Nos. 16-1436 and 16-1540

In the Supreme Court of the United States

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

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.

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

v.

STATE OF HAWAII, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND NINTH CIRCUITS

REPLY BRIEF FOR THE PETITIONERS

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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I. RESPONDENTS' CHALLENGES TO THE ORDER ARE NOT JUSTICIABLE

Setting aside the impact of Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 27, 2017) (which will be addressed in supplemental briefing), the lower courts never should have reached the merits. Respondents' statutory claims are barred by the rule that the denial of entry to aliens abroad is not judicially reviewable "unless Congress says otherwise"—and far from

authorizing review, Congress has foreclosed it. *Saavedra Bruno* v. *Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999). To garner review, respondents therefore must claim a violation of their own constitutional rights. *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972); *Kerry* v. *Din*, 135 S. Ct. 2128 (2015). But they merely reframe derivative injuries that flow from the effect of Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) (Order), on aliens abroad. In any event, those claimed delay-in-entry injuries are now moot because the only family members plausibly affected by the entry suspension have received visas. And even if respondents could challenge the Order's entry suspension, they cannot possibly challenge its refugee provisions.

A. Respondents' Statutory Challenges To Section 2(c) Are Not Cognizable

1. The Administrative Procedure Act does not authorize review

Respondents do not directly confront the fundamental principle that "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 543 (1950). Respondents instead begin by arguing (IRAP Br. 29) that the Administrative Procedure Act (APA), 5 U.S.C. 702, authorizes review here. But in three ways the APA embraces the general rule that visa denials are not judicially reviewable.

a. The APA does not apply "to the extent that * * * statutes preclude judicial review." 5 U.S.C. 701(a)(1). "Whether and to what extent a particular statute precludes judicial review is determined not only from its

express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 345 (1984) (*CNI*). Here, the conclusion is "unmistakable" from history that "the immigration laws 'preclude judicial review' of the consular visa decisions." *Saavedra Bruno*, 197 F.3d at 1160 (citation omitted).

Indeed, the one time this Court held that the APA permitted review of an order excluding an alien who had presented himself at the border, see *Brownell* v. *Tom We Shung*, 352 U.S. 180, 184-186 (1956), Congress responded by abrogating that ruling. Gov't Br. 25. Both this Court and Congress acted on the understanding that aliens abroad have no such right under the APA. The Court disclaimed any "suggest[ion]" that "an alien who has never presented himself at the border of this country may avail himself of the declaratory judgment action by bringing the action from abroad." 352 U.S. at 184 n.3. The House Report accompanying the abrogating statute was even clearer, explaining that APA suits would "give recognition to a fallacious doctrine that an alien has a 'right' to enter this country which he may litigate in the courts of the United States against the U.S. Government as a defendant." H.R. Rep. No. 1086, 87th Cong., 1st Sess. 33 (1961).

Respondents assert (IRAP Br. 28) that no specific provision of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, expressly bars review. But this Court has made clear that statutory context can preclude review even without "express language." *CNI*, 467 U.S. at 345. And "[t]here was no reason for Congress to" preclude review expressly because, "[g]iven the historical background against which it has legislated

over the years * * * , Congress could safely assume that aliens residing abroad were barred from challenging consular visa decisions in federal court unless legislation specifically permitted such actions." *Saavedra Bruno*, 197 F.3d at 1162. Indeed, if an alien present in the United States cannot invoke the APA to obtain review—as Congress prescribed in 1961, Gov't Br. 25—then *a fortiori* neither aliens abroad nor U.S. citizens acting at their behest may seek review. And given that Congress generally foreclosed "judicial review" of visa revocations, 8 U.S.C. 1201(i), it is implausible that Congress would allow review of visa denials in the first instance.

b. In addition, the APA provision that creates a cause of action, 5 U.S.C. 702, itself preserves the background rule of nonreviewability. Section 702 contains a "qualifying clause" providing that "'[n]othing herein'—which includes the portion of § 702 from which the presumption of reviewability is derived—'affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground.'" *Saavedra Bruno*, 197 F.3d at 1158 (quoting 5 U.S.C. 702(1)). "[T]he doctrine of consular nonreviewability—the origin of which predates passage of the APA—thus represents one of the 'limitations on judicial review' unaffected by § 702's opening clause granting a right of review to persons suffering 'legal wrong' from agency action." *Id.* at 1160 (citation omitted).

c. Finally, the APA does not apply "to the extent that * * * agency action is committed to agency discretion by law." 5 U.S.C. 701(a)(2). The President is not an "agency" under the APA, and thus his decisions are not "reviewable for abuse of discretion under the APA." *Franklin* v. *Massachusetts*, 505 U.S. 788, 800-801

(1992). But if the APA applied, the statutes granting the President broad authority to suspend and restrict entry of aliens commit those matters to his discretion. 8 U.S.C. 1182(f), 1185(a)(1); see *Webster* v. *Doe*, 486 U.S. 592, 599-601 (1988).

2. Respondents cannot avoid the need for express authorization to review their statutory claims

Unable to ground review in the APA or any other statute, respondents try to avoid the need for express statutory authorization in various ways. None is sound.

a. Respondents assert (IRAP Br. 25-29; Hawaii Br. 15-18) that this Court's decisions authorize the review they seek. The decisions they cite, however, involved either habeas actions brought by aliens in U.S. custody, see *Knauff*, *supra*, or deportation of aliens in the United States, *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 581-582 (1952)—not exclusion of aliens abroad.

Respondents cite (IRAP Br. 25; Hawaii Br. 16) only one case, *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), in which this Court reviewed a challenge by aliens abroad to measures returning them to their home country. Contrary to respondents' description (IRAP Br. 25), the Court did not "reject[]" the argument that the aliens' claims were unreviewable; it simply did not address reviewability because it rejected their claims on the merits. Cf. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 91 (1998). Moreover, the aliens in *Sale* alleged that the INA and a treaty gave

them a judicially enforceable right. Here, respondents have no such colorable claim. See pp. 8-9, *infra*.[1]

Respondents' remaining cases are irrelevant. *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981), addressed a presidential order nullifying attachments against assets of (and suspending claims against) Iran. And *Dalton* v. *Specter*, 511 U.S. 462 (1994), dealt with closure of a naval base. Neither involved exclusion of aliens. Moreover, *Dalton* merely "assume[d] for the sake of argument that some claims that the President has violated a statutory mandate are judicially reviewable outside the framework of the APA." *Id.* at 474. It then explained that "longstanding authority holds that such review is not available when the statute in question commits the decision to the discretion of the President," and "[h]ow the President chooses to exercise the discretion Congress has granted him"—here in 8 U.S.C. 1182(f) and 1185(a)(1)—"is not a matter for [judicial] review." 511 U.S. at 474, 476.

b. Respondents' other arguments lack merit. First, they argue (IRAP Br. 27-28; Hawaii Br. 17) that nonreviewability of exclusion of aliens abroad applies only to consular officers' individualized decisions, not the President's policy decisions. But it makes no sense to permit review of decisions by the Head of the Executive Branch—often grounded in sensitive foreign-affairs and national-security determinations—while barring review of consular officers' case-specific determinations. Respondents assert that consular officers possess "discretion,"

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[1] Respondents invoke (IRAP Br. 26) *Abourezk* v. *Reagan*, 785 F.2d 1043 (D.C. Cir. 1986), aff'd by an equally divided Court, 484 U.S. 1 (1987). But *Abourezk* held that Congress expressly authorized review in 8 U.S.C. 1329 (1982). 785 F.2d at 1050-1051. Congress later amended that statute to preclude review. *Saavedra Bruno*, 197 F.3d at 1162, 1164.

Hawaii Br. 17 (citation omitted); see IRAP Br. 28 n.17, but the Constitution and statutes at issue here grant the President far more latitude than provisions governing consular officers. Compare 8 U.S.C. 1182(f), 1185(a)(1), with 22 C.F.R. 40.6.

Second, respondents assert (Hawaii Br. 16-17) that only Congress's decisions are unreviewable. But *Knauff* made clear that "[t]he action of the *executive officer* * * * is final and conclusive." 338 U.S. at 543 (emphasis added). Although "[n]ormally Congress supplies the conditions of the privilege of entry into the United States," "the power of exclusion of aliens is also inherent in the executive department of the sovereign," and "Congress may in broad terms authorize the executive to exercise the power." *Ibid.* Especially when Congress has done so, the Executive's decisions are similarly unreviewable. See *ibid.*

Third, respondents incorrectly argue (IRAP Br. 26) that, because they also assert constitutional claims, constitutional avoidance compels considering their statutory arguments first. The principle that courts should "'not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of,'" applies only if the nonconstitutional ground is "'present.'" *Pearson* v. *Callahan*, 555 U.S. 223, 241 (2009) (citation omitted). It does not justify disregarding other limitations on judicial review. See, *e.g.*, *Stern* v. *Marshall*, 564 U.S. 462, 478-482 (2011) (constitutional avoidance did not require disregarding party's waiver of statutory argument); *Doe*, 486 U.S. at 600-605 (constitutional claims reviewable but statutory claims not reviewable

under APA). Otherwise, litigants could circumvent limitations on judicial review of statutory claims simply by adding meritless constitutional claims.

3. Respondents lack any statutory right to enforce

Even if the general nonreviewability rule did not foreclose respondents' claims, respondents cannot challenge Section 2(c) on statutory grounds because no statute affords them any rights to enforce. The APA's "general cause of action" exists only for "persons 'adversely affected or aggrieved by agency action within the meaning of a relevant statute,'" *CNI*, 467 U.S. at 345 (citation omitted)—*i.e.*, persons to whom Congress intended to accord privately enforceable rights. See also *Thompson* v. *North Am. Stainless, LP*, 562 U.S. 170, 177-178 (2011).

Respondents cannot assert any rights under the statutes they invoke in challenging Section 2(c). The provisions empowering the President to suspend or restrict entry of aliens, 8 U.S.C. 1182(f), 1185(a)(1), and prohibiting nationality-based discrimination in the issuance of immigrant visas, 8 U.S.C. 1152(a)(1)(A), do not confer any rights on U.S. persons seeking entry of aliens. Even when the INA permits a U.S. person to file a petition for a foreign family member's classification as a relative eligible for immigrant status (*e.g.*, John Doe #1 petitioning for his wife), any interest he has "terminate[s]" "[w]hen [his] petition [i]s granted." *Saavedra Bruno*, 197 F.3d at 1164. Nothing in the INA authorizes him to challenge the later denial of a visa to his relative. *A fortiori*, persons or entities whom the INA does *not* entitle to petition for classification of aliens (*e.g.*, Hawaii) have no statutory right regarding aliens' entry. And for the individual respondents whose relatives have

now received visas, any claimed statutory right is moot. See pp. 13-14, *infra*.

4. No equitable action for injunctive relief is available

Respondents alternatively contend (IRAP Br. 29; Hawaii Br. 15) that they may bring an equitable action for injunctive relief under *Armstrong* v. *Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015). But the "judge-made remedy" *Armstrong* addressed does not permit plaintiffs to sidestep "express and implied statutory limitations" on judicial review of nonconstitutional claims, such as under the APA; "'[c]ourts of equity can no more disregard'" those limitations than may "'courts of law.'" *Id.* at 1384-1385 (citation omitted). Indeed, a suit for injunctive or declaratory relief is the primary vehicle for challenging government action under the APA itself. See 5 U.S.C. 703. *Armstrong* itself held that a federal statute "implicitly preclude[d] private enforcement" actions "in equity" based on the text and structure of the statute. 135 S. Ct. at 1385. Likewise here, the general rule of nonreviewability precludes the type of equitable action respondents contemplate. A contrary rule would eviscerate the APA's limits on judicial review.

B. Respondents' Establishment Clause Challenges To Section 2(c) Are Not Cognizable

This Court has permitted review of exclusion of aliens abroad only when U.S. citizens assert that the exclusion infringes their own constitutional rights. Respondents cannot point to any cognizable violation of their own Establishment Clause rights.

1. The individual respondents' delay-in-entry injuries are not cognizable and in any event are now moot

a. To secure review under *Mandel* and *Din*, respondents must show that Section 2(c) violated their

own Establishment Clause rights. But Section 2(c) applied only to aliens abroad; it did not regulate Doe #1 or Dr. Elshikh at all. Respondents claim that the Order violates the Establishment Clause because it discriminates against their foreign-national relatives. But only those persons who are personally subject to religious discrimination have standing to challenge such action as allegedly discriminatory. Gov't Br. 29-30. That principle applies with particular force here because respondents' alien relatives abroad themselves have no constitutional rights regarding their entry. See *Mandel*, 408 U.S. at 762. It makes no sense to allow U.S. plaintiffs to assert a derivative Establishment Clause claim predicated on alleged discrimination against aliens who themselves have no rights to assert.[2]

b. Respondents are left to contend (Hawaii Br. 19) that anyone who suffers injury-in-fact from an alleged violation of the Establishment Clause may challenge the alleged violation. This Court has never adopted that broad theory, and a simple example illustrates why it cannot be correct. Consider a non-Muslim U.S. citizen who seeks to have his Syrian, non-Muslim brother-in-law visit. On respondents' view, the U.S. citizen could sue to challenge the Order's exclusion of the brother-in-

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[2] The Fourth Circuit correctly did not find that the organizational respondents in No. 16-1436 had standing to challenge Section 2(c). Two of them—IRAP and HIAS—are refugee-resettlement organizations and have not identified any member or client injured by Section 2(c), Gov't Br. 28 n.10, as opposed to the refugee provisions. See pp. 16-17, *infra*. Respondent MESA did allege that Section 2(c) would prevent its members from attending the organization's annual meeting. But that conference is scheduled for November 2017—long after both the 90-day suspension was originally scheduled to expire in June 2017 *and* the actual expiration date of September 24, 2017. Gov't Br. 28 n.10; *IRAP* Gov't C.A. Br. 25.

law under the Establishment Clause on the basis that it discriminates against Muslims. Yet the Order cannot plausibly be said to discriminate against the U.S. citizen (who is not Muslim) on the basis of his own religion; the Order does not apply to him at all. And the brother-in-law (who also is not Muslim) has no rights regarding his entry under the Establishment Clause. The same is true here.

Respondents cite no case that contravenes the common-sense principle that, regardless of injury-in-fact, a plaintiff still must allege a violation of his own Establishment Clause rights. They cite (IRAP Br. 20-21; Hawaii Br. 19-21) *McGowan* v. *Maryland*, 366 U.S. 420 (1961), and *Two Guys From Harrison-Allentown, Inc.* v. *McGinley*, 366 U.S. 582 (1961). But both involved typical Establishment Clause claims brought by employees and businesses directly regulated by Sunday-closing laws. *McGowan*, 366 U.S. at 430-431; *Two Guys*, 366 U.S. at 583 n.1. Although compliance with those laws caused the plaintiffs economic injury, their Establishment Clause rights were implicated because they were coerced into engaging in an allegedly religious practice—observing the Sabbath—by laws purportedly adopted for religious purposes.[3] Respondents' other

[3] Respondents assert that *Two Guys* permitted a business to challenge application of a Sunday-closing law "even though the direct victims of the penalties were the store's *employees*." Hawaii Br. 21; see IRAP Br. 20. That is incorrect. The law regulated the business directly, see 366 U.S. at 583 n.1, and this Court characterized the challenge as one by the business to prevent application of the law to the business itself, see *id.* at 585-586. The law's operation against the employees was merely an additional means of regulating the business. See *Two Guys From Harrison-Allentown, Inc.* v. *McGinley*, 179 F. Supp. 944, 946 (E.D. Pa. 1959), aff'd, 366 U.S. 582 (1961).

cases likewise were brought by plaintiffs directly subject to the regulations at issue. See *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703, 705-711 (1985) (employer challenging law requiring businesses to allow employees not to work on their chosen Sabbath); *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116, 117-127 (1982) (restaurant operator challenging law allowing nearby churches to veto liquor licenses); *Epperson* v. *Arkansas*, 393 U.S. 97, 100 (1968) (teacher challenging law forbidding teaching of evolution).

Respondents also argue (Hawaii Br. 18) that the Establishment Clause is different because it imposes a structural constraint on the government. But a person seeking to challenge governmental action must still show a violation of his own rights under the Clause. The cases above, for example, were all brought by plaintiffs whose conduct was directly regulated by the laws at issue. Moreover, this Court has rejected respondents' argument for Establishment Clause exceptionalism: the Clause "establishes a norm of conduct which the Federal Government is bound to honor—to no greater or lesser extent than any other inscribed in the Constitution." *Valley Forge Christian Coll.* v. *Americans United For Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982). Had respondents asserted substantively identical claims of discrimination against other persons under the Free Exercise Clause, *e.g.*, *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993) (*Lukumi*), their claims undisputedly would be foreclosed, see *McGowan*, 366 U.S. at 429-430. Respondents presumably did not style their claims in free-exercise terms precisely because the categorical, nationwide relief they request would then plainly be unavailable. But there is no reason to allow

respondents to evade established justiciability rules by applying special, less stringent standards for Establishment Clause claims.

c. Even if the individual respondents' asserted injuries were once cognizable, they are now plainly moot. All but one whose relatives sought visas—Dr. Elshikh's mother-in-law, Doe #1's wife, Paul Harrison's fiancé, and John Doe #3's wife—have now received them. Gov't Br. 28 n.10. That leaves only Jane Doe #2's sister in *IRAP*. But respondents do not dispute that Doe #2's sister faces a multi-year wait for an immigrant-visa number for a sibling to become available, *ibid.*, and thus they have not contended that Doe #2's sister would ever have been affected by the Order's temporary 90-day entry suspension.[4]

Implicitly recognizing as much, respondents have belatedly asked to insert new plaintiffs into these appeals. IRAP Br. 22 n.15; Hawaii Br. 26. Those requests are futile because none of the proposed parties alleges a non-speculative, cognizable injury traceable to the Order. The *Hawaii* respondents seek to add an anonymous plaintiff with a Yemeni son-in-law, but they have not even alleged that the son-in-law has submitted his visa application. *Hawaii* Gov't Resp. in Opp. to Mot. to Add Party 2, 14-15. And the *IRAP* respondents seek to add plaintiffs whose alien relatives allegedly had visa-application interviews but did not receive visas—meaning the relatives may never have been affected by the Order at all. See 22 C.F.R. 41.121(a), 42.81(a).

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[4] Dr. Elshikh argues that other, unspecified members of his family "remain in Syria." Hawaii Br. 25. Those claims are not in the record, see *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 495 n.* (2009), and Dr. Elshikh does not assert that any of his other relatives has even applied for a visa.

IRAP Gov't Resp. in Opp. to Mot. to Add Parties 2, 14-15. The Court should not countenance respondents' efforts to reshape this litigation at the eleventh hour.

2. The individual respondents' message injuries are not cognizable

Respondents alternatively contend (IRAP Br. 16-17, 21-23; Hawaii Br. 23-25) that the Order violates their own rights by sending a "message" condemning their religion. But respondents identify only one setting where this Court has recognized such a message injury: overtly religious displays or activities to which plaintiffs were directly exposed. See *ibid.* (citing cases). Here, by contrast, the Order is directed to aliens abroad and says nothing about religion.

Nor may respondents recast a facially religion-neutral regulation of conduct as sending an implicit religious message. That would mean that any Muslim—or perhaps anyone who objects to a perceived implicit message—could challenge the Order. This Court has held that such generalized injury is insufficient because "standing would extend nationwide to all members of the particular * * * groups against which the Government was alleged to be discriminating." *Allen* v. *Wright*, 468 U.S. 737, 755-756 (1984). Indeed, that is precisely what respondents urge: they contend that the individual respondents may challenge the Order based on its purported message even though their relatives have received visas. IRAP Br. 21; Hawaii Br. 25. But claims of such "stigmatizing injury" may be brought only by "'those persons who are personally denied equal treatment' by the challenged discriminatory conduct." *Allen*, 468 U.S. at 755 (citation omitted).

Respondents' contrary theory would render *Valley Forge*'s rule an empty pleading requirement. On their

view, any purportedly religiously motivated conduct could be recast as sending an implicit religious message. For example, respondents' position would mean that the plaintiffs in *Valley Forge* would have had standing if they had simply alleged that the transfer of land without cost to a Christian college sent a pro-Christian or anti-atheist message. That cannot be correct. See *In re Navy Chaplaincy*, 534 F.3d 756, 764 (D.C. Cir. 2008) (Kavanaugh, J.), cert. denied, 556 U.S. 1167 (2009).

3. Hawaii does not allege a cognizable violation of any Establishment Clause rights of its own

Hawaii likewise cannot assert that the Order violates its own constitutional rights, and indeed the Ninth Circuit did not affirm the *Hawaii* injunction on Establishment Clause grounds. Hawaii argues (Br. 19, 22-23) that it may sue to prevent the federal government from violating the Establishment Clause rights of its citizens. That is wrong for three reasons.

First, for the same reasons discussed above, the Order does not violate the rights of Hawaii's citizens because it does not regulate them. Second, Hawaii's theory would mean that a State would have standing to challenge *any* federal law that allegedly violated the Establishment Clause rights of its citizens. But it is well established that a state cannot sue the federal government as *parens patriae*; in that context, it is the federal government, not the States, that represents the interests of citizens. See *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982). That is especially true of the exclusion of aliens, a power vested exclusively in the national government.

Third, even if Hawaii were correct (Br. 19) that the Establishment Clause was originally intended to "'protect[] state establishments from federal interference,'"

Cutter v. *Wilkinson*, 544 U.S. 709, 728 (2005) (Thomas, J., concurring) (citation omitted), that would not help Hawaii here. States no longer can create such establishments in light of the Fourteenth Amendment. See *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 679 n.4 (2002) (Thomas, J., concurring). Hawaii argues (Br. 19) that States still have an interest in preserving their own policies of "preventing any establishment of religion." But whatever interest States may have in not being directly regulated by an asserted federal establishment of religion, it is not implicated here. The Order does not regulate Hawaii at all, much less require the State to participate in implementing a federal establishment.[5]

C. Respondents Cannot Challenge The Order's Refugee Provisions

In all events, no respondent has standing to challenge Section 6(a) and (b), the provisions governing refugees. Only the *Hawaii* district court enjoined Section 6(a) and (b); the *IRAP* district court rejected respondents' request for an injunction, and those respondents did not cross-appeal. And in *Hawaii*, neither respondent asserted a cognizable injury from the refugee provisions. Dr. Elshikh's mother-in-law was not seeking

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[5] Hawaii also has failed to demonstrate any concrete injury. Hawaii's standing must be determined as of the time it filed suit, see *Davis* v. *FEC*, 554 U.S. 724, 732-733 (2008), and it did not identify any concrete injury that was extant or imminent when it filed its operative complaint in March 2017. Even now, Hawaii points only (Br. 22) to students who already accepted admission for the 2017-2018 academic year, which commenced in August; a Syrian speaker scheduled to visit Hawaii in September, who presumably has visited already; and students who have applied for (but evidently not yet received) admission to study at the university in 2018. None of those allegations suffice to establish Hawaii's standing.

admission as a refugee. Hawaii contends (Br. 22) that the Order has prevented the State "from resettling refugees within its borders." But Hawaii never explained how it has a cognizable statutory (much less constitutional) interest in the initial entry of aliens as refugees—a matter committed exclusively to the federal government. Moreover, Hawaii has never identified any particular refugees whom it seeks to "resettle." See J.A. 1039-1040. Vague desires to have the United States allow a handful of refugees to enter the country and the State in the future are insufficient to establish a concrete, cognizable Article III injury. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 564 (1992).

II. THE ORDER DOES NOT VIOLATE THE INA

A. The Order Is Expressly Authorized By 8 U.S.C. 1182(f) And 1185(a)(1)

Respondents do not defend the Ninth Circuit's rationale that the Order failed to provide a sufficiently detailed factual basis to "support the conclusion that entry" of the affected aliens is detrimental to the national interest under 8 U.S.C. 1182(f). J.A. 1197. And for good reason. The Order directed a worldwide review of vetting procedures used to identify whether nationals seeking entry into this country pose a national-security or public-safety threat, and while that review was pending, it temporarily paused entry from the six countries that Congress and the Executive previously had determined posed heightened risk. The Order's findings are not reviewable at all, but they amply suffice under any plausible interpretation of Section 1182(f).

Instead, respondents ask this Court (Hawaii Br. 31) to replace Section 1182(f)'s text with a requirement that

the President may "exclude only (1) aliens akin to subversives, war criminals, and the statutorily inadmissible; and (2) aliens whose admission would undermine congressional policy during an exigency in which it was impracticable for Congress to act." That interpretation has no basis in Section 1182(f)'s text or history or this Court's precedent. Respondents also have no answer to Section 1185(a)(1).

1. a. When "statutory language is plain, [courts] must enforce it according to its terms." *Jimenez* v. *Quarterman*, 555 U.S. 113, 118 (2009). Section 1182(f) authorizes the President to "suspend the entry of all aliens or any class of aliens," and to "impose on the entry of aliens any restrictions he may deem to be appropriate," "[w]henever [he] finds" that such entry "would be detrimental to the interests of the United States." 8 U.S.C. 1182(f). That language vests the President with a "sweeping proclamation power" that "provides a safeguard against the danger posed by any particular case or class of cases that is not covered" by a specific provision in the INA. *Abourezk* v. *Reagan*, 785 F.2d 1043, 1049 n.2 (D.C. Cir. 1986), aff'd by an equally divided Court, 484 U.S. 1 (1987).

Respondents' reading cannot be reconciled with the statutory text. Their only textual argument (Hawaii Br. 38) is that the phrase "interests of the United States" locks Section 1182(f) into 1940s administrative practice. That is not credible. As this Court has held, such phrases do not constrain discretion; they confer it. Thus, in *Doe*, the Court construed that language as "exud[ing] deference" to the Executive and "foreclos[ing] the application of any meaningful judicial standard of review." 486 U.S. at 600; see also, *e.g.*, *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 369-370 (2000) (broadly construing

"'national security interests of the United States'"); *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 322-327 (1936).

b. Respondents urge the Court (Hawaii Br. 31-37) to disregard this plain language, contending that "'[i]nterests of the United States' had a settled meaning" when Section 1182(f) was enacted in 1952 and the phrase "brought 'the old soil with it.'" *Id.* at 35, 38 (quoting *Sekhar* v. *United States*, 133 S. Ct. 2720, 2724 (2013)). Their contention fails for three reasons.

First, respondents fail to show that "interests of the United States" had a settled meaning even in the context of the statutes respondents discuss. Respondents assert (Hawaii Br. 31) that "[t]he language of Section 1182(f) originated in 1918." But the phrase "interests of the United States" did not appear in that statute. Act of May 22, 1918, ch. 81, 40 Stat. 559. As respondents note (Hawaii Br. 32), that language was added to the 1918 Act in 1941, at the request of President Roosevelt, to "broaden this statutory authority." See Act of June 21, 1941, ch. 210, 55 Stat. 252. Respondents argue based primarily on floor debates that Congress in 1941 understood that the newly expanded power would be used only to "'suppress[] subversive activities.'" Hawaii Br. 33 (citation omitted). But "[i]t is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history." *Pittston Coal Grp.* v. *Sebben*, 488 U.S. 105, 115 (1988). Where, as here, "the text of the [relevant] statute plainly embraces criteria of more general application," it controls. *Ibid.* Respondents note (Hawaii Br. 33-34) that, during World War II, President Roosevelt's Administration used this authority to target aliens whose entry undermined the war effort, such as spies

and saboteurs. But they cite no evidence that the Executive understood those applications as exhausting the *only* permissible uses of the President's power.

Second, respondents' history refutes their contention that Congress intended *Section 1182(f)* to carry the meaning they impute to the 1941 law. As respondents concede, the 1941 law was the predecessor not of Section 1182(f), but of Section 1185(a)(1). Section 1182(f) was added in 1952, using the broad language it contains today. See Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 212(e), 66 Stat. 188 (8 U.S.C. 1182(f)). Both the fact that Congress enacted Section 1182(f) *in addition* to what became Section 1185(a)(1), and the different language Congress employed, confirm that Section 1182(f) was meant to confer a different power. See *Clark* v. *Rameker*, 134 S. Ct. 2242, 2248 (2014) (presumption against superfluity); *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (difference in language in same law is presumed deliberate).

Third, Section 1182(f)'s own legislative history confirms its breadth. Opponents criticized Section 1182(f) as "giv[ing] the President the power to suspend all immigration whenever he feels it is in the national interest to do so," 98 Cong. Rec. 4249 (1952) (letter from Rhoads Murphey, Friends Comm. on National Legislation), and as a "very, very broad provision," *id.* at 4304-4305, 4423, 5114 (statements of Reps. Celler and Multer and Sen. Lehman); S. Rep. No. 1137, 82d Cong., 2d Sess. Pt. 2, at 4 (1952) (minority views); see also S. Rep. No. 1515, 81st Cong., 2d Sess. 381, 805-806 (1950). No one suggested otherwise.

c. Respondents' remaining arguments lack merit. First, they argue (Hawaii Br. 29-30) that this Court's cases support reading Section 1182(f) narrowly, citing

Kent v. *Dulles*, 357 U.S. 116 (1958). But *Kent* was a straightforward constitutional-avoidance case addressing the denial of passports to U.S. citizens based on their political beliefs, which threatened to transgress their freedoms of speech and travel. See *id.* at 125-130. Here, in contrast, Section 1182(f) applies to the suspension of entry of aliens abroad—who, unlike the U.S. citizens in *Kent,* are not entitled to the same constitutional protections.

Respondents suggest (Hawaii Br. 29-30) that the avoidance canon requires construing Section 1182(f) narrowly to avoid a nondelegation-doctrine question. But as this Court made clear in *Knauff* (addressing the 1941 statute above), nondelegation concerns are at their nadir in this setting because the authority to exclude aliens "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." 338 U.S. at 542. Thus, "[w]hen Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power," but also "implementing an inherent executive power." *Ibid.* Even if the avoidance canon applied, it would mean at most that Section 1182(f) is limited to the foreign-affairs and national-security context, which is precisely where the Order operates.

Second, respondents assert (Hawaii Br. 36-37) that historical practice supports their narrow, atextual interpretation of Section 1182(f). But as they acknowledge (*id.* at 37), in August 1986, President Reagan suspended entry of "all Cuban nationals," with limited exceptions, based on the Cuban government's decision in May 1985 to suspend an immigration agreement. Proclamation No. 5517, 51 Fed. Reg. 30,470 (Aug. 26, 1986). That proclamation, issued more than a year after Cuba's decision,

cannot be dismissed as addressing a "fast-breaking diplomatic crisis that Congress was plainly ill-suited to address." Hawaii Br. 37. Indeed, many past presidential proclamations did not address "exigencies" in the narrow sense respondents assert, *ibid.*, but rather invoked Section 1182(f) to encourage foreign nations' cooperation with the United States' objectives. See, *e.g.*, Exec. Order No. 13,662, 79 Fed. Reg. 16,169 (Mar. 24, 2014) (suspending entry of (*inter alios*) aliens who operated in financial, energy, and engineering sectors of Russian economy); Proclamation No. 7524, 67 Fed. Reg. 8857 (Feb. 26, 2002) (aliens who "derive significant financial benefit from policies that undermine or injure Zimbabwe's democratic institutions" through dealings with its government); Proclamation No. 6730, 59 Fed. Reg. 50,683 (Oct. 5, 1994) (similar for Liberia). The Order likewise sought in part to pressure countries to provide the United States with the information necessary to vet their nationals. See J.A. 1423-1424 (§ 1(g)).

Third, respondents argue (IRAP Br. 51; Hawaii Br. 38-39) that Section 1182(f) must be read narrowly to prevent the President from readopting a quota system or prohibiting immigrant farm workers in order to protect the domestic economy. But whatever outer limits may exist on the President's authority under Sections 1182(f) and 1185(a), they are not implicated here. The Order does not seek to subvert the INA by reinstituting the quota system; rather, it has helped *implement* the INA by ensuring that the government has the information needed to determine whether aliens present national-security or safety risks. Nor did the President invoke his power to protect the domestic economy; instead, he used it to protect national security and conduct foreign policy,

matters at the core of Sections 1182(f) and 1185(a) and the INA more generally.

Fourth, respondents assert (IRAP Br. 52-53; Hawaii Br. 42-43 & n.12) that the Order contravenes the statutory framework governing vetting of aliens seeking entry. That is wrong. To be sure, especially since September 11, 2001, Congress has enacted laws giving the Executive Branch better tools to detect terrorist entry. But those statutes do not remotely suggest that Congress concluded that the existing vetting system is sufficient and that the President may not seek to improve it, respond to new developments, or seek to pressure other nations to provide the information needed to vet their nationals. Thus, the Order does not conflict with any of the statutes respondents cite.

2. Whatever Section 1182(f)'s scope, the Order was independently authorized by 8 U.S.C. 1185(a)(1), which provides that it "shall be unlawful" for any alien to "enter" the United States "except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe." *Ibid.* Respondents make no effort to show that the Order's restrictions exceed that authority. *Ibid.* Respondents incorrectly assert (IRAP Br. 56) that the government has not relied on Section 1185(a)(1) as an independent basis for the Order. The Order expressly invokes that provision, J.A. 1426 (§ 2(c)), and the government has consistently argued that it supports the Order, *e.g.*, Gov't Br. 40-41, 53-54, 56, 64, 68; *Hawaii* Gov't C.A. Br. 20-21 (No. 17-15589); *Hawaii* Gov't C.A. Reply Br. 20-26 (No. 17-15589). And respondents' legislative-history-driven reading of the 1941 law that became Section 1185(a)(1) is irrelevant because, as they

acknowledge (Hawaii Br. 34 n.8), Congress in 1978 eliminated the restrictions confining Section 1185(a)(1) to times of war and national emergency. See Foreign Relations Authorization Act, Fiscal Year 1979, Pub. L. No. 95-426, § 707(a), 92 Stat. 992-993. Congress thus rejected the kind of limitations on Section 1185(a)(1) that respondents wrongly try to read into Section 1182(f).

B. Section 2(c) Is Consistent With 8 U.S.C. 1152(a)(1)(A)

1. There is no conflict between the President's broad authority to suspend or restrict "entry" under Sections 1182(f) and 1185(a)(1) and the principle in Section 1152(a)(1)(A) that consular officers may not discriminate on various bases (including nationality) in the "issuance of an immigrant visa." Section 1182(f) confers on the President power over the "entry" of "any class of aliens" in the "interests of the United States." Section 1185(a)(1) likewise addresses the President's authority to impose restrictions on whether and when aliens may "enter." By contrast, Section 1152(a)(1)(A) does not govern the President's authority over "entry" at all; it does not mention either the President or entry. See *Sale*, 509 U.S. at 171-173 (statutory references to particular executive officials did not encompass powers vested in the President).

The statutes thus do not conflict because, by their plain terms, they address distinct subjects and operate in different spheres. Section 1152(a)(1)(A)'s nondiscrimination principle applies only to the universe of applicants *who would otherwise be eligible to receive visas*. See 8 U.S.C. 1201(g) (visas may not be issued to aliens "ineligible to receive [them] * * * under [S]ection 1182"). If an alien is ineligible to receive a visa on any ground enumerated in Section 1182—for instance, criminal history, terrorist affiliation, or (as here) being

subject to an entry suspension—Section 1152(a)(1)(A) does not apply. Respondents offer no reason why Congress would have required the issuance of immigrant visas (which are for those wishing to live in the United States) to aliens who are barred from entering for any reason under Section 1182. See also H.R. Rep. No. 745, 89th Cong., 1st Sess. 12 (1965).

Respondents' argument is also squarely foreclosed by history. In 1986, for example, President Reagan invoked Section 1182(f) to suspend entry of Cuban nationals on the ground that he was "retaliat[ing] against Cuba's breach of an immigration agreement." Hawaii Br. 45. Similarly, in 1979, President Carter invoked Section 1185(a)(1) to limit "entry of" Iranian nationals. See Exec. Order No. 12,172, 44 Fed. Reg. 67,947 (Nov. 28, 1979); Exec. Order No. 12,206, 45 Fed. Reg. 24,101 (Apr. 9, 1980). Although President Carter's Order itself did not deny or revoke visas to Iranian nationals by its terms, he simultaneously explained how the new measures would operate: the State Department would "invalidate all visas issued to Iranian citizens for future entry into the United States, effective today," and "w[ould] not reissue visas, nor w[ould] [it] issue new visas, except for compelling and proven humanitarian reasons or where the national interest of our own country requires."[6] And that is how the State Department implemented it. See 45 Fed. Reg. 24,436 (Apr. 9, 1980). In respondents' view, that action was illegal.

Indeed, under respondents' view, if the President knew today that an unidentified Iranian national was seeking to enter the country with a dirty bomb, he

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[6] The American Presidency Project, Jimmy Carter, *Sanctions Against Iran: Remarks Announcing U.S. Actions* (Apr. 7, 1980), https://goo.gl/4iX168.

could not temporarily bar the entry of all Iranian nationals. Respondents have no answer to the serious constitutional and practical concerns that would arise under their interpretation of Sections 1182(f) and 1185(a)(1)(A). See Gov't Br. 52-54.

2. Even if Section 1152(a)(1)(A) applied here, it could not justify the existing injunctions. Section 1152(a)(1)(A) does not govern the President's broad power over "entry" because it does not govern "entry" at all. Thus, even if respondents' relatives were eligible to receive immigrant visas, they are not entitled to enter the United States. Section 1152(a)(1)(A) therefore provides no basis for enjoining Section 2(c), which governs entry, not visas.

Respondents' position requires reading the later-enacted Section 1152(a)(1)(A) as impliedly repealing the President's broad power to suspend entry of "any class of aliens"—a category that obviously would otherwise include aliens from a particular country. But courts require an irreconcilable conflict before finding an implied repeal. See *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 155 (1976). Here there is no such conflict, because Section 1152(a)(1)(A) does not address the President's power over "entry."

Notwithstanding this clear text, respondents argue (IRAP Br. 58-59; Hawaii Br. 44-45) that Section 1152(a)(1)(A) must be read to reach entry or its prohibition on discrimination in visa issuance would be meaningless. But Section 1152(a)(1)(A) applies to the vast majority of aliens whose entry has not been restricted under Section 1182(f). Moreover, a visa is a travel document that is never sufficient alone to entitle an alien to enter the country; if an alien holds a visa but "is found to be inadmissible" upon arrival at a port of entry, he

cannot enter. See 8 U.S.C. 1201(h), 1225(a). And like the Ninth Circuit, J.A. 1233 n.24, respondents do not even attempt to explain how Section 1152(a)(1)(A)—which applies only to immigrant visas—supports enjoining Section 2(c) as to nonimmigrant visas.

3. Respondents' remaining arguments likewise do not support their assertion that Section 1152(a)(1)(A) overrides the President's authority under Sections 1182(f) and 1185(a)(1). They argue (IRAP Br. 59; Hawaii Br. 45) that Section 1152(a)(1)(A) is "more specific" because it "addresses nationality discrimination in the issuance of visas." As explained above, there is no conflict because the two statutes cover different subjects. In any event, Section 1152(a)(1) prescribes a general rule governing consular officers' issuance of visas to aliens otherwise eligible to receive them; Section 1182(f) is more specific because it concerns the President's special power to suspend or restrict entry of aliens or classes of aliens when in the national interest.[7]

Respondents also suggest (IRAP Br. 59; Hawaii Br. 46) that Section 1152(a)(1)(A) embodies a categorical rejection of nationality-based distinctions in federal immigration law. That is wrong. Section 1152(a)(1)(A) applies in one circumstance: "the issuance of an immigrant visa."

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[7] Respondents argue that Section 1152(a)(1)(A) contains various exceptions but does not include Section 1182(f) among them. No exception for Section 1182(f) is necessary, however, because Section 1182(f) renders a covered alien ineligible for a visa and addresses only entry, not visa issuance. Moreover, Section 1152(a)(1)(A)'s listed exceptions are demonstrably not exhaustive. For example, 8 U.S.C. 1253(d)—which requires the Secretary of State to "order consular officers" to "discontinue granting immigrant visas or nonimmigrant visas" to nationals of a country that refuses to accept return of its own nationals—is not listed in Section 1152(a)(1)(A)'s exceptions.

It does not apply to non-immigrant visas, and it does not apply to suspending or restricting "entry." Moreover, the immigration laws and regulations are replete with provisions that draw distinctions based on aliens' nationality—including, most notably, the Visa Waiver program. 8 U.S.C. 1182(a)(7)(B)(iv), 1187; see, *e.g.*, 8 U.S.C. 1101(a)(15)(E), (E)(iii), (F)(iii), (b)(1)(G), 1184(e), 1232, 1254a, 1255 note, 1437, 1735; Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, § 202, 111 Stat. 2193-2194; 8 C.F.R. 214.2(h)(5)(i)(F), (6)(i)(E), 214.5, 245.7, 245.15, 245.21.[8]

C. Section 6(b) Is Consistent With 8 U.S.C. 1157

Section 6(b)'s limitation on the number of refugees who could be admitted in Fiscal Year 2017 is consistent with 8 U.S.C. 1157. Section 1157(a)'s cap, set at the beginning of each fiscal year, governs the number of refugees who "'may be'" admitted, not the number who "'must be.'" Hawaii Br. 46-47 (citation omitted). That is why the federal government routinely admits far fewer refugees than authorized by the cap. Gov't Br. 61. Respondents' assertion (Hawaii Br. 47) that Section 6(b) "alter[ed] the number that 'may be' admitted" is wrong. Section 6(b) did not change the Section 1157(a) ceiling; it simply directed federal agencies to admit fewer refugees than the maximum number authorized by that ceiling during Fiscal Year 2017, which has now ended.

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[8] Respondents erroneously conflate "nationality" with "'national origin.'" Hawaii Br. 46 (citation omitted); see IRAP Br. 59. Unlike national origin (and race), which are immutable characteristics, nationality concerns the country to which one "ow[es] permanent allegiance." 8 U.S.C. 1101(a)(21). "[C]lassifications on the basis of nationality are frequently unavoidable in immigration matters." *Rajah* v. *Mukasey*, 544 F.3d 427, 435 (2d Cir. 2008).

III. THE ORDER DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

Respondents' Establishment Clause challenges are governed by *Mandel*, but they fail under any standard of review. Section 2's purpose was to conduct a worldwide review of the procedures for vetting aliens who seek entry into this country, and to pause entry from six countries that posed particularly acute risks pending such review. Those purposes have nothing to do with religion.

A. The Order Is Constitutional Under *Mandel* And *Din*

1. In the area of the exclusion of aliens abroad, *Mandel* requires "minimal scrutiny (rational-basis review)." *Sessions* v. *Morales-Santana*, 137 S. Ct. 1678, 1693 (2017). Thus where, as here, the challenged action is facially neutral and supported by an objectively reasonable factual basis, courts may not "look behind the exercise of that discretion" (408 U.S. at 770) in search of ulterior motives. After all, "[t]he Executive should not have to disclose its 'real' reasons for deeming nationals of a particular country a special threat * * * and even if it did, * * * a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy." *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999) (*AAADC*). That straightforward logic disposes of respondents' constitutional challenge.

2. Respondents make two principal counterarguments, both of which lack merit.

a. Respondents begin by arguing that *Mandel* does not apply. First, they assert that as in *INS* v. *Chadha*, 462 U.S. 919 (1983), the Establishment Clause is a structural constraint on governmental power to which

Mandel is inapplicable. But *Chadha* did not concern exclusion of aliens outside the United States; it addressed deportation of aliens already present. *See id.* at 923-928. Moreover, *Chadha* addressed the procedure by which Congress may exercise legislative power. *Id.* at 944-959. *Mandel* has no sensible application in that context.

Second, respondents contend that *Mandel* applies only to claims that "challenge the adequacy of the Government's explanation for an alien's exclusion," not to respondents' claims here that the exclusion's purpose was "unconstitutional." Hawaii Br. 49. *Fiallo* v. *Bell*, 430 U.S. 787 (1977), forecloses that argument; it held that *Mandel*'s test governed a constitutional challenge to an immigration statute that expressly drew distinctions based on "sex and illegitimacy." *Id.* at 794-795; see *id.* at 789-791, 797-800. Moreover, in *Mandel* itself, Justice Marshall maintained in dissent that the government's proffered reason was a "sham" not because the explanation for denying Mandel a waiver was inadequate, but because in the dissent's view it was untrue: the "Department of State had already conceded" facts that disproved that rationale. 408 U.S. at 778. That was the contention the majority categorically refused to entertain in refusing to "look behind" the stated reason. *Id.* at 770.

Third, respondents assert (Hawaii Br. 51) that *Mandel* "do[es] not apply to broad Executive policymaking." That too is wrong. The Court has applied *Mandel* to federal statutes, see *Fiallo*, 430 U.S. at 794-795, and the rule originated in a case involving a decision by "the Executive," *Mandel*, 408 U.S. at 770. Here, the President acted pursuant to broad grants of authority by

Congress. It also makes no sense to exempt broad policies simply because they are made by the President. "[T]he promulgation of broad policy is precisely what we expect the political branches to do; Presidents rarely, if ever, trouble themselves with decisions to admit or exclude individual visa-seekers." *Washington* v. *Trump*, 858 F.3d 1168, 1179-1180 (9th Cir. 2017) (Bybee, J., dissenting from the denial of reconsideration en banc). It would invert the constitutional structure to "give deference to a consular officer making an individual determination, but not the President when making a broad, national security-based decision." *Id.* at 1179.

b. Respondents also argue that, even if *Mandel* applies, Justice Kennedy's concurrence (joined by Justice Alito) in *Din*, *supra*, reads *Mandel* to allow courts to undertake a boundless search for evidence of "'bad faith.'" IRAP Br. 33-36 (citation omitted); see Hawaii Br. 50. Respondents' reliance on *Din* is misplaced.

In *Din*, there was no question that the government's stated reason for excluding the alien—he was inadmissible on "terrorism-related" grounds under 8 U.S.C. 1182(a)(3)(B)—was "facially legitimate." 135 S. Ct. at 2140 (Kennedy, J., concurring in the judgment). And the government's decision "indicate[d] it relied upon a bona fide factual basis" for invoking that reason to exclude him—there, by citing a statutory ground for inadmissibility that "specifie[d] discrete factual predicates the consular officer must find to exist before denying a visa." *Id.* at 2140-2141. Because the U.S.-citizen plaintiff offered nothing to refute that factual basis, the concurring Justices explained that "*Mandel* instructs us not to 'look behind' the Government's exclusion of" the alien. *Id.* at 2141. The concurring Justices' reference to "bad faith" thus did not propose an enormous

loophole in *Mandel*. They merely hypothesized that, if the government had not identified a factual basis for the exclusion, the plaintiff might have been able to seek "additional factual details." *Id.* at 2141. But when the government does identify such a basis—as it did in *Mandel* and *Din*—that is the end of the analysis. Under rational-basis review, if "there are plausible reasons for" the challenged action, the "inquiry is at an end." *United States R.R. Ret. Bd.* v. *Fritz,* 449 U.S. 166, 179 (1980). That is particularly true for laws involving the exclusion of aliens. See *AAADC*, 525 U.S. at 491.

In sum, the Order's stated national-security objective is unquestionably facially legitimate. And respondents have never contended that the facts recited in the Order for invoking that national-security rationale are not objectively reasonable. That should be the end of the analysis. Nothing in *Mandel* or *Din* permits further inquiry into the purported subjective motivations of government officials.

B. The Order Is Constitutional Under Domestic Establishment Clause Precedent

In any event, the Order is constitutional under any standard of review. Section 2(c)'s purpose was to protect national security and further foreign policy by conducting a worldwide review of vetting procedures and, pending the outcome, pausing entry from countries that had previously been found to pose heightened terrorism-related concerns. Respondents' contrary arguments rest principally on campaign statements. Those statements should not be considered at all. Regardless, they have no bearing on the policy that was ultimately adopted, which is not a "Muslim ban."

1. Respondents fail to show, even under domestic Establishment Clause precedent, that the Order is

premised on an impermissible religious purpose. They make virtually no effort to show that the Order's text or operation reflects any religious purpose. They cite nothing in the refugee provisions remotely suggesting a religious aim. Respondents assert (Hawaii Br. 54) that Section 2(c)'s entry suspension encompasses six Muslim-majority nations. But they disregard both that those six countries are the same ones previously identified by Congress and the Executive as raising heightened terrorism-related concerns, and that the Order omits the world's many other Muslim countries that had not been so identified. Respondents cite (IRAP Br. 40) a provision directing data collection about "acts of gender-based violence against women, including so-called 'honor killings,' in the United States by foreign nationals." J.A. 1437 (§ 11(a)(iii)). But "[h]onor crimes are not specific to any religion, nor are they limited to any one region of the world."[9] That single provision cannot possibly justify invalidating an Executive Order concerning immigration and national security.

Respondents also ignore that the Order was supported by three Cabinet officials: the Secretary of Homeland Security and the Attorney General (who recommended it), and the Secretary of State (who joined them in announcing it). See Gov't Br. 7-8. As the Secretary of State described on the day of its issuance, the Order is "a vital measure for strengthening our national security."[10] Respondents' theory would require this Court to conclude that all of those officials were either

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[9] Human Rights Watch, *HRW World Report 2001: Women's Rights, Item 12—Integration of the Human Rights of Women and the Gender Perspective* (Apr. 6, 2001), https://goo.gl/uBub9w.

[10] Rex W. Tillerson, Sec'y of State, *Remarks on the President's Executive Order Signed Today* (Mar. 6, 2017), https://goo.gl/815HN4.

motivated by, or at least complicit in, anti-Muslim animus. There is no basis for that remarkable conclusion. On its face and in operation, the Order has nothing to do with religion.

2. Respondents ask the Court (IRAP Br. 37-39; Hawaii Br. 55-56) to ignore all of that and instead look to extrinsic campaign statements to divine a religious purpose. But campaign statements should not be considered at all, and even if they were, the statements on which respondents principally rely pertain to a proposal that was never adopted. They are therefore doubly irrelevant.

a. Statements made by a political candidate running for the Presidency form no part of the official action by which courts adjudge the constitutionality of laws. Campaign statements are made in the heat of political battle, are imprecise, and change over time. See Southeastern Legal Found. Amicus Br. 14-23. More importantly, they are made before the candidate swears an oath to uphold and defend the Constitution, forms his Administration, and receives the advice of his Cabinet. These momentous steps mark a fundamental shift from private citizen to the embodiment of the Executive Branch. Statements by a candidate running for President have no bearing on the meaning of actions taken by the Executive Branch.

None of respondents' cases is to the contrary. *McCreary County* v. *ACLU of Kentucky*, 545 U.S. 844 (2005), involved an expressly religious display, and the county executive brought his own pastor to speak at the official unveiling; the pastor's remarks thus were part of the official record. *Id.* at 869. In *Lukumi*, the plurality considered public statements at a town-council meeting that were in effect legislative history of the

local ordinance at issue. 508 U.S. at 541 (opinion of Kennedy, J.). Most of respondents' other cases similarly involved statements from a State's constitutional convention, see *Hunter* v. *Underwood*, 471 U.S. 222, 229-230 (1985), or else referenda, initiative campaigns, or their equivalent, where statements of sponsors explaining the referenda's meaning are likewise akin to traditional legislative history, see *Washington* v. *Seattle Sch. Dist. No. 1*, 458 U.S. 457, 463, 471 (1982); *Epperson*, 393 U.S. at 108 n.16; *LeBlanc-Sternberg* v. *Fletcher*, 67 F.3d 412, 417-422 (2d Cir. 1995), cert. denied, 518 U.S. 1017 (1996). *Glassroth* v. *Moore*, 335 F.3d 1282 (11th Cir.), cert. denied, 540 U.S. 1000 (2003), concerned an overtly religious Ten Commandments display, and the candidate sponsoring the display repeatedly confirmed its religious purpose after taking office, *id.* at 1284-1285, 1297. And *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), merely noted that "circumstantial" evidence of an improper purpose, such as a "clear pattern, unexplainable on grounds other than" discrimination, may be relevant. *Id.* at 266. Respondents identify no case in which this Court invalidated government action that was religion-neutral in its text and operation based on campaign statements made by a candidate running for office.

b. Even if campaign statements were not categorically off-limits, the statements here have no bearing on the Order's meaning. Respondents invoke remarks such as a 2015 press release calling for a "total and complete shutdown of Muslims entering the United States." IRAP Br. 1-2; Hawaii Br. 8. But those statements describe something that was never adopted. Then-candidate and now-President Trump clarified over time

that the Order's focus was security, not religion. See Gov't Br. 74. As President Trump stated after his election in describing the directive the Order replaced, and as the Order's text and operation clearly demonstrate, the Order "[is] not a Muslim ban."[11] And since taking office, the President has praised Islam as "one of the world's great faiths," decried "the murder of innocent Muslims," and emphasized that the fight against terrorism "is not a battle between different faiths, different sects, or different civilizations," but one "between barbaric criminals who seek to obliterate human life and decent people" of all religions who "want to protect life."[12] Under an objective review that accords the Head of a co-equal branch the presumption of regularity that is owed the Office, the Order here was based on national security and foreign policy, not religion.

IV. THE GLOBAL INJUNCTIONS ARE OVERBROAD

Finally, should this Court conclude that any injunction is nonetheless proper, it should reject the injunctions' vastly overbroad scope. Respondents do not dispute that Article III and equitable principles confine relief to what is necessary to redress injuries to the plaintiffs. Gov't Br. 78-79. An injunction limited to the individual respondents would have fully redressed their claimed injuries by allowing entry of their relatives. Respondents argue that a "message of condemnation would remain." IRAP Br. 60; see Hawaii Br. 61. But

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[11] *President Trump Signing Executive Orders*, C-SPAN.org (Jan. 28, 2017) (statement of President Donald J. Trump, at 3:32), https://www.c-span.org/video/?423167-1/president-trump-signing-executive-orders.

[12] Washington Post Staff, *President Trump's full speech from Saudi Arabia on global terrorism*, Wash. Post, May 21, 2017, https://goo.gl/viJRg2.

once the Order was enjoined as to respondents' relatives, it could not send any message to respondents. Respondents' contrary theory would nullify Article III and equitable limitations and enable any Muslim in the United States—perhaps anyone who objects to the Order—to sue and obtain global relief. And Hawaii does not attempt to show it would suffer irreparable harm without a categorical injunction. As Hawaii recently joined other States in arguing, federal courts should not enjoin a federal immigration policy "nationwide" "based on a single State's speculative claim of harm." State of Washington et al. Amicus Br. at 2, *United States* v. *Texas*, 136 S. Ct. 2271 (2016) (No. 15-674).[13]

The decisions below reflect a disturbing trend of issuing nationwide injunctions at the behest of individual litigants. See generally Bray, *supra* n.13. This trend allows a single district court to bring judicial review in all other fora to a halt; deprives other courts, including this one, of differing perspectives on important questions; and undercuts the congressionally authorized mechanism that *is* intended to permit broader relief—namely, class actions. The Court should repudiate that practice. At the very least, it should make clear that, in these circumstances, a *preliminary* injunction issued in response to a request for a temporary restraining order

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[13] Respondents incorrectly argue (Hawaii Br. 61) that equity permits broader relief. Nationwide injunctions were not relief "traditionally accorded by courts of equity." *Grupo Mexicano de Desarollo S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 319 (1999) (citation omitted). They did not exist at equity at all. See generally Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. (forthcoming 2017) (Feb. 9, 2017 draft), https://goo.gl/7uNygt (Bray).

should be narrowly tailored to the plaintiffs, not a vehicle for halting public policy across the Nation.

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The judgments of the courts of appeals should be reversed.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

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