to the United States. § 1(h)(ii). The Secretary also determined that Iraq did not meet the United States' requirements, but in lieu of entry restrictions, recommended additional scrutiny of Iraqi nationals seeking entry because of the United States' close cooperative relationship with Iraq, the strong United States diplomatic presence in Iraq, the significant presence of United States forces in Iraq, and Iraq's commitment to combatting the Islamic State of Iraq and Syria (ISIS). § 1(g). The Secretary also recommended entry restrictions on nationals of Somalia. Although Somalia generally satisfies the information-sharing criteria, the Secretary found that the Somali government's inability to effectively and consistently cooperate, as well as the terrorist threat that emanates from its territory, present special circumstances warranting limitations on entry. § 1(i).

Pursuant to the President's broad authority under Article II of the Constitution and federal statutes, including 8 U.S.C. 1182(f) and 1185(a)(1), and based on extensive consultation with his Cabinet, the President issued a Proclamation on September 24, 2017 consistent with the Secretary of Homeland Security's recommendations. The Proclamation imposes a different set of restrictions than Section 2(c) of the Order, and it applies to a different set of countries. Unlike the Order, the Proclamation imposes no restrictions on Sudan, but it does impose restrictions on Chad, North Korea, and Venezuela. The restrictions are tailored for each country to take account of U.S. goals for foreign policy, national security, and counterterrorism, as well as individualized assessments of the country's conditions and capabilities. Thus, for countries that refuse to cooperate regularly with the United States (Iran, North Korea, and Syria), the Proclamation suspends entry of persons seeking both immigrant and nonimmigrant visas; for countries that are valuable terrorism partners but nonetheless have information-sharing deficiencies (Chad, Libya, and Yemen), it suspends entry only of persons seeking immigrant visas and business, tourist, and business/tourist nonimmigrant visas; for Somalia, it suspends entry of persons seeking immigrant visas and requires additional scrutiny of nationals seeking nonimmigrant visas; and for Venezuela, it suspends entry of "officials of government agencies of Venezuela involved in screening and vetting procedures" and "their immediate family members" on nonimmigrant business and tourist visas. § 2.

The Proclamation also exempts certain categories of foreign nationals from the suspensions and provides that the limitations on entry are subject to case-by-case waivers in accordance with guidance implemented by the Departments of State and Homeland Security. § 3.

For each country, the Proclamation is designed "to encourage cooperation" and to "protect the United States until such time as improvements occur." § 1(h)(i). To that end, it requires an ongoing review process to determine whether the limitations imposed should be continued, terminated, modified, or supplemented. § 4. The suspensions on entry were effective immediately for foreign nationals who previously were restricted under the Order and this Court's June 26 stay, and they will be effective October 18 for all other covered persons. § 7.

B. The Appeals Of The Preliminary Injunctions Are Or Soon Will Be Moot

1. Sections 2(c) and 6(b) of the Order have expired

Section 2(c)'s 90-day entry suspension ended on September 24. Section 6(b)'s refugee cap ended on September 30. As a result, the preliminary injunction in *IRAP* against Section 2(c) is now without effect, as are the portions of the preliminary injunction in *Hawaii* against Sections 2(c) and 6(b). Thus, these appeals of the injunctions are moot. See *University of Tex.* v. *Camenisch*, 451 U.S. 390, 394 (1981) (When enjoined conduct has ceased, "the correctness of the decision to grant [the] preliminary injunction * * * is moot."). If this Court were to continue to hear these appeals, it would be asked to decide questions with no ongoing practical import: for example, whether the Ninth Circuit was wrong to conclude that the Order lacked sufficient findings, J.A. 1197, even though the Proclamation is supported by new and different national-security findings; and whether the Fourth Circuit was wrong to conclude that the Order's national-security determinations were pretextual, J.A. 219-223, even though the Proclamation now in effect is the result of an extensive, multi-agency review and recommendations from the President's Cabinet. An opinion from this Court on those issues would be advisory.

For the same reason, even if respondents' claims were ever justiciable, but see Gov't Br. 22-35, Sections 2(c) and 6(b) of the Order no longer impose any arguable harm on respondents. See *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997) ("To qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'") (citation omitted). As the United States explained in its initial brief (at 28-30), the claims of the only two individual respondents whom the courts of appeals found to have standing became moot wholly apart from the Order's expiration when their relatives received visas. And now that the Order has expired, neither they nor any other respondent can claim to be injured by any supposed "message" that the Order formerly communicated. Nor can Hawaii claim pecuniary or any other type of harm from the now-lapsed provisions. Indeed, respondents themselves effectively conceded in this Court that the running of the Order's time limits would moot these appeals. See IRAP Br. in Opp. 13 (arguing that when Section 2(c)'s time-limited ban expires, "[a]t that point, the injunction will be moot"); Hawaii Supp. Br. in Opp. to Appl. for Stay 35 (arguing that "'time will soon bury the question'" because once the government's reviews were complete, "this Court's review will serve no practical purpose") (citation omitted).

The President's September 24 Proclamation confirms that respondents' challenges to Section 2(c) are moot, because this Court has held that a case is moot when a challenged government regulation is replaced by one that is not substantially similar. See, *e.g.*, *Kremens* v. *Bartley*, 431 U.S. 119, 128-129 (1977) (claims of named plaintiffs challenging a Pennsylvania statute were moot because the state had since enacted a new statute substantially altering the

challenged procedures). Here, the new Proclamation materially differs from the Order in several ways that bear directly on the legal questions raised by these appeals. In *Hawaii*, the Ninth Circuit's core statutory holding was that the Order lacked a "sufficient finding * * * that the entry of the excluded classes [of aliens] would be detrimental to the interests of the United States." J.A. 1197. And in *IRAP*, the Fourth Circuit held that the Order was the product of religious animus, not bona fide security concerns. J.A. 219-223 (concluding that Order was "motivated" by a "desire to exclude Muslims from the United States"). The Proclamation's text and operation, however, differ significantly from Section 2(c), and it is based on detailed findings regarding the national-security interests of the United States that were reached after a thorough, worldwide review and extensive consultation. Although the *IRAP* respondents are now challenging the Proclamation, see 17-cv-361 D. Ct. Doc. 198, at 2 (D. Md. Sept. 29, 2017), that new and distinct challenge must proceed on its own terms and in the district court in the first instance.[*]

The exceptions to mootness that this Court has recognized do not apply. The limited exception when a legal question is capable of repetition yet evading review "applies 'only in exceptional circumstances,'" where "the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration," and "there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again." *Kingdomware Technologies, Inc.* v. *United States*, 136 S. Ct. 1969, 1976 (2016) (citation omitted; brackets in original). Here, there is no significant likelihood that the same parties will be subject to the same action again. Dr. Elshikh's mother-in-law and Doe #1's wife have now received visas to immigrate to the United States, and Dr. Elshikh's mother-in-law has in fact already entered the country. Gov't Br. 30. Although Dr. Elshikh claims to have other relatives who could be affected by a policy that denies entry to nationals of certain countries, that claim is not in the record. Regardless, there is no evidence that he or anyone else has successfully petitioned the U.S. Citizenship and Immigration Services on behalf of those other relatives or that they have filed visa applications with the State Department. "Such speculative contingencies afford no basis for [the Court's] passing on the substantive issues [the parties] would have [the Court] decide with respect to the now-expired provisions." *Burke* v. *Barnes*, 479 U.S. 361, 364-365 (1987) (citation, and quotation marks omitted). Moreover, no respondent is likely to face the "same action": the purposes of the temporary suspensions that were set out in the Order have been accomplished, and the President has issued a new Proclamation based on new findings.

The exception to mootness for a defendant's "voluntary cessation" of "allegedly illegal conduct" also does not apply here. *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n.10 (1982). That exception exists because "a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior." *City News & Novelty, Inc.* v. *City of Waukesha*, 531 U.S. 278, 285 n.1 (2001). But the government has not

[*] Similarly, the President's September 29 Determination regarding the maximum number of refugees to be admitted in Fiscal Year 2018 confirms that the *Hawaii* respondents' challenge to Section 6(b) is moot. The Ninth Circuit held that Section 6(b) violated 8 U.S.C. 1157 because it reduced mid-year the number of admissible refugees below the maximum that had been set for Fiscal Year 2017. J.A. 1216-1221. But the new Determination establishes a new, different maximum for the newly commenced fiscal year, rendering academic the Ninth Circuit's analysis of Section 6(b) of the Order under 8 U.S.C. 1157.

altered Section 2(c) or 6(b) of the Order to cause mootness. Rather, the entry suspension and refugee cap were always temporary while the Departments of State and Homeland Security reviewed the Nation's screening and vetting procedures; the provisions simply expired by their own terms. In *Burke*, Members of the House of Representatives sued to challenge the President's pocket-veto of a bill pertaining to U.S. military aid to El Salvador. 479 U.S. at 363. When the "bill in question expired by its own terms * * * a few weeks after the Court of Appeals entered its judgment," this Court held "that any issues concerning whether [the bill] became a law were mooted." *Ibid.* The same is true here. And although the President extended the suspensions' effective date to clarify that they would take effect only when injunctions against them were lifted, that had the effect of prolonging the potential for judicial review—not evading it. If respondents (or anyone else) believes the Proclamation violates their rights, they can file new challenges and those claims will not evade review (provided the plaintiffs satisfy the requirements for judicial review, such as standing).

2. The global suspension of refugee travel and decisions under Section 6(a) is scheduled to expire soon

Section 6(a)'s 120-day global suspension on refugee adjudications and travel is set to expire on October 24. At the end of the 120 days, the Order directs that "[t]he Secretary of State shall resume travel of refugees into the United States under the USRAP * * * , and the Secretary of Homeland Security shall resume making decisions on applications for refugee status only for stateless persons and nationals of countries for which the Secretary of State, the Secretary of Homeland Security, and the Director of National Intelligence have jointly determined that the additional procedures implemented pursuant to [the review during the 120-day process] are adequate to ensure the security and welfare of the United States." J.A. 1433-1434. The Section 6(a) review process is ongoing, and the United States anticipates that, per the terms of the Order, the government will complete its review and undertake any new actions regarding refugees by October 24. The government will promptly apprise the Court of such developments.

Any further decision regarding prospective restrictions on refugees, based on the multiagency assessments conducted during the 120-day review, will confirm that the appeal of the injunction in *Hawaii* against Section 6(a) is moot. Just as a challenge to the new Proclamation would require new claims, a challenge to the legality of any new measures regarding refugees would require a showing that such measures are causing a concrete and particularized injury, as well as new proceedings to account for the government's review process. None of that is before the Court here. In fact, no respondent in *Hawaii* even has a justiciable claim against Section 6(a). See Gov't Reply Br. 16-17. Hawaii is the only party whose challenge to Section 6(a) is at issue in this Court, see *id.* at 16, but at most a handful of refugees are placed in Hawaii each year (approximately three per year since 2010, none in Fiscal Year 2016, and only three in Fiscal Year 2017). See Hawaii Br. 22; Bureau of Population, Refugees, and Migration, U.S. Dep't of State, *Proposed Refugee Admissions for Fiscal Year 2018*, Tbl. VIII, https://www.state.gov/documents/organization/274857.pdf; Bureau of Population, Refugees, and Migration, U.S. Dep't of State, *Refugee Arrivals by Placement State and Nationality Oct. 1, 2016 through Aug. 31, 2017*, http://www.wrapsnet.org/s/Arrivals-by-State-and-Nationality-by-Month9517.xls. Hawaii cannot show a cognizable injury from being able to receive refugees except those covered by any particular set of restrictions, and Hawaii clearly has not done

so on this record. Nor could Hawaii establish that any new measures would cause it irreparable harm, which independently precludes continued injunctive relief.

C. The Judgments Below Should Be Vacated Under *Munsingwear*

Where, as here, an appeal becomes moot before the appealing party can obtain review, the Court's "established practice" is to "vacate the judgments below and remand with a direction to dismiss." *Munsingwear*, 340 U.S. at 39. This rule is "commonly utilized," *id.* at 41, and is the "normal" procedure for mootness, *Camreta* v. *Green*, 563 U.S. 692, 713 (2011). The rule serves important purposes: vacatur "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." *Munsingwear*, 340 U.S. at 40. In addition, a "party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." *U.S. Bancorp Mortgage Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 25 (1994). "Vagaries of circumstance" describes these cases: the temporary provisions in Sections 2(c) and 6(b) of the Order have expired on their own terms, and Section 6(a)'s global suspension on refugees will soon do likewise. This Court repeatedly has vacated preliminary injunctions where cases became moot on their way here. See *Honig* v. *Students of Cal. Sch. for the Blind*, 471 U.S. 148 (1985) (per curiam); *Railway Labor Executives' Ass'n* v. *Gibbons*, 455 U.S. 457 (1982); *Camenisch*, 451 U.S. at 390.

Vacatur is particularly essential here given the implications of the decisions below for the President's ability to conduct foreign affairs and protect national security. As this Court has repeatedly noted, "courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Department of Navy* v. *Egan*, 484 U.S. 518, 530 (1988); see *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108, 115-116 (2013) (noting "the danger of unwarranted judicial interference in the conduct of foreign policy"); *First Nat. City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759, 765-768 (1972) (opinion of Rehnquist, J.) ("[T]his Court has recognized the primacy of the Executive in the conduct of foreign relations."). If allowed to stand, the lower courts' decisions threaten to undermine the Executive's ability to deal with sensitive foreign-policy issues in strategically important regions of the world. The Court should not permit that unnecessary consequence, especially when the rulings below are preliminary injunctions litigated on a highly expedited basis.

1. The government did not attempt to evade judicial review

Respondents note that vacatur generally is not appropriate where "the party seeking relief from the judgment below caused the mootness by voluntary action." *Bancorp*, 513 U.S. at 24. This exception to *Munsingwear* has been applied where the party seeking vacatur mooted the case by settlement, *id.* at 25, or failed to pursue an appeal, *Karcher* v. *May*, 484 U.S. 72, 83 (1987). But those are starkly different from the circumstances here. Indeed, this Court has previously recognized that vacatur is the proper course when a case becomes moot due to the expiration of a challenged law. See *Burke*, 479 U.S. at 363. In *Burke*, where the case was mooted when the challenged bill "expired by its own terms," this Court vacated the court of appeals' judgment and remanded with instructions to dismiss the complaint. *Id.* at 365. This case is materially indistinguishable from *Burke*. And the brevity of the Order's temporary provisions is actually a virtue, ensuring that restrictions are not retained for longer than is necessary.

The logic of *Burke*, as the Court made clear in *Alvarez* v. *Smith*, 558 U.S. 87 (2009), is that when neither a "desire to avoid review" nor "the presence of th[e] federal case" played any "significant role" in motivating the circumstances that caused mootness, there is "not present * * * the kind of 'voluntary forfeit[ure]' of a legal remedy that led the Court in *Bancorp* to find that considerations of 'fairness' and 'equity' tilted against vacatur." *Id*. at 96-97 (brackets in original). That description fully applies here: the mooting events in these appeals—the time limits that were features of the Order from the start—were unrelated to the litigation and certainly not an attempt to evade judicial review. From the beginning, the Order's entry and refugee suspensions always were temporary measures to facilitate the government's interagency review processes and to protect national security in the interim.

2. Numerous additional factors counsel in favor of vacatur

Although vacatur is an "equitable tradition," *Bancorp*, 513 U.S. at 25, the Court has recognized that sometimes it is a "necessity," *Camreta*, 563 U.S. at 713. It is difficult to imagine circumstances better suited to *Munsingwear* than these.

First, as noted above, leaving intact the lower courts' judgments potentially could inflict serious damage on the President's ability to protect national security, conduct foreign affairs, and formulate Executive Branch policy. In *Arizonans*, this Court recognized that, when considering the equities of vacatur, courts should take account of exceptional circumstances, including affording respect for the place of States in our federal system. 520 U.S. at 75. These appeals concern another, no less critical part of our constitutional structure—the Framers' allocation of responsibility to the Executive to manage foreign affairs and protect national security. See, *e.g.*, *Winter* v. *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) ("[N]either the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people." (quoting *Boumediene* v. *Bush*, 553 U.S. 723, 797 (2008))); *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 490-491 (1999) (noting that immigration and deportation policy implicates "foreign-policy objectives" that the judiciary is "ill equipped" to assess). Here, the President acted pursuant to the broad authority vested in him by the Constitution and Acts of Congress, including 8 U.S.C. 1182(f) and 1185(a)(1). When the President of the United States, pursuant to express statutory authorizations and in consultation with multiple Cabinet officials, has implemented procedures that he deems necessary to protect national security, invalidation of the President's action should not stand where mootness prevents this Court from considering the matter.

Second, the decisions below have the potential for seriously problematic "prospective effect[s]," *Camreta*, 563 U.S. at 702, contrary to the Court's admonition that a judgment "unreviewable because of mootness" generally should not "spawn[ ] any legal consequences," *Munsingwear*, 340 U.S. at 42. In *Camreta*, the Court reviewed a lower-court opinion that had found a constitutional violation but also had held that the defendants were shielded by qualified immunity. The case thereafter became moot, and this Court held that vacatur was appropriate because "a constitutional ruling in a qualified immunity case is a legally consequential decision." 563 U.S. at 713. Even though the defendants had ultimately prevailed below on qualified-immunity grounds, the "adverse constitutional ruling" would continue to "injur[e]" them, because an official who "regularly engages in that conduct as part of his job * * * must either change the way he performs his duties or risk a meritorious damages action." *Id*. at 703.

Here, although some parts of the lower courts' opinions have been overtaken by events, other parts of the opinions potentially remain "legally consequential." *Camreta*, 563 U.S. at 713. For example, the Ninth Circuit held that the President is generally forbidden by 8 U.S.C. 1152(a)(1)(A) from using country-by-country security assessments to impose nation-specific restrictions on entry, which the court held would constitute "discriminat[ion]," or an unlawful "preference or priority," in the "issuance of an immigrant visa" on the basis of "nationality." J.A. 1209-1210 (citation and emphasis omitted). The Ninth Circuit also held that Section 1182(f) requires the President to provide detailed findings sufficient to satisfy APA-style judicial review, even though the Executive often must withhold this information for national-security and foreign-policy reasons. And the Ninth Circuit held that 8 U.S.C. 1157 prevents the President from directing that fewer refugees be admitted than the maximum number established each fiscal year in consultation with Congress. J.A. 1216-1221.

Those conclusions contravene longstanding government practice. See Gov't Reply Br. 21-22, 25 (describing President Reagan's proclamation barring entry of Cuban nationals and President Carter's order resulting in the denial of visas to Iranian nationals); *id.* at 28 (describing how the government routinely admits fewer refugees than authorized by the annual maximum). The Fourth Circuit's ruling finding anti-Muslim animus likewise risks undermining the President's ability to conduct foreign policy and protect national security in a critical region of the world. Moreover, if the judgments below are not vacated, plaintiffs can be expected to attempt to rely on them in new litigation. The *IRAP* respondents are already challenging the Proclamation in district court based on the Fourth Circuit's holdings, and a separate new lawsuit against the Proclamation has been filed in the same district court. 17-cv-2921 D. Ct. Doc. 1 (D. Md. Oct. 2, 2017). Similarly, respondents in *Hawaii* or other plaintiffs may claim that the Ninth Circuit's decision below disables the Proclamation's country-specific conditions on the entry of foreign nationals into the United States. The lower courts should be considering challenges to the Proclamation anew based on its text, operation, and findings—all of which are materially different from the Order. The government respectfully submits that this is exactly a case where *Munsingwear* vacatur is a "necessity." *Camreta*, 563 U.S. at 713.

Third, the decisions below are interlocutory. "The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Camenisch*, 451 U.S. at 395. Here, the lower courts made sweeping rulings about the scope of Executive authority, reviewability, and injunctive relief that could affect future cases. Those rulings—including an extraordinary conclusion that the President was motivated by animus disguised as concern for national security, J.A. 219-223 (*IRAP*)—should not be frozen where mootness has deprived the government of "a full opportunity to present [its] case" or to obtain "a final judicial decision based on the actual merits of the controversy." *Camenisch*, 451 U.S. at 396.

Fourth, the judgments below rest on what are at best highly dubious determinations of justiciability. This Court in *Arizonans* explained that vacatur was appropriate in part because of the Court's grave doubts about standing, both for the initial plaintiff and the parties attempting to appeal. See 520 U.S. at 72-73. Similar fundamental problems infect these appeals. As

explained above, most of the individual respondents' family members have received visas during this litigation, Gov't Br. 30, and none of the other respondents ever had justiciable claims in the first place, *id.* at 22-35. The sweeping, worldwide injunctions affirmed by the courts of appeals, in suits in which the courts relied on claims asserted by two individuals (which are now moot) and the State of Hawaii (which has no cognizable stake in the admission of aliens from abroad), vastly exceeded the permissible scope of relief under both Article III and bedrock equitable principles. Decisions resting on such a tenuous foundation should not stand.

Fifth, contrary to respondents' suggestion that the government was not diligent (IRAP Br. 30; Hawaii Br. 27), this is not a case where the government "slept on its rights" and "now asks [the Court] to do what by orderly procedure it could have done for itself." *Munsingwear*, 340 U.S. at 41. When the Fourth Circuit affirmed the injunction against Section 2(c), the government moved swiftly to seek both a writ of certiorari and a stay from this Court precisely so that the government could carry out the Order. The government even sought certiorari before judgment as to the injunction entered by the district court in the *Hawaii* case. This Court then granted a stay that enabled the government to put the Order largely into effect. The Court in *Burke* vacated under *Munsingwear* without any suggestion that the petitioners had a special obligation to seek review from this Court before the challenged bill expired by its own terms, and the government is aware of no case suggesting that it must seek expedited consideration (including potentially a summer argument) for the sole purpose of preventing a case from becoming moot. In light of this Court's partial stay of the lower courts' injunctions, there was even less reason in these appeals than in *Burke* to request such an extraordinary procedure.

At bottom, respondents contend that it is "important" for the Court to delineate the limits of the President's powers over immigration. Hawaii Br. 27. But this Court has held that "[w]here difficult issues of great public importance are involved, there are strong reasons to adhere scrupulously to the customary limits of [the Court's] discretion" and to its "customary procedural rules." *Illinois* v. *Gates*, 462 U.S. 213, 224 (1983). The customary procedural rule in cases like these is vacatur under *Munsingwear*. This Court should follow that rule here.

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For the foregoing reasons, the Court should vacate both of the lower courts' judgments as moot. The appeal of the Fourth Circuit's judgment is now moot in full, as is the Ninth Circuit appeal concerning Sections 2(c) and 6(b). For the only portion of the Ninth Circuit's judgment still at issue—regarding the global refugee suspension in Section 6(a)—no respondent has a justiciable claim, and in any event the global suspension will expire in less than three weeks. At a minimum, once Section 6(a) expires on October 24, this Court should vacate the judgments and remand with instructions to dismiss the complaints. To the extent the Court concludes that any part of either appeal is not moot, the case should be reset for argument, and the judgments of the courts of appeals should be reversed.

Sincerely,

/s/ Noel J. Francisco

Noel J. Francisco
Solicitor General

cc: Counsel of record (via email)