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)

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

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The district court's ruling enjoins worldwide a national-security and foreign-relations judgment by the President in a Proclamation issued pursuant to broad constitutional and statutory authority. That judgment represents the culmination of a multi-agency review of foreign governments' information-sharing practices and risk factors, which identified certain governments' practices as deficient. Plaintiffs offer no persuasive reason to allow the injunction effectively to nullify the Proclamation before this Court has an opportunity to rule on its validity and scope.

Plaintiffs would equate the Proclamation with Executive Order No. 13,780 (EO-2) and contend that the Proclamation contains insufficient findings under this Court's prior reasoning in its now-vacated opinion enjoining EO-2. The Government respectfully disagrees that a Presidential finding that entry of excluded classes of aliens would be detrimental to the interests of the United States is judicially reviewable under 8 U.S.C. § 1182(f) or required at all under 8 U.S.C. § 1185(a)(1), but even assuming the correctness of those rulings, the detailed findings in the Proclamation readily satisfy the standard set out by this Court. The Government's comprehensive review identified particular concerns about the information-sharing and identity-management procedures of particular countries, as well as other country-specific risk factors, to which the Proclamation's entry restrictions are tailored. The Proclamation's detailed findings put it on the same, if not better, footing as similar decisions by past Presidents.

Plaintiffs also err in contending that the Proclamation violates 8 U.S.C. § 1152(a)(1)(A). Sections 1182(f) and 1185(a) address which aliens are eligible for visas in the first instance; Section 1152(a)(1)(A) prohibits nationality-based discrimination among aliens who are eligible for visas. Plaintiffs' contrary arguments cannot be squared with historical practice, and ask this Court to impose limits (and exceptions to the limits) found nowhere in the text of Section 1152.

Plaintiffs also identify no cognizable, irreparable harm that they would suffer if the Proclamation takes effect during the brief period of an expedited appeal. Plaintiffs' statutory and constitutional claims are not justiciable, and the speculative injuries they forecast would not even be ripe unless and until identified aliens apply, are otherwise eligible for visas, and are denied a waiver. And, at a minimum, the injunction should be stayed to the extent it extends to third parties with whom plaintiffs have no connection at all, or at least to aliens abroad who lack a bona fide relationship with any person or entity in the United States.

I. The Balance Of Harms Supports A Stay

A. The injunction causes irreparable harm to the government and public by intruding on the President's national security judgment and in the area of immigration, where the President's constitutional and statutory powers are at their highest. Mot. 8-9. Plaintiffs assert that the injunction merely preserves the "'status quo'" that existed "'for years.'" Opp. 20 (quoting TRO Op. 37). But the Proclamation rests on the

President's new findings—informed by a recent, comprehensive, multi-agency review—of actual deficiencies in certain countries' information sharing and other risk factors. Plaintiffs offer no valid reason to discount that process or the resulting determinations. They identify (Opp. 20) former national-security officials who disagree with the Proclamation's policy judgment, but none of those officials participated in the recent review, diplomatic-engagement, and recommendation processes that culminated in the Proclamation.

Plaintiffs' assertion (Opp. 20) that the government acted with insufficient speed is also meritless. The brief period allowed by the Proclamation for orderly worldwide implementation of its restrictions hardly demonstrates a lack of dispatch. The government sought a stay two business days after the preliminary injunction in this case was entered.

B. Plaintiffs fail to identify any countervailing harm during the brief period of an expedited appeal. Their assertion of "prolonged separation from family members," prospective students and faculty, or group members (Opp. 21) is unfounded; briefing and argument will be complete in a matter of weeks. Contrary to plaintiffs' assertion (Opp. 21), they face no "immediate" injury from the Proclamation. Unless and until a particular alien subject to the Proclamation's restrictions applies and is found otherwise eligible for a visa and is denied a waiver under the Proclamation, the Proclamation will not affect them at all.

II. The Government Is Likely To Prevail On Appeal

A. Plaintiffs' Claims Are Not Justiciable

Plaintiffs' authorities cast no doubt on the longstanding 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). Plaintiffs contend that this Court's decision addressing EO-1 limits the nonreviewability rule to "an individual consular officer's decision to deny a visa." Opp. 9. But that decision addressed the reviewability of constitutional claims, *Washington v. Trump*, 847 F.3d 1151, 1161-1163 (9th Cir. 2017), and has no bearing on the statutory claims on which this injunction rests. Plaintiffs cite (Opp. 9) this Court's decision addressing EO-2, but that vacated decision "holds no precedential value," *Schmidt v. Contra Costa County*, 693 F.3d 1122, 1137 n.15 (9th Cir. 2012), and failed to give due weight to the fact that constitutional principles of deference to the political branches exemplified by the doctrine of consular nonreviewability should apply with particular force to the President. Plaintiffs also note (Opp. 9-10) that *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), decided the merits, but the absence of any ruling on reviewability means *Sale* "ha[s] no precedential effect" on that issue. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998).

Plaintiffs alternatively argue (Opp. 9) that the Administrative Procedure Act (APA) authorizes review. Far from displacing the nonreviewability rule, the APA embraces it. *See* 5 U.S.C. §§ 701(a)(1), 702(1); *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1157-62 (D.C. Cir. 1999). Moreover, the APA does not authorize review because plaintiffs identify no "final agency action." 5 U.S.C. § 704. Nor may plaintiffs sidestep these limitations by styling their suit as seeking equitable relief. Opp. 8-9. "[C]ourts of equity" cannot "disregard" the "express and implied statutory limitations" on review that otherwise apply. *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1384-85 (2015).

B. The Proclamation Does Not Violate The INA Or The Establishment Clause

1. Plaintiffs contend (Opp. 12) that courts must review the sufficiency of the President's finding that entry of certain aliens would be "detrimental to the interests of the United States." 8 U.S.C. § 1182(f). But the longstanding, general rule is that, "where Congress has authorized a public officer to take some specified legislative action when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of the facts calling for that action is not subject to review," except to confirm that the requisite determination was made. *United States v. George S. Bush & Co.*, 310 U.S. 371, 380 (1940); *see Webster v. Doe*, 486 U.S. 592, 600-01 (1988). That rule has compelling force with respect to a national-security judgment of the President. The

Proclamation expressly makes the only finding Section 1182(f) requires: that entry of the nationals affected by "would be detrimental to the interests of the United States," Procl. pmbl. And Section 1185(a)(1) requires no findings at all.

Plaintiffs erroneously contend (Opp. 11-13) that this Court's decision addressing EO-2 permits scrutinizing whether the President's findings "support[]" his judgment regarding which aliens' entry to suspend or restrict. The Government respectfully disagrees with this Court's prior conclusion, but even assuming its correctness, the Proclamation makes the types of findings this Court contemplated. Based on an exhaustive, multi-agency, worldwide review, it finds that "current screening processes are inadequate" as to particular countries because of concrete deficiencies in their information sharing that they have failed to correct. *Hawaii v. Trump*, 859 F.3d 741, 773 (9th Cir.), *vacated as moot*, 2017 WL 4782860 (U.S. Oct. 24, 2017); *see* Procl. §§ 1-2. It further explains how the restrictions advance a vital "diplomatic" objective of "increas[ing] political pressure" on foreign governments to improve their cooperation. *Hawaii*, 859 F.3d at 772 n.13; *see* Procl. § 1(b), (h).

Plaintiffs' contention (Opp. 12-13) that Section 1182(f) and 1185(a)(1) require a finding that affected aliens themselves pose an immediate danger because they "engaged in self-evidently harmful conduct" or "subversive activities," violated international law, or entered illegally has no grounding in statutory text or this Court's prior decision. And it is irreconcilable with historical practice. Neither

President Reagan's order suspending entry of Cuban nationals under Section 1182(f) nor President Carter's order regarding entry of Iranian nationals under Section 1185(a)(1) found that all restricted aliens posed a particularized threat.

Plaintiffs resort (Opp. 13-16) to assailing the fit between the President's findings and the restrictions imposed. But neither Sections 1182(f) and 1185(a)(1), nor this Court's prior decision, provide any basis for such a narrow-tailoring requirement. Even in ordinary APA review, which is unavailable here, if a "rational connection between the facts found and the choice made" exists, judicial inquiry is at an end. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). The Proclamation clearly satisfies that standard. *See IRAP v. Trump*, 2017 WL 467314 at *23 (D. Md. 2017).

Plaintiffs contend (Opp. 14) that particular countries' information-sharing deficiencies can be adequately addressed through case-by-case adjudication. But the President determined that the information provided by certain countries is deficient for *systemic* reasons that generally make individualized assessment inadequate. Moreover, country-level restrictions can prompt other nations' governments to improve their cooperation, as occurred during the Proclamation's engagement process and the prior entry suspensions.

Plaintiffs argue (Opp. 14-15) that the Order "contradicts its stated rationale" because it does not bar every traveler from every covered country, and because of

individualized assessments regarding conditions in Iraq, Venezuela, and Somalia. But the various exemptions either do not equally implicate the concerns motivating the Proclamation, *e.g.*, Procl. § 3(b)(iv) (dual nationals traveling on non-covered nation's passport), or reflect careful balancing of countervailing considerations, *e.g.*, *id.* § 3(c) (waivers).

Plaintiffs also argue (Opp. 15-16) that the Proclamation is "overbroad" because it does not exempt certain low-risk travelers. The Proclamation, however, is not based on the assumption that everyone traveling from one of the covered nations is likely a terrorist, but that their governments do not reliably provide information needed to vet their nationals. The possibility that certain aliens may present unique circumstances that warrant special consideration is precisely why the Proclamation provides for individualized exceptions. The Proclamation need not perfectly align with every potential risk faced by the country; instead, Congress provided the President broad authority to determine appropriate entry restrictions for classes of aliens. Thus, even if the Proclamation were overinclusive or underinclusive at the margins, that would provide no basis for invalidating it. Moreover, plaintiffs' overbreadth argument overlooks the Proclamation's additional purpose in encouraging foreign governments to improve their practices, much like the Cuban and Iranian entry suspensions.

2. Plaintiffs' alternative theory (Opp. 17-19) that the Proclamation violates Section 1152(a)(1)(A)'s ban on nationality discrimination in the issuance of immigrant visas fares no better. Sections 1182(f) and 1185(a), like numerous other provisions in the INA, limit the universe of individuals eligible to receive visas. Consistent with its intent to eliminate the country quota system for immigrant visas, Section 1152(a)(1)(A) operates only for those aliens otherwise eligible for an immigrant visa under Section 1185(f) or Section 1185(a)(1). Accordingly, Section 1152(a)(1)(A) has no application to an alien whose entry has been barred by Section 1182(f).

Plaintiffs contend (Opp. 17) the Government's argument results in a "circumvention" of Section 1152(a)(1)(A), but that assumes that Congress intended to cabin the President's distinct power to protect the Nation. Plaintiffs also assert that the Government's argument is a "complete departure from the text" of Section 1152(a)(1)(A), but omit the critical language in that provision, which prohibits nationality-based discrimination "in the issuance of an immigrant visa," 8 U.S.C. § 1152(a)(1)(A), whereas Section 1182(f) concerns the "entry" of an alien, and thus addresses whether the alien is eligible for a visa in the first instance. It is plaintiffs who would depart from the text, asking this Court to apply Section 1152(a)(1)(A) to *non*-immigrant visas, Opp. 19 n.10, despite the plain words of the statute. The single case plaintiffs cite does not mention Section 1152(a)(1)(A), much less provide a basis for deviating from its text.

Plaintiffs also err in relying on *Legal Assistance for Vietnamese Asylum Seekers v. Department of State, Bureau of Consular Affairs*, 45 F.3d 469 (D.C. Cir. 1995), *vacated on other grounds*, 519 U.S. 1 (1996). That case did not involve Presidential action authorized by Sections 1182(f) or 1185(a)(1).

Moreover, plaintiffs concede that nationality-based entry restrictions are lawful notwithstanding Section 1152(a)(1)(A) where—as with President Carter's and President Reagan's nationality-specific entry suspensions—it is a response to "exigent circumstances." Opp. 18-19. Nothing in Section 1152(a)(1)(A)'s text, however, supports an "exigency" exception. Like the Proclamation, those actions were lawful because Section 1152(a)(1)(A) does not conflict with (let alone supersede) the President's authority under Sections 1182(f) and 1185(a)(1). And nothing in these provisions provides a judicially administrable basis to determine when our relations with a particular country are sufficiently severe that entry restrictions on nationals from that country would be in the national interest.

3. Plaintiffs' Establishment Clause challenge, which the district court did not address, has no bearing on whether the injunction (premised on statutory claims) should be stayed pending appeal. It also fails on the merits. Plaintiffs' challenge is governed by, and fails under, the "facially legitimate and bona fide reason" test of *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972), which entails "minimal scrutiny (rational-basis review)," *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1693 (2017). The

Proclamation rests expressly on national-security and foreign-policy concerns unrelated to religion. Even under domestic Establishment Clause precedent, furthermore, the Proclamation passes muster because it resulted from a comprehensive review of screening and vetting procedures and the recommendations of multiple Cabinet-level officials whose motives have never been questioned.

III. The Global Injunction Is Improper

Plaintiffs do not dispute that Article III and equitable principles require limiting injunctive relief to redressing plaintiffs' own cognizable, irreparable injuries. Yet they do not identify any concrete, irreparable injury to plaintiffs that warrants enjoining the Proclamation worldwide. Any alleged delay in entry of particular aliens to whom plaintiffs have specific ties would be fully redressed by injunctive relief limited to those aliens.

Plaintiffs contend (Opp. 22) that, whenever an Executive policy "contravenes a statute, it is invalid in all applications and must be enjoined on its face." Like the district court, Opinion 38, plaintiffs erroneously conflate the breadth of their legal theory with the proper scope of relief necessary to redress plaintiffs' own injuries. Nor can an asserted generalized interest in uniform enforcement of immigration laws (Opp. 22)—a power vested in the Executive pursuant to Acts of Congress—justify enjoining all enforcement of the Proclamation, even as to aliens to whom plaintiffs have no

connection. A proper deference to the immigration power requires particular caution, not breadth, in any judicial relief.

Plaintiffs' reliance (Opp. 22) on this Court's prior ruling is misplaced. The Supreme Court stayed that injunction in substantial part, concluding that the equitable balance weighed against injunctive relief for aliens lacking a credible claim of a bona fide relationship to a U.S. person or entity. *Trump v. IRAP*, 137 S. Ct. 2080, 2087-89 (2017). At the very least, the district court's injunction should not be allowed to nullify the Proclamation during this expedited appeal to a greater degree than the Supreme Court permitted with respect to EO-2. Plaintiffs correctly note (Opp. 23) that the circumstances the Supreme Court addressed differed, but those differences make a stay even more appropriate here. Now that the multi-agency review is complete and the President has identified specific, concrete national-security threats and foreign-policy interests that the Proclamation addresses, the equitable balance tips decisively in favor of a stay.[1]

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[1] Plaintiffs erroneously assert (Opp. 22-23) that the government "waived" a request to limit relief in this way, but the government argued below that the global relief plaintiffs sought would impermissibly extend beyond persons with a "cognizable and meritorious claim and who will suffer irreparable harm in the absence of an injunction," D. Ct. Dkt. 378, at 39. That includes persons who lack any bona fide relationship with a U.S. person or entity, for whom no Establishment Clause or INA claim can be asserted.

CONCLUSION

For these reasons, defendants respectfully request that, pending completion of appellate review (including any Supreme Court review), 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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NOVEMBER 2017

CERTIFICATE OF COMPLIANCE

I hereby certify that this reply complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-volume limitations of Ninth Circuit Rule 27-1(1)(d) and 32-3(2). This motion contains 2,793 words, excluding the parts of the motion excluded by Fed. R. App. P. 27(a)(2)(B) and (d)(2) and 32(f).

/s/ Sharon Swingle
Sharon Swingle

CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2017, I electronically filed the foregoing reply with the Clerk of the Court for the United States Court of Appeals for the Fourth 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