No. 17-17168

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF HAWAII, ISMAIL ELSHIKH, JOHN DOES 1 & 2, and MUSLIM ASSOCIATION OF HAWAII, INC.,

Plaintiffs–Appellees,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; ELAINE DUKE in her official capacity as Acting Secretary of Homeland Security; UNITED STATES DEPARTMENT OF STATE; REX TILLERSON, in his official capacity as Secretary of State; and the UNITED STATES OF AMERICA,

Defendants–Appellants.

On Appeal from the United States District Court
for the District of Hawaii
(1:17-cv-00050-DKW-KSC)

MOTION OF DEFENDANTS-APPELLANTS FOR AN EMERGENCY STAY PENDING EXPEDITED APPEAL AND ADMINISTRATIVE STAY

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INTRODUCTION

The district court enjoined worldwide a Proclamation issued by the President of the United States pursuant to the President's broad constitutional and statutory authority to suspend or restrict the entry of aliens abroad when he deems it in the Nation's interest. The Proclamation—"Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats," 82 Fed. Reg. 45,161 (Sept. 27, 2017)—was issued after a global review by the Department of Homeland Security (DHS) and the Department of State of foreign governments' information-sharing practices and risk factors, culminating in a recommendation that the President restrict entry of certain nationals of eight countries that have inadequate practices or otherwise present heightened risks. The Proclamation imposes country-specific restrictions that, in the President's judgment, would most effectively "encourage cooperation" in information sharing and "protect the United States until such time as improvements occur." *Id.* at 45,164.

The district court ruled that the Proclamation exceeds the President's authority under 8 U.S.C. §§ 1182(f) and 1185(a)(1), and constitutes impermissible nationality-based discrimination in the issuance of immigrant visas under 8 U.S.C. § 1152(a)(1)(A). That erroneous ruling threatens the ability of this and future Presidents to address national security threats and advance foreign policy interests. The Immigration and Nationality Act (INA) does not require the President to make

reticulated findings of current harm to the United States before suspending entry of aliens from a country whose practices pose risks to our Nation. Nor does the INA prohibit the President from imposing nationality-specific restrictions on entry to the United States, as past Presidents have also done. In any event, plaintiffs' challenge to the exclusion of aliens abroad is not justiciable.

The remaining stay factors support staying the injunction pending expedited appeal. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). The balance of harms tips sharply in favor of a stay: Barring effectuation of the President's judgment that the entry of certain nationals of eight countries should be restricted to protect national security threatens the interests of the government and the public (which merge, *Nken v. Holder*, 556 U.S. 418, 435 (2009)). By contrast, plaintiffs have not identified any cognizable and irreparable injury that they personally would incur if the restrictions on entry take effect, especially during the brief period of an expedited appeal. Nor do the equities support the district court's worldwide injunction.

The district court relied on *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017) (per curiam), as precedent, but this Court's opinion has now been vacated by the Supreme Court. *Trump v. Hawaii*, No. 16-1540, Order (S. Ct. Oct. 24, 2017). As a result, *Hawaii* "holds no precedential value," *Schmidt v. Contra Costa County*, 693 F.3d 1122, 1137 n.15 (9th Cir. 2012), and this Court should consider the issues anew, *Camreta v. Greene*, 563 U.S. 692, 713 (2011). This Court should stay the injunction pending final

disposition of the appeal, and should grant an administrative stay until it rules on this request.

BACKGROUND

1. On March 6, 2017, the President issued Executive Order No. 13,780, 82 Fed. Reg. 13,209 (2017) (EO-2). EO-2 directed the Secretary of Homeland Security to conduct a global review of whether foreign governments provide adequate information about their nationals seeking U.S. visas. *Id.* § 2(a). EO-2 directed the Secretary to report findings to the President, after which nations identified as deficient would be encouraged to alter their information-sharing practices, prior to the Secretary's recommendation of appropriate entry restrictions on any nations that continued to have inadequate practices or that presented other special circumstances. *Id*. § 2(d)-(f).

During that review, EO-2 temporarily suspended the entry of foreign nationals from six countries that had previously been identified by Congress or the Executive as presenting terrorism-related concerns. EO-2 § 2(c). EO-2 also temporarily suspended travel of refugees to the United States under the U.S. Refugee Admissions Program and adjudication on applications for refugee status, and capped at 50,000 the total number of refugees to be admitted in fiscal year 2017. *Id.* § 6(a), (b).

The district court below preliminarily enjoined application of those provisions, as well as internal review processes called for by EO-2. *Hawaii v. Trump*,

245 F. Supp. 3d 1227 (D. Haw. 2017). Another district court also enjoined § 2(c)'s entry suspension. *IRAP v. Trump*, 241 F. Supp. 3d 539 (D. Md. 2017). This Court affirmed the district court injunction insofar as it enjoined § 2(c)'s entry suspension, § 6(a)'s suspension of refugee travel to the United States and applications for refugee status, and § 6(b)'s cap on the number of refugee admissions. *Hawaii*, 859 F.3d 741. The Fourth Circuit affirmed the narrower injunction entered by the Maryland district court. *IRAP v. Trump*, 857 F.3d 554 (4th Cir. 2017) (en banc).

The Supreme Court granted certiorari, and partially stayed the injunctions pending review, *Trump v. IRAP*, 137 S. Ct. 2080 (2017). After EO-2's entry suspension expired, the Supreme Court vacated the *IRAP* ruling as moot. *Trump v. IRAP*, No. 16-1436, 2017 WL 4518553 (S. Ct. Oct. 10, 2017). Following termination of the refugee suspension in EO-2, the Supreme Court vacated the *Hawaii* ruling as moot. *Supra* at p.2.

2. On September 24, 2017, the President issued the Proclamation, which is the product of a comprehensive review of vetting and screening procedures. First, the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, identified the information needed from foreign governments to enable the United States to make informed decisions about foreign nationals applying for visas. Procl. § 1(c). The Secretary of Homeland Security "established global requirements for information sharing in support of immigration

screening and vetting." *Id.* pmbl. DHS, in coordination with the Department of State, collected data on, and evaluated, nearly 200 countries, and identified each country's information-sharing practices and risk factors. *Id.* § 1(d). The Department of State engaged with foreign governments to encourage them to improve their performance, which yielded significant gains. *Id.* § 1(f). The Secretary of Homeland Security then recommended that the President impose entry restrictions on certain nationals from eight countries; after further Executive Branch consultation, the President acted in accordance with that recommendation. *Id.* § 1(h), (i).

The President determined that "the immigrant and nonimmigrant entry into the United States of persons [subject to the entry restrictions] would be detrimental to the interests of the United States, and that their entry should be subject to certain restrictions, limitations, and exceptions." Procl. pmbl. Specifically, the President found that screening and vetting protocols "play a critical role" in allowing the United States "to protect its citizens from terrorist attacks and other public-safety threats." *Id.* § 1(a). Foreign governments' information-sharing and identity-management practices, including managing the identity and travel documents of nationals, and providing information about known or suspected terrorists and criminal-history information, are important for the effectiveness of those screening and vetting protocols. *Id.* § 1(b). The President concluded that the restrictions imposed by the Proclamation "are, in [the President's] judgment, necessary to prevent the entry of those foreign nationals about

whom the United States Government lacks sufficient information to assess the risks they pose," "to elicit improved identity-management and information-sharing" by foreign governments "and to advance foreign policy, national security, and counterterrorism objectives." *Id.* § 1(h).

For countries that refuse to cooperate regularly with the United States (Iran, North Korea, and Syria), the Proclamation suspends entry of all nationals, except for Iranian nationals seeking nonimmigrant student (F and M) and exchange visitor (J) visas. Procl. § 2(b)(ii), (d)(ii), (e)(ii). For countries that are valuable counterterrorism partners but have information-sharing deficiencies (Chad, Libya, and Yemen), the Proclamation suspends entry only of nationals seeking immigrant visas and nonimmigrant business, tourist, and business/tourist (B-1, B-2, B-1/B-2) visas. *Id.* § 2(a)(ii), (c)(ii), (g)(ii). For Somalia, which has significant identity-management deficiencies and is unable to effectively control all of its territory, the Proclamation suspends entry of nationals seeking immigrant visas and requires additional scrutiny of nationals seeking nonimmigrant visas. *Id.* § 2(h)(ii). For Venezuela, which refuses to cooperate in information sharing but for which alternative means of obtaining identity information are available, the Proclamation suspends entry of government officials "involved in screening and vetting procedures," and "their immediate family members," on nonimmigrant business or tourist visas. *Id.* § 2(f)(ii). The Proclamation

provides for case-by-case waivers, *id.* § 3(c), and ongoing review to determine whether restrictions should remain in place, *id.* § 4.

3. The district court entered a nationwide temporary restraining order that bars enforcement worldwide of Section 2's restrictions except as to nationals of Venezuela and North Korea. TRO Order 10 & n.10, Dkt. 387. The district court concluded that the entry restrictions likely exceed the President's authority under 8 U.S.C. §§ 1182(f) and 1185(a), and likely violate 8 U.S.C. § 1152(a)(1), which prohibits nationality-based discrimination in the issuance of immigrant visas. TRO Order 25-37.

The district court subsequently converted its temporary restraining order into a preliminary injunction, after the federal defendants court notified the district court about the potential for vacatur of this Court's *Hawaii* opinion and suggested that the court convert the temporary restraining order into a preliminary injunction only if vacatur of *Hawaii* would not change the court's decision. Dkt. 388, at 2; *see* PI Order 1-2, Dkt. 390. In light of that decision, it is clear that the district court would not reach a different result in light of the subsequent vacatur order, and thus no purpose would be served by a remand. This Court should consider now the legal issues raised by this stay motion and on appeal.

ARGUMENT

I. The Balance Of Harms Weighs Strongly In Favor Of A Stay

A. The District Court's Injunction Imposes Serious, Irreparable Harm On The Government And The Public

The district court's injunction barring enforcement of the Proclamation's entry restrictions undermines the President's constitutional and statutory authority to safeguard the Nation's security and intrudes on the political branches' constitutional prerogatives. "[N]o governmental interest is more compelling than the security of the Nation," *Haig v. Agee*, 453 U.S. 280, 307 (1981), and "the Government's interest in combatting terrorism is an urgent objective of the highest order," *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010) (*HLP*). The President's protection of these interests warrants the utmost deference, particularly where, as here, he acts based on a "[p]redictive judgment" regarding specific national-security risks. *Department of the Navy v. Egan*, 484 U.S. 518, 529 (1988); *see HLP*, 561 U.S. at 33-35.

The injunction also causes irreparable injury by invalidating an action taken at the height of the President's authority. "[T]he President has unique responsibility" over "foreign and military affairs." *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993). Rules "concerning the admissibility of aliens" also "implement[] an inherent executive power." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950). And because "the President act[ed] pursuant to an express * * * authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his

own right plus all that Congress can delegate." *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083-84 (2015).

The district court's injunction overriding the President's judgment thus necessarily imposes irreparable harm. Even a single State "suffers a form of irreparable injury" "[a]ny time [it] is enjoined by a court from effectuating statutes enacted by representatives of its people." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers); *see, e.g.*, *O Centro Espirita Beneficiente Uniao de Vegetal v. Ashcroft*, 314 F.3d 463, 467 (10th Cir. 2002). *A fortiori*, this injunction imposes irreparable injury on the President and the public given "the singular importance of the President's duties" to the entire Nation. *Nixon v. Fitzgerald*, 457 U.S. 731, 751 (1982).

B. A Brief Stay Pending Expedited Appeal Would Not Impose Any Substantial Harm On Plaintiffs

Plaintiffs, by contrast, would suffer no cognizable harm, much less irreparable injury, from a stay. The only concrete, judicially cognizable harm plaintiffs allege is that the Proclamation will prevent specific, identified individuals such as family members from entering the United States. But delay in entry alone does not amount to irreparable harm, particularly for the brief period while the Court considers the appeal on the merits (for which the parties have agreed to a highly expedited briefing schedule). Moreover, visa processing times vary widely, *Mendez-Garcia* v. *Lynch*, 840 F.3d 655, 666 (9th Cir. 2016), and it is not unusual for an alien to wait months or years for a decision on a visa application. *E.g., Kodra v. Secretary, Dep't of State*,

903 F. Supp. 2d 1323, 1325-27 (M.D. Fla. 2012). Until aliens abroad meet otherwise-applicable visa requirements and seek and are denied a waiver, they have not received final agency action, and plaintiffs' claimed harms are unripe and too "remote" and "speculative" to merit injunctive relief, *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009). During the brief period of an expedited appeal, the individual aliens that plaintiffs identify can pursue the visa application and waiver process.

II. The Government Is Likely To Prevail On The Merits

A. Plaintiffs' Claims Are Not Justiciable

1. It is a bedrock separation-of-powers principle that "the power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). "[I]t 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." *Knauff*, 338 U.S. at 543.

Courts have distilled from these deeply rooted principles of nonreviewability the rule that the denial or revocation of a visa for an alien abroad "is not subject to judicial review * * * unless Congress says otherwise." *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999). Congress has not provided for judicial review of decisions to exclude aliens abroad, *e.g.*, 6 U.S.C. § 236(f), and has forbidden

"judicial review" of visa revocations (subject to a narrow exception inapplicable to aliens abroad), 8 U.S.C. § 1201(i).

Furthermore, the conclusion is "unmistakable" from history that "the immigration laws 'preclude judicial review' of [] consular visa decisions." *Saavedra Bruno*, 197 F.3d at 1160. The lone time the Supreme Court held that certain aliens (only those physically present in the United States) could seek review of exclusion orders under the Administrative Procedure Act (APA), Congress abrogated the ruling and limited those aliens to the habeas remedy. *See id.* at 1157-62. Because even an alien present in the United States cannot obtain review under APA, *a fortiori* neither can aliens abroad or U.S. citizens acting at their behest. *See* 5 U.S.C. §§ 701(a)(1), 702(1).

2. In previously holding that plaintiffs' challenges to EO-2 were justiciable, this Court reasoned that the principle of nonreviewability of the exclusion of aliens applies only to "an individual consular officer's decision to grant or to deny a visa" but not to "the President's *promulgation* of sweeping immigration policy." *Hawaii*, 859 F.3d 741, 769. Although the nonreviewability principle is applied most frequently to decisions by consular officers adjudicating visa applications, it would invert the constitutional structure to limit review in that context while permitting review of the President's decision to restrict entry of classes of aliens. A consular officer is a subordinate executive-branch official serving under the President within

the Article II constitutional hierarchy. Consular nonreviewability is grounded in the "firmly-established principle" that the power to exclude aliens is "inherent in sovereignty, necessary for maintaining normal international relations and defending the country," and to "be exercised exclusively by the political branches of government." *Saavedra Bruno*, 197 F.3d at 1158-59. Those considerations apply even more strongly to broad policy decisions made by the President than to individualized decisions by a consular official. *See Harisiades v. Shaughnessy*, 342 U.S. 580, 584-91 (1952) (relying on these considerations in rejecting broad challenges to immigration statute).

This Court also relied on *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986), *aff'd by an equally divided court*, 484 U.S. 1 (1987), and *Legal Assistance for Vietnamese Asylum Seekers v. Department of State*, 45 F.3d 469 (D.C. Cir. 1995), *vacated on other grounds*, 519 U.S. 1 (1996), which followed *Abourezk*. *See Hawaii*, 859 F.3d at 768. But as the D.C. Circuit recognized in *Saavedra Bruno*, *Abourezk* "rested in large measure" on an INA provision that was subsequently amended to "make[] clear that district courts do not have general jurisdiction over claims arising under the immigration laws." 197 F.3d at 1164.[1]

[1] This Court also previously invoked *Sale*, *supra*, but the Supreme Court there rejected plaintiffs' claims on the merits without addressing reviewability.

Finally, this Court relied on cases adjudicating constitutional challenges to immigration laws or policies. *Hawaii*, 859 F.3d at 768. As the Supreme Court has recognized, however, constitutional claims are different. *See Webster v. Doe*, 486 U.S. 592, 603 (1988) (recognizing that, even where statutory claims are precluded, Congress must speak "clear[ly]" to preclude review of constitutional claims). That principle is inapposite here, because the district court's injunction was premised solely on plaintiffs' statutory claims.

3. Review is also unavailable because the APA provides for judicial review only of "final agency action." 5 U.S.C. § 704. The President's Proclamation is not agency action at all, *see Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992), and any challenge is not yet ripe because no alien identified by plaintiffs has yet been denied a visa based on the Proclamation.[2] The APA also does not apply to the extent "agency action is committed to agency discretion by law," 5 U.S.C. § 701(a)(2);

[2] The district court suggested that a Syrian journalist was denied a visa to speak at a University of Hawaii lecture series as a result of the Proclamation, TRO Order 12, 22 n.13, but that is entirely speculative. Apart from the fact that Proclamation was not issued until September 24, 2017 and the declaration does not specify when in September the journalist's visa was denied, Dkt. 370-8 ¶¶ 4-9, the Proclamation's entry restrictions were not scheduled to become effective until October 18, 2017 for Syrians (among others) with a credible claim of a bona fide relationship with a U.S. entity. Procl. § 7(a)(ii), (b).

here, the relevant statutes give the President unreviewable discretion to impose restrictions on entry. *Infra* at p.16.

B. The Proclamation's Entry Restrictions Are Within The Scope Of The President's Authority Under 8 U.S.C. §§ 1182(f) And 1185(a)(1) And Do Not Violate 8 U.S.C. § 1152(a)(1)

The district court also erred in holding that plaintiffs are likely to succeed on their claims that the Proclamation's entry restrictions do not come within the scope of the President's statutory authority under 8 U.S.C. §§ 1182(f) and 1185(a)(1) and that the entry restrictions contravene 8 U.S.C. § 1152(a)(1) as applied to aliens seeking immigrant visas. The government respectfully disagrees with the Court's reasoning in *Hawaii* that Section 1185(a)(1) requires a Presidential finding that entry of excluded classes of aliens would be detrimental to the interests of the United States. In any event, however, the detailed findings in the Proclamation amply satisfy the standard applied by the Court.

1. The President Has Extremely Broad Discretion To Suspend Entry Of Aliens Abroad

The President's Proclamation was issued pursuant to his inherent Article II authority to exclude aliens, *see Knauff*, 338 U.S. at 543, and his broad statutory authority under 8 U.S.C. §§ 1182(f) and 1185(a)(1). Section 1182(f) provides that "[w]henever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the

entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate." As courts have repeatedly recognized, Section 1182(f) provides the President "sweeping" discretionary power to suspend the entry of aliens. *Abourezk*, 785 F.2d at 1049 n.2; *see also Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498, 1507 (11th Cir. 1992); *Allende v. Shultz*, 845 F.2d 1111, 1118 & n.13 (1st Cir. 1988); *Mow Sun Wong v. Campbell*, 626 F.2d 739, 744 n.9 (9th Cir. 1980). The Supreme Court has deemed it "perfectly clear that [Section] 1182(f) * * * grants the President ample power to establish a naval blockade that would simply deny illegal Haitian migrants the ability to disembark on our shores." *Sale*, 509 U.S. at 187.

Section 1185(a)(1) similarly authorizes the President to restrict the entry of aliens into the United States, or to set "such reasonable rules, regulations, and orders," and "such limitations and exceptions as the President may prescribe." This statutory text likewise confirms the breadth of the President's authority, without requiring any predicate finding whatsoever. *See Agee*, 453 U.S. at 297 (construing similar language in § 1185(b) as "le[aving] the power to make exceptions exclusively in the hands of the Executive"); *Allende*, 845 F.2d at 1118 & n.13.

The plain terms of Sections 1182(f) and 1185(a)(1) provide no basis for judicial second-guessing of the President's determination about what restrictions to "prescribe" or what restrictions are necessary to avoid "detriment[] to the interests

of the United States." In these circumstances, where Congress has expressly committed these matters to the President's judgment and discretion, there are no meaningful standards for review. *See Doe*, 486 U.S. at 600-01. As the Supreme Court recognized in *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 491 (1999), courts are "ill-equipped to determine the[] authenticity and utterly unable to assess the[] adequacy" of the Executive's reasons for excluding particular foreign nationals. At a minimum, to the extent Section 1182(f) envisions any "find[ings]," the fact that the President acts by "proclamation" suggests that they need not be extensive and should not be subject to searching review.

Historical practice likewise confirms the breadth of, and deference owed to, the President's exercise of authority under Sections 1182(f) and 1185(a)(1). For decades, Presidents have restricted entry pursuant to those statutes without detailed public justifications or findings; some have discussed the President's rationale in one or two sentences that broadly declare the Nation's interests.[3] The only justification provided for the Presidential action at issue in *Sale* was that "[t]here continues to be a serious problem of persons attempting to come to the United States by sea without

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[3] *E.g.*, Proclamation No. 8693, 76 Fed. Reg. 44,751 (2011); Proclamation No. 8342, 74 Fed. Reg. 4093 (2009); Proclamation No. 6958, 61 Fed. Reg. 60,007 (1996); Proclamation No. 5887, 53 Fed. Reg. 43,185 (1988); Proclamation No. 5829, 53 Fed. Reg. 22,289 (1988).

necessary documentation and otherwise illegally," Executive Order No. 12,807, pmbl. pt. 4, 57 Fed. Reg. 23,133 (1992), but the Supreme Court expressed no concerns about the adequacy of that finding, ruling that "[w]hether the President's chosen method" made sense from a policy perspective was "irrelevant to the scope of his authority" under Section 1182(f). *Sale*, 509 U.S. at 187-88.

Similarly, in 1979 when President Carter invoked Section 1185(a)(1) to restrict entry of Iranian nationals, he made no express findings and delegated the authority to prescribe restrictions to lower Executive Branch officials. *See* Exec. Order No. 12,172, § 1-101, 44 Fed. Reg. 67,947 (1979). Yet courts, including this Court, refused to invalidate those restrictions. *See Yassini v. Crosland*, 618 F.2d 1356, 1362 (9th Cir. 1980); *Nademi v. INS*, 679 F.2d 811, 813-14 (10th Cir. 1982).

2. The Proclamation Is Fully Justified By The President's National Security And Foreign Affairs Judgments

The President's Proclamation was based on a detailed explanation for his express finding that the entry of aliens subject to the restrictions would be detrimental to national interests. That finding readily satisfies even the standards applied by this Court in *Hawaii*.

As the President explained, the entry restrictions serve two purposes. First, they "prevent the entry of those foreign nationals about whom the United States Government lacks sufficient information to assess the risks they pose to the United States." Procl. § 1(h)(i); *Id.* § 1(a), (b) (discussing the importance of foreign

government's information-sharing to vetting process). Plaintiffs have offered no basis to second-guess this national-security judgment. *Cf. Egan*, 484 U.S. at 530.

Second, the entry restrictions are "needed to elicit improved identity-management and information-sharing protocols and practices from foreign governments" whose nationals are subject to the restrictions. Procl. § 1(h)(i). The diplomatic engagement period described in the Proclamation yielded significant improvements in foreign governments' information sharing, *id.* § 1(e)-(g), and the United States has a foreign policy interest in continuing to encourage improvement. Surely the President can also impose restrictions to try to encourage positive future behavior, contrary to the district court's cramped understanding of the President's authority, TRO Order 31-32.

The explanations provided in the Proclamation amply satisfy any requirement under Sections 1182(f) and 1185(a)(1) to make findings in support of the targeted entry restrictions. The President specifically determined, based on the Secretary of Homeland Security's review and recommendation, that the identified countries have inadequate information-sharing practices to allow the United States to adequately assess the risks posed by their nationals. Procl. § 1(g), (i). That finding distinguishes this Court's prior decision that EO-2 was not based on "any finding that the current screening processes are inadequate." *Hawaii*, 859 F.3d at 773.

Furthermore, the specific harms that are the focus of the entry restrictions are by their nature nationality-based. "Information-sharing and identity-management protocols and practices of foreign governments are important" to the United States' abilities to properly screen and vet aliens to protect the United States "from terrorist attacks and other public-safety threats." Procl. § 1(a)-(b). Foreign governments "manage the identity and travel documents of their nationals," and "also control the circumstances under which they provide information about their nationals to other governments." *Id.* § 1(b). Such practices apply to all of a foreign government's nationals traveling on that country's passports. The Proclamation is well-tailored to the concerns that animate it, and its entry restrictions exclude dual nationals of a covered country who are traveling on a non-covered country's passport. *Id.* § 3(b)(iv). The nation-specific deficiencies identified by the President further distinguish the entry restrictions here from EO-2's entry suspensions, which this Court criticized as not based on a "finding that nationality alone renders entry of this broad class of individuals a heightened security risk to the United States." *Hawaii*, 859 F.3d at 772.

The district court also faulted the President for tailoring entry restrictions to the particular circumstances of each identified country and, in some instances, to classes of visas within each country. TRO Order 30. But those carefully tailored entry restrictions are a virtue of the Proclamation, not a failing: they demonstrate

that the specific restrictions were imposed based on a country-specific evaluation of relevant factors, including foreign-policy, national-security, and counterterrorism goals. *See* Procl. § 1(h)(1). The differences in entry restrictions reflect nuanced tailoring to the particular factual and diplomatic situation in each identified country. Moreover, the district court's conclusion that the Proclamation is both "overbroad *and* underinclusive" misunderstands the nature of the President's power. An action under Section 1182(f) or Section 1185(a)(1)(A) need not confront every security problem the Nation faces.

There is no basis in this Court's prior rulings, much less in the broad discretionary language of 8 U.S.C. §§ 1182(f) and 1185(a)(1), for the type of exacting scrutiny applied by the district court. Even if some type of judicial review were appropriate, the degree of justification and tailoring demanded were improper. At most, the President should justify entry restrictions in aliens by articulating a connection between the entry restrictions imposed and the national interest, a standard the President's findings in the Proclamation plainly satisfy. The district court's approach would deeply enmesh courts in second-guessing the President's conduct of foreign affairs, despite the well-established principle that such matters are "largely immune from judicial inquiry or interference." *Regan v. Wald*, 468 U.S. 222, 242 (1984).

3. The Entry Restrictions Imposed By The Proclamation Do Not Violate 8 U.S.C. § 1152(a)(1)(A)

The district court also held that the Proclamation's targeted entry restrictions violate 8 U.S.C. § 1152(a)(1)(A), which prohibits discrimination on the basis of nationality in the "issuance of an immigrant visa." But there is no conflict between Section 1152(a)(1)(A) and Sections 1182(f) and 1185(a). The statutory provisions operate in different spheres: Sections 1182(f) and 1185(a), like numerous other provisions of the INA, limit the universe of individuals eligible to receive visas; Section 1152(a)(1)(A), by contrast, prohibits discrimination on the basis of nationality within that universe of eligible individuals.

The legislative history shows that Congress understood the INA to operate in this manner. The 1965 amendment enacting the provision codified at 8 U.S.C. § 1152(a)(1)(A) was designed to eliminate the country-quota system previously in effect, but it was intended to operate only as to those aliens *otherwise eligible for visas*, not to modify the eligibility criteria for admission or to limit any of the pre-existing provisions like Sections 1185(f) or 1185(a)(1) addressing entry or protecting security. *See* H. Rep. No. 89-745, at 12-13 (1965); S. Rep. No. 89-748, at 11, 13 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3328, 3329, 3331.

Historical practice supports this interpretation. In 1986, President Reagan suspended the immigrant entry of "all Cuban nationals," subject to certain exceptions, until "the Secretary of State, after consultation with the Attorney

General, determines that normal migration procedures with Cuba have been restored." 51 Fed. Reg. 30,470, 30,471 (1986). President Carter issued an order in 1979 in response to the Iranian hostage crisis; although the order did not itself deny or revoke visas, the President explained upon its issuance that the State Department would "invalidate all visas issued to Iranian citizens" and would not reissue visas or issue new visas "except for compelling and proven humanitarian reasons or where the national interest of our own country requires." Jimmy Carter, *Sanctions Against Iran: Remarks Announcing U.S. Actions* (Apr. 7, 1980), http://www.presidency.ucsb.edu/ws/?pid=33233; *see also See* 44 Fed. Reg. 67,947 (Nov. 26, 1979).

Indeed, this Court previously recognized that the President may permissibly distinguish among "classes of aliens on the basis of nationality" when warranted "as retaliatory diplomatic measures responsive to government conduct directed at the United States." *Hawaii*, 859 F.3d at 772 n.13. The district court's order does not even acknowledge this statement, and its construction of Section 1152(a)(1)(A) would appear to render invalid the prior proclamations by President Reagan and President Carter. *See also* TRO Order 26-27 n.14.

Construing Section 1152(a)(1) to disable the President from taking action against the nationals of a foreign state for foreign-affairs or nationality-security reasons would also raise serious constitutional concerns. That reading should be

rejected given the available construction harmonizing Sections 1182(f), 1185(a)(1), and 1152(a)(1).

In any event, even if one concluded that Section 1152(a)(1) is inconsistent with Sections 1182(f) and 1185(a)(1), background principles of construction would require finding that Section 1152(a)(1) gives way. Section 1185(a)(1) was enacted in its current form in 1978, after enactment of Section 1152(a)(1), and as the most recent statute, would prevail. *See* Foreign Relations Authorization Act, Fiscal Year 1979, Pub. L. No. 95-426, § 707(a), 92 Stat. 963, 992-93 (1978). Furthermore, which Section 1152(a)(1)(A) establishes a general rule governing nondiscrimination in the issuance of visas by those involved in that process, Sections 1182(f) and 1185(a)(1) constitute unique grants of authority directly to the *President* to restrict entry of aliens to protect the national interest, which are more specific than, and thus supersede, Section 1152(a)(1)(A)'s general rule.

C. The Global Injunction Is Improper

At a minimum, the district court erred because Article III and equitable principles require that the injunction be limited to redressing plaintiffs' own cognizable, irreparable injuries deriving from the exclusion of identifiable aliens. *Lewis v. Casey*, 518 U.S. 343, 357 (1996); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). There is no basis for a worldwide injunction with respect to all aliens. The district court's belief that the Proclamation is invalid in all its

applications reflects its legal rationale for ruling in favor of the parties before the court. It does not justify relief to third parties.

The Supreme Court partially stayed the previously issued nationwide injunction against EO-2 to the extent it reached foreign nationals who lack any bona fide relationship with a person or entity in the United States. *Trump*, 137 S. Ct. at 2087. At a minimum, this Court should similarly partially stay the district court's overbroad injunction, which contains no such limiting provision. Moreover, the Supreme Court did not conclude that a similarly narrowed injunction was appropriate in all circumstances, and the Court carefully tailored its stay to the circumstances presented there. This case is very different for the reasons described, and the equitable balancing requires following the ordinary rule of plaintiff-specific relief.

CONCLUSION

For these reasons, defendants respectfully request that, pending final disposition of the appeal, this Court stay the preliminary injunction, in whole or at least as to all aliens except those identified aliens whose exclusion would impose a cognizable, irreparable injury on plaintiffs. In addition, defendants respectfully request that, pending a ruling on a stay pending appeal, the Court grant an immediate administrative stay.

Respectfully submitted,

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OCTOBER 2017

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-volume limitations of Fed. R. App. P. 27(d)(2)(A). This motion contains 5,516 words, excluding the parts of the motion excluded by Fed. R. App. P. 27(d)(2) and 32(f).

/s/ Sharon Swingle
Sharon Swingle

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2017, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Sharon Swingle
Sharon Swingle