No. 17-17168

In the United States Court of Appeals for the Ninth Circuit

STATE OF HAWAII; ISMAIL ELSHIKH; JOHN DOES, 1 & 2; MUSLIM ASS'N OF HAWAII, INC.,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HOMELAND SECURITY; U.S. DEPARTMENT OF STATE; REX W. TILLERSON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE; UNITED STATES OF AMERICA,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Hawaii

BRIEF FOR THE STATES OF TEXAS, ALABAMA, ARIZONA, ARKANSAS, FLORIDA, KANSAS, LOUISIANA, MISSOURI, OHIO, OKLAHOMA, SOUTH CAROLINA, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF APPELLANTS

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Interest of Amici Curiae

Amici curiae are the States of Texas, Alabama, Arizona, Arkansas, Florida, Kansas, Louisiana, Missouri, Ohio, Oklahoma, South Carolina, and West Virginia.[1] The States have a significant interest in protecting their residents' safety. But the States and their elected officials must generally rely on the federal Executive Branch to restrict or set the terms of aliens' entry into the States for public-safety and national-security reasons, pursuant to the laws of Congress. *See Arizona v. United States*, 567 U.S. 387, 409-10 (2012). And the Immigration and Nationality Act (INA) gives the Executive significant authority to suspend aliens' entry into the country. Amici therefore have a substantial interest in the alleged existence of restrictions on the President's ability to suspend the entry of aliens as he determines is in the national interest.

[1] The parties consent to the filing of this merits brief, which amici would nevertheless be entitled to file as of right under Federal Rule of Appellate Procedure 29(a)(2).

Summary of the Argument

The court below issued yet another remarkable injunction of the President's Proclamation suspending the entry of specified classes of nonresident aliens. The injunction denies the federal government—under a statutory regime crafted by the people's representatives in Congress—the latitude necessary to make national-security, foreign-affairs, and immigration-policy judgments inherent in this country's nature as a sovereign. The injunction is contrary to law because it issued despite multiple longstanding doctrines limiting the availability of judicial remedies for disagreement with policy decisions like the Proclamation here.

First, the injunction cannot be justified by a discriminatory-purpose challenge to the Proclamation based on purported religious animus. The Supreme Court accords facially neutral government actions a presumption of validity and good faith, so those actions can be invalidated under a discriminatory-purpose analysis only if there is clear proof of pretext to overcome these presumptions. This longstanding, exacting standard for judicial scrutiny of government motives has been recognized in multiple types of constitutional challenges. *See infra* Part I.A. This limit respects institutional roles by precluding "judicial psychoanalysis of a drafter's heart of hearts." *McCreary Cty. v. ACLU*, 545 U.S. 844, 862 (2005). And no grounds here satisfy the exacting standards for showing that the Proclamation is pretext masking a religious classification. The Proclamation classifies aliens according to nationality based on concerns about the government's ability to adequately vet and manage nationals of eight covered countries. That result is the culmination of months of review and input from

numerous federal officials. Not only that, but several countries covered by the Proclamation were previously identified by Congress and the Obama Administration, under the visa-waiver program, as national-security "countries of concern." The Proclamation is therefore valid, as it provides a "facially legitimate and bona fide reason" for exercising the President's 8 U.S.C. § 1182(f) national-security and foreign-affairs powers to restrict entry. *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972).

Second, the President had statutory authority to issue the Proclamation. The Proclamation comports with Congress's scheme granting the President sweeping power, under 8 U.S.C. § 1182(f), to restrict alien entry into the United States. Thus, in addition to the presumptions of constitutionality and good faith, the Proclamation must also be further accorded "the strongest of presumptions and the widest latitude of judicial interpretation," because it is in *Youngstown*'s first zone of executive action pursuant to congressionally delegated power. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

Third, the injunction cannot be justified under a procedural-due-process theory turning on whether a nonresident alien abroad has a sufficient connection to the United States. The Constitution does not apply extraterritorially to nonresident aliens abroad seeking entry. So neither the Fifth Amendment nor the Establishment Clause extend to the aliens covered by the Proclamation. Indeed, this Court has specifically recognized that there is no "judicial remedy" to override the Executive's use of its delegated 8 U.S.C. § 1182(f) power to deny classes of nonresident aliens entry into this country. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993).

But even assuming the Constitution applies to nonresident aliens abroad seeking entry, the Proclamation fully complies with any possible due-process requirements. The Proclamation publicly sets forth facially valid, bona fide national-security grounds for restricting entry to classes of nonresident aliens abroad. At a minimum, constitutional rights do not extend extraterritorially to "foreign nationals abroad who have no connection to the United States at all." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (2017) (per curiam) (*IRAP*).

ARGUMENT

I. Plaintiffs Cannot Overcome the Exacting Standard that Applies to Discriminatory-Purpose Challenges to Facially Neutral Government Actions.

As the Supreme Court has recognized for years and in many different contexts, a discriminatory-purpose challenge to facially neutral government action faces an exacting standard. The central principle in this well-established body of case law is that a facially neutral government action can be invalidated as pretext only upon a clear showing. *See infra* pp. 7-8. This high standard for overriding government action by discerning a discriminatory purpose respects the "heavy presumption of constitutionality to which a carefully considered decision of a coequal and representative branch of our Government is entitled." *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 721 (1990) (citation and quotation marks omitted).

That heavy presumption cannot be overcome by plaintiffs' arguments here, especially given the Proclamation's detailed national-security findings, the resonance of those findings in determinations of numerous federal officials, and the judicial deference owed to executive decisions in this context. *See* Presidential Proclamation No. 9645 § 1(c)-(j), 82 Fed. Reg. 45,161, 45,162-65 (Sept. 24, 2017). Arguments deeming the Proclamation pretext for a religious test discount those weighty considerations, and undermine the sound reasons for the exacting standard required to invalidate facially neutral government action based on an alleged discriminatory purpose.

A. An exacting standard insulates government action from being deemed a discriminatory pretext absent clear proof overcoming the presumptions of constitutionality and good faith.

A discriminatory-purpose challenge to facially neutral government action faces an exacting standard under Supreme Court precedent: it requires clear proof of pretext.

1. This exacting standard for discriminatory-purpose challenges is just one application of the Supreme Court's general recognition that government action is presumed valid, *e.g.*, *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 353 (1918); that government actors are presumed to act in good faith, *Miller v. Johnson*, 515 U.S. 900, 916 (1995); and that a "presumption of regularity" attaches to official government action, *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926). These doctrines create a "heavy presumption of constitutionality." *Triplett*, 494 U.S. at 721.

And this presumption of constitutionality applies with particular force to the foreign-affairs and national-security determinations at issue here. *See Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491-92 (1999) (*AADC*). After all, "[u]nlike the President and some designated Members of Congress, neither the Members of th[e Supreme] Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people." *Boumediene v. Bush*, 553 U.S. 723, 797 (2008). Indeed, "the Government's interest in enforcing" the Proclamation's travel restrictions "and the Executive's authority to do so" extend from the government's "interest in preserving national security[, which] is an urgent objective of the highest order," particularly "when there is no

tie between the foreign national and the United States." *IRAP*, 137 S. Ct. at 2088 (quotation marks omitted).

2. Consequently, the Supreme Court "has recognized, ever since *Fletcher v. Peck*, [6 Cranch 87, 130-31 (1810),] that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977); *see also Washington v. Trump*, 858 F.3d 1168, 1174 (9th Cir. 2017) (Kozinski, J., dissenting from denial of rehearing en banc). The Supreme Court has therefore permitted a discriminatory-purpose analysis of government action in only a "very limited and well-defined class of cases." *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 377 n.6 (1991).

Even when it has permitted a discriminatory-purpose analysis of government action, this Court has concomitantly stated that any such analysis proceeds under an exacting standard. As Chief Justice Marshall explained for the Supreme Court over two centuries ago in *Fletcher*, government action can be declared unconstitutional only upon a "clear and strong" showing. 6 Cranch at 128.

The Supreme Court has thus repeatedly explained, in various contexts, that courts can override facially neutral government actions as pretext only upon clear proof. For example:

- When there are "legitimate reasons" for government action, courts "will not infer a discriminatory purpose." *McCleskey v. Kemp*, 481 U.S. 279, 298-99 (1987) (rejecting equal-protection claim).

- A law's impact does not permit "the inference that the statute is but a pretext" when the classification drawn by a law "has always been neutral" as to a protected status, and the law is "not a law that can plausibly be explained only as a [suspect class]-based classification." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272, 275 (1979) (rejecting equal-protection claim); *see Arlington Heights*, 429 U.S. at 269-71; *Washington v. Davis*, 426 U.S. 229, 245-48 (1976).

- Only the "clearest proof" will suffice to override the stated intent of government action, to which courts "defer." *Smith v. Doe*, 538 U.S. 84, 92 (2003) (rejecting ex-post-facto claim); *see Flemming v. Nestor*, 363 U.S. 603, 617 (1960) (citing *Fletcher*, 6 Cranch at 128).

- "[Unless] an understanding of official objective emerges from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts," judicial inquiry into purpose may make little "practical sense." *McCreary Cty.*, 545 U.S. at 862.

This exacting standard for a discriminatory-purpose challenge to facially neutral government action exists for good reason. It ensures that a purpose inquiry will remain judicial in nature, safeguarding against a devolution into policy-based reasoning that elevates views about a perceived lack of policy merit into findings of illicit purpose. Even when an official adopts a different policy after criticism of an earlier proposal, critics can be quick to perceive an illicit purpose when they disagree with the final policy issued. *See Tenney v. Brandhove*, 341 U.S. 367, 378 (1951) ("In times of political passion, dishonest or vindictive motives are readily attributed . . . and as readily believed."). The clearest-proof standard helps keep the Judiciary above that political fray.

B. There is nothing close to clear proof that the Proclamation here, which classifies aliens by nationality and reflects national-security concerns, is a pretext for a religious test.

The Proclamation's travel restrictions classify aliens by nationality—not religion. The Proclamation's suspension of entry by certain nationals from eight countries neither mentions any religion nor depends on whether affected aliens are Muslim. *See* Proclamation No. 9645 §§ 2, 3.

The Proclamation therefore is emphatically not a "Muslim ban." The Proclamation includes two non-majority-Muslim countries (North Korea and Venezuela), and excludes two majority-Muslim countries (Iraq and Sudan) that were covered by the President's previous entry suspensions. Data from the Pew-Templeton Global Religious Futures Project indicates that the countries covered by the Proclamation contain fewer than 9% of the world's Muslims. Chad, Iran, Libya, North Korea, Syria, Venezuela, Yemen, and Somalia are identified as "Countries of Identified Concern," from which entry is suspended or limited as "detrimental to the interests of the United States." Proclamation pmbl., § 2. Six of these countries were already included in the list of seven countries under 8 U.S.C. § 1187(a)(12) was created by Congress and the Obama Administration, in administering the visa-waiver program, upon finding each to be a national-security "country or area of concern." 8 U.S.C. § 1187(a)(12)(A)(i)(III).

The manifestly legitimate rationale for suspending entry for certain nationals (*see* Proclamation §§ 1-2) includes "each country's capacity, ability, and willingness to cooperate with [U.S.] identity-management and information-sharing policies and

each country's risk factors," and "foreign policy, national security, and counterterrorism goals." Proclamation § 1(h)(i). The proclamation reflects the "country-specific restrictions that would be most likely to encourage cooperation given each country's distinct circumstances, and that would, at the same time, protect the United States until such time as improvements occur." *Id.*

Moreover, before the current Administration took office, numerous federal officials—including the FBI Director, the Director of National Intelligence, and the Assistant Director of the FBI's Counterterrorism Division—expressed concerns about the country's current ability to vet alien entry. According to the House Homeland Security Committee, ISIS and other terrorists "are determined" to abuse refugee programs, and "groups like ISIS may seek to exploit the current refugee flows." The national-security interests implicated by the ongoing War on Terror against radical Islamic terrorists have been recognized since the 2001 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (codified at 50 U.S.C. § 1541 note).

Given this national-security grounding, a challenge to the Proclamation as a pretext for religious discrimination must fail. Ample reason exists for courts to leave undisturbed the delicate policy judgments inherent in the Proclamation. These decisions account for sensitive border-security factors indicating a heightened national-security risk that courts are not well situated to evaluate. *See Boumediene*, 553 U.S. at 797; *AADC*, 525 U.S. at 491. When it comes to deciding the best way to use a sovereign's power over its borders to manage risk, courts have long recognized that the political branches are uniquely well situated. *E.g.*, *Mathews v. Diaz*, 426 U.S. 67, 81 (1976); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89, 591 (1952).

Comments the President made during his campaign for office cannot overcome the combination of (1) the Proclamation's detailed explanation of its national-security basis, (2) the legitimate basis for that reasoning in conclusions of numerous federal officials, *see supra* p. 10, and (3) the exacting standard for deeming facially neutral government action pretext for a discriminatory purpose, *see supra* Part I.A. Furthermore, the Supreme Court has recognized the limited significance of campaign statements made before candidates assume the responsibilities of office. *See Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002); *see also Washington*, 858 F.3d at 1172-74 (Kozinski, J., dissenting from denial of rehearing en banc). And comments made by nongovernment officials are irrelevant for determining whether the Executive Branch took action as a pretext for a prohibited, discriminatory purpose. *See Feeney*, 442 U.S. at 279.

II. The Proclamation Complies with the INA, so It Also Receives "the Strongest of Presumptions" of Validity Because It Is Within *Youngstown*'s First Category as Executive Action Pursuant to Power Delegated Expressly by Congress.

The Proclamation also complies with Congress's statutory delegation of Executive power, so no purported INA violation would justify the injunction. In fact, the President's action here is accorded "the strongest of presumptions and the widest latitude of judicial interpretation." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring), quoted in *Dames & Moore v. Regan*, 453 U.S. 654, 674 (1981). That is because the Proclamation is within *Youngstown*'s first zone of executive action: Congress expressly delegated to the President the authority he exercised here. The burden of

persuasion for plaintiffs' constitutional challenges will therefore "rest heavily upon" plaintiffs, as the parties challenging the President's *Youngstown*-zone-one action. *Id.*

A. The Proclamation suspends the entry into the United States of several classes of aliens comprising certain nationals of eight listed countries, subject to certain exceptions. Proclamation §§ 2, 3, 6. This Proclamation exercises authority that Congress expressly delegated.

1. "Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953). Congress too has recognized this sovereign power to exclude aliens, giving the President broad discretion to suspend the entry of any class of aliens:

> *Whenever* 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.

8 U.S.C. § 1182(f) (emphases added). It is unlawful for an alien to enter the country in violation of "such limitations and exceptions as the President may prescribe." *Id.* § 1185(a)(1).

In addition to the President's broad § 1182(f) power to suspend the entry of aliens, Congress also provided that the Executive "may at any time, in [its] discretion," revoke a visa. *Id.* § 1201(i). Such a discretionary visa revocation is judicially

unreviewable except in one narrow circumstance: in a removal proceeding (as opposed to an entry denial), if the "revocation provides the sole ground for removal." *Id.*

2. Any challenge to congressional authorization for the Proclamation's nationality-based suspension of entry under § 1182(f) founders on the Supreme Court's decision in *Sale*, 509 U.S. at 187-88. *Sale* held—in terms equally applicable here—that no "judicial remedy" exists to override the Executive's use of its § 1182(f) power to deny entry to specified classes of nonresident aliens. *Id.* at 188 (quoting *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 841 (D.C. Cir. 1987) (Edwards, J., concurring in part and dissenting in part)).

Sale is fatal to any claim that the Proclamation here is unauthorized by the INA. *Sale* held it "perfectly clear that 8 U.S.C. § 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." *Id.* at 187. The Supreme Court rejected the argument that a later-enacted statutory provision limits the President's power under § 1182(f) to suspend aliens' entry into the United States, reasoning that it "would have been extraordinary for Congress to make such an important change in the law without any mention of that possible effect." *Id.* at 176.

Likewise here. The Proclamation cannot be enjoined on the basis that there is no sufficient finding that the entry of the excluded classes would be detrimental to the interests of the United States. The President need not even disclose his "reasons for deeming nationals of a particular country a special threat," *AADC*, 525 U.S. at 491, let alone to a court's satisfaction. Even when the President does disclose his

reasons for deeming certain nationals to present a national-security risk, courts are "ill equipped to determine their authenticity and utterly unable to assess their adequacy." *Id.*

In all events, the Proclamation provides extensive findings supporting the need for a suspension of entry for several failed states, governments that are state sponsors of terrorism, or governments otherwise unwilling or unable to respond to adequate vetting or other terrorism-related concerns. Proclamation §§ 1(g)-(j), 2(a)-(h). "[W]hen it comes to collecting evidence and drawing factual inferences" regarding determinations such as these, "the lack of competence on the part of the courts is marked, and respect for the Government's conclusions is appropriate." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010).

3. Nor is Congress's broad delegation of authority to suspend the entry of classes of aliens undermined by 8 U.S.C. § 1152(a)(1)(A), which makes no mention of § 1182(f). Section 1152(a)(1)(A) does not address the entry of aliens into the country at all. Instead, it is part of a set of restrictions on the issuance of immigrant visas—that is, permission for aliens to seek admission for permanent residence. *See* 8 U.S.C. §§ 1101(a)(15)-(16), 1151(a)-(b), 1181(a). Added in the Immigration and Nationality Act of 1965, which abolished an earlier nationality-based quota system for allocating immigrant visas, § 1152(a)(1)(A) provides:

> Except as specifically provided [elsewhere in the INA], no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence.

Section 1152(a)(1)(A) does not conflict with § 1182(f) or impliedly restrict nationality-based denials of entry under § 1182(f). *See Sale*, 509 U.S. at 176. An alien's entry into this country is a different and much more consequential event than the preliminary step of receiving a visa, which merely entitles the alien to apply for admission into the country. *See* 8 U.S.C. §§ 1101(a)(4), 1181, 1182(a), 1184. Visa possession does not control or guarantee entry; the INA provides several ways in which visa-holding aliens can be denied entry. *E.g.*, *id.* §§ 1101(a)(13)(A), 1182(a), (f), 1201(h), (i); 22 C.F.R. §§ 41.122, 42.82. One of them is the President's express authority under § 1182(f) to suspend the entry of classes of aliens.

This design of the INA has been repeatedly recognized in past practice. For example, over 30 years ago, the President suspended the entry of Cuban nationals as immigrants, subject to certain exceptions. Presidential Proclamation No. 5517, 51 Fed. Reg. 30,470 (Aug. 26, 1986); *see also Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 648 & n.2 (4th Cir. 2017) (en banc) (Niemeyer, J., dissenting) (citing additional examples), *vacated as moot*, ___ S. Ct. ___, 2017 WL 4518553 (Oct. 10, 2017). Plaintiffs point to no instance in which the government has read § 1152(a)(1)(A)'s visa-allocation provisions as prohibiting nationality-based suspensions of entry under § 1182(f). *See, e.g.*, U.S.Br.45-48.

Finally, § 1152(a)(1)(A) applies only to immigrant visas, and does not cover other prospective entrants, such as those seeking nonimmigrant visas. So, even on plaintiffs' view, this section cannot possibly establish that § 2 of the Proclamation is statutorily unauthorized as applied to aliens seeking entry as nonimmigrants.

4. The President's § 1182(f) authority to suspend aliens' entry is not limited by 8 U.S.C. § 1182(a), which also makes no mention of § 1182(f). In § 1182(a), Congress enumerated no fewer than seventy grounds that make an alien automatically inadmissible to this country, unless an exception applies. Congress did not provide that these are the only grounds on which the Executive can deny aliens entry. Instead, Congress in § 1182(f) separately enabled the President to impose additional entry restrictions.

As the D.C. Circuit correctly recognized in *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986), § 1182(f) permits the Executive to deny aliens entry even if the aliens are not within one of the enumerated § 1182(a) categories that automatically make aliens inadmissible: "The President's sweeping proclamation power [in § 1182(f)] thus provides a safeguard against the danger posed by any particular case or class of cases that is not covered by one of the categories in section 1182(a)." *Id.* at 1049 n.2. The *Abourezk* court even noted an example of this understanding in a nationality-based § 1182(f) proclamation issued by President Reagan, which suspended entry for "officers or employees of the Cuban government or the Cuban Communist Party." *Id.* (citing Presidential Proclamation No. 5377, 50 Fed. Reg. 41,329 (Oct. 10, 1985)).[2]

[2] Nor are the Proclamation's travel restrictions contrary to other INA provisions that plaintiffs cite. For example, the visa-waiver program and Congress's visa-processing scheme do not contradict the Proclamation (T.R.O.Mot.28-30 (Dkt.No.368-1)) because Congress merely "set the *minimum* requirements for an alien to gain entry" while "grant[ing] the President authority to impose *additional* restrictions when he deems appropriate." U.S.Resp.27-28 (Dkt.No.378).

B. Because the Proclamation is an exercise of power delegated by Congress in the INA, it is executive action in the first *Youngstown* zone. The Proclamation is therefore also "supported by the strongest of presumptions and the widest latitude of judicial interpretation." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring), quoted in *Dames & Moore*, 453 U.S. at 674. Overcoming this strongest presumption for any claim challenging the Proclamation is a burden that rests "heavily" on plaintiffs. *Id.*

Plaintiffs' significant burden is well-founded here, not only because of the explicit congressional grant of authority to deny entry, 8 U.S.C. § 1182(f), but also because of the INA's complementary approach to allowing entry. Specifically, Congress enacted "extensive and complex" provisions detailing how over forty different classes of nonimmigrants, refugees, and other aliens can attain lawful presence in the country. *Arizona*, 567 U.S. at 395; *see Texas v. United States*, 809 F.3d 134, 179 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (per curiam). But while Congress imposed these detailed criteria to significantly restrict the Executive's ability to unilaterally allow aliens to be lawfully present in the country, Congress simultaneously provided the Executive broad authority to exclude aliens from the country, under § 1182(f).

The President's authority in this context therefore "includes all that he possesses in his own right plus all that Congress can delegate." *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring), quoted in *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 375 (2000), and *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083-

84 (2015). The injunction here is thus remarkable for interfering with a decision authorized by two branches of government in a particularly sensitive area. The admission of aliens into this country is a federal prerogative "inherent in sovereignty" that must "be exercised exclusively by the political branches of government." *Mandel*, 408 U.S. at 765 (quotation marks omitted); *accord United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950).

Plaintiffs' claim that the Proclamation is pretext for a religious classification thus fails for this additional reason that the Proclamation is within *Youngstown*'s first zone. And the Proclamation is already accorded the heavy presumption that facially neutral government action is valid and taken in good faith. *See supra* Part I.A.

Especially with those presumptions in mind, the Executive provided a "facially legitimate and bona fide reason" for exercising 8 U.S.C. § 1182(f) national-security and foreign-affairs powers to restrict entry. *Mandel*, 408 U.S. at 770; *see also Kerry v. Din*, 135 S. Ct. 2128, 2140-41 (2015) (Kennedy, J., concurring in the judgment) (federal government official informing alien of visa denial based expressly on statutory provision is a "facially legitimate and bona fide" reason under *Mandel*). Courts therefore must "neither look behind the exercise of that discretion, nor test it by balancing its justification against" plaintiffs' asserted constitutional rights. *Mandel*, 408 U.S. at 770.

III. The Constitutional Provisions Invoked by Plaintiffs Do Not Extend Extraterritorially, Nonresident Aliens Abroad Possess No Constitutional Rights Regarding Entry into this Country, and the Proclamation Provides All Process that Could Possibly Be Due.

Finally, the Proclamation cannot be enjoined on a procedural-due-process theory. Any such theory, turning on whether a nonresident alien abroad has a sufficient connection to the United States, cannot prevail. That is because the constitutional provisions on which plaintiffs rely do not apply extraterritorially. And even if they do, the Proclamation provides all process that is possibly due by giving facially neutral, bona fide national-security grounds for its restrictions.

A. The constitutional claims here are fundamentally untenable because the constitutional provisions that plaintiffs invoke are inapplicable to the nonresident aliens abroad covered by the Proclamation.

1. Nonresident aliens outside territory under clear United States control possess no constitutional rights regarding the terms on which they may enter the country: It is "clear" that "an unadmitted and nonresident alien" "ha[s] no constitutional right of entry to this country as a nonimmigrant or otherwise." *Mandel*, 408 U.S. at 762. The "power to admit or exclude aliens is a sovereign prerogative," and aliens seeking admission to the United States request a "privilege." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982).

Consequently, the Fifth Amendment's Due Process Clause provides no "judicial remedy" to override the President's 8 U.S.C. § 1182(f) power to deny classes of nonresident aliens entry. *Sale*, 509 U.S. at 188; *see id.* ("agree[ing] with the conclu-

sion expressed in Judge Edwards' concurring opinion" regarding statutory and constitutional challenges in *Gracey*, 809 F.2d at 841: "'there is no solution to be found in a judicial remedy'" overriding the Executive's exercise of § 1182(f) authority (emphasis added)).

The Supreme Court has long "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (citing *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950)). Rather, the Due Process Clause applies only "within the territorial jurisdiction." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

The Constitution does not regulate immigration policy regarding foreign nationals who are neither resident nor present in United States territory. The Court has therefore recognized a key distinction between aliens inside versus outside the United States, according the former certain constitutional rights while not extending those rights to the latter. *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *cf. Boumediene*, 553 U.S. at 754 (involving (1) lengthy detention, rather than entry denial, at (2) Guantanamo Bay, where the United States had "plenary control, or practical sovereignty").

2. Plaintiffs' challenges fare no better if framed as claims that the Proclamation violates rights against religious discrimination under the equal-protection component of the Fifth Amendment's Due Process Clause and under the Establishment Clause. Plaintiffs' theory is the same as to both Clauses—that the Proclamation is a

pretext for discrimination on account of religion. But that theory fails because non-resident aliens seeking to enter the country lack constitutional rights regarding entry in the first place. *See supra* p. 19.

What is more, Congress has repeatedly designated members of certain religious groups—such as Soviet Jews, Evangelical Christians, and members of the Ukrainian Orthodox Church—as presenting "special humanitarian concern to the United States" for immigration purposes. 8 U.S.C. § 1157(a)(3) & note; *see* Department of State, Foreign Operations, and Related Programs Appropriations Act, 2016, Pub. L. No. 114-113, div. K, § 7034(k)(8)(A), 129 Stat. 2705, 2765 (2015) (reauthorizing this designation). That accepted practice underscores the inapplicability in this context of the religious-nondiscrimination rights invoked by plaintiffs.

Plaintiffs cannot make an end-run around the territorial limits on constitutional rights by relying on the alleged stigmatizing effect on individuals within the United States of a challenged decision about whether nonresident aliens outside this country are admitted. To hold otherwise would allow bootstrapping a constitutional claim based on government action regulating only aliens beyond constitutional protection. Amici are aware of no instance, outside the present context, in which a U.S. citizen or alien resident in this country prevailed on an Establishment Clause claim based on the stigma allegedly perceived by how the government treated other persons who possessed no constitutional rights regarding entry. *Cf. Lamont v. Woods*, 948 F.2d 825, 827, 843 (2d Cir. 1991) (allowing an Establishment Clause claim to proceed based on the unique taxpayer-standing doctrine in a challenge to the expenditure of government funds in foreign countries).

B. Even if the constitutional provisions at issue could somehow apply extraterritorially, there is still no constitutional violation from the Proclamation's limits on the entry of nonresident aliens abroad. Plaintiffs' Fifth Amendment claim would thus fail for this reason as well.

1. There can be no Fifth Amendment violation if one is not deprived of a constitutionally protected interest in life, liberty, or property. *E.g.*, *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011) (per curiam); *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999). And nonresident aliens abroad have no constitutionally protected interest in entering the United States. *See Mandel*, 408 U.S. at 762. Even apart from the issue of entry into the United States, "[t]here is no constitutionally protected interest in either obtaining or continuing to possess a visa." *Louhghalam v. Trump*, 230 F. Supp. 3d 26, 35 (D. Mass. 2017). Similarly, multiple courts of appeals have rejected due-process claims regarding visa issuance or processing. *See, e.g.*, *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State, Bureau of Consular Affairs*, 104 F.3d 1349, 1354 (D.C. Cir. 1997); *Azizi v. Thornburgh*, 908 F.2d 1130, 1134 (2d Cir. 1990); *De Avilia v. Civiletti*, 643 F.2d 471, 477 (7th Cir. 1981). Thus, plaintiffs lack support for the notion that aliens have due-process claims to advance.

2. In *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (per curiam), a panel of the Ninth Circuit posited that several categories of aliens, other than lawful permanent residents, may have "potential" claims to constitutional protections regarding travel and entry. *Id.* at 1166. That suggestion was incorrect because the four categories of aliens cited by the Ninth Circuit lack valid constitutional claims.

First, there are no constitutional rights regarding prospective entry for aliens who are in the United States "unlawfully." *Id.* The INA provides that visas issued to aliens seeking admission to the country confer no entitlement to be admitted, and that visas can be revoked at any time in the Executive's discretion. 8 U.S.C. § 1201(h)-(i). Even as to an alien who was admitted into the country under a visa, "revocation of an entry visa issued to an alien already within our country has no effect upon the alien's liberty or property interests," and thus cannot support a due-process challenge. *Knoetze v. U.S. Dep't of State*, 634 F.2d 207, 212 (5th Cir. 1981).

If removal proceedings—which involve the distinct situation of potential detention and forcible removal—were instituted against an alien who is in this country and whose visa was revoked, that alien would have certain due-process protections under the Fifth Amendment. *See Demore v. Kim*, 538 U.S. 510, 523 (2003) (noting that it is "well established" that aliens have due-process rights in deportation hearings). But the Supreme Court has never held that the Fifth Amendment is violated when restrictions are placed on nonresident aliens abroad seeking to enter the country. *Cf. Landon*, 459 U.S. at 32.

Second, this Proclamation does not cover any nonresident alien visa holders who travelled internationally and are attempting to reenter the country. The Proclamation applies only to aliens who were outside the United States on the effective date of the Proclamation, who did not have a valid visa on the effective date of the Proclamation, and who did not have a visa that was canceled or revoked under Executive Order 13,769 of January 27, 2017. Proclamation §§ 3(a), 6(d). Regardless, *Landon* does not establish that "non-immigrant visaholders" have due-process rights when

seeking to return from abroad. *See Washington*, 847 F.3d at 1166 (citing *Landon*, 459 U.S. at 33-34). *Landon* involved a resident alien, and suggested that any process due must account for the circumstances of an alien's ties to this country. *See* 459 U.S. at 32-34. Those ties are significantly less in the case of a nonresident alien who was temporarily admitted on a nonimmigrant visa. In any event, *Landon* was decided before Congress changed the nature of an alien's interest in visa possession by amending the INA, in 2004, to provide that "[t]here shall be no means of judicial review . . . of a revocation" of a visa, "except in the context of a removal proceeding if such revocation pro-vides the sole ground for removal under" the INA. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 5304(a), 118 Stat. 3638, 3736 (codified at 8 U.S.C. § 1201(i)).

Third, there are no viable due-process claims for aliens abroad seeking refugee status. *See Washington*, 847 F.3d at 1166. That argument morphs statutory protections for those seeking asylum, *see* 8 U.S.C. § 1158, into constitutional protections for refugees. Asylum and refugee admission are not the same thing. The INA's asylum protection can be sought by individuals who are already "physically present in the United States or who arrive[] in the United States." 8 U.S.C. § 1158(a)(1). Only an alien outside the United States may apply to be admitted as a refugee. *See id.* §§ 1101(a)(42), 1157(a), 1158(a), (c)(1), 1181(c). Hence, § 1182(f) independently permits the Executive to deny refugee applicants entry into the United States. Similarly, statutory provisions under the United Nations Convention Against Torture (CAT) provide that certain aliens may not be returned to a country in which they fear torture, "regardless of whether the person is physically present in the United States."

8 U.S.C. § 1231 note. The CAT provisions, however, merely limit the possible countries to which an alien can be returned and say nothing about overriding the President's statutory authority to restrict alien entry into the United States. *See id.* § 1182(f).

Fourth, plaintiffs lack viable due-process arguments based on visa applicants who have a relationship with a U.S. resident or institution. *See Washington*, 847 F.3d at 1166 (citing *Din*, 135 S. Ct. at 2139 (Kennedy, J., concurring in the judgment); *id.* at 2142 (Breyer, J., dissenting); *Mandel*, 408 U.S. at 762–65. *Din* did not hold that such due-process rights exist. To the contrary, the narrowest opinion concurring in the judgment in *Din* expressly did not decide whether a U.S. citizen has a protected liberty interest in the visa application of her alien spouse, such that she was entitled to notice of the reason for the application's denial. *See* 135 S. Ct. at 2139-41 (Kennedy, J., concurring in the judgment). In fact, the concurrence reasoned that, even if due process applied in this context, the only process possibly required was that the Executive give a "facially legitimate and bona fide reason" for denying a visa to an alien abroad. *Id.* at 2141.

And the *Din* concurrence's standard is plainly met here by the Proclamation's lengthy recitation of national-security reasons. *See* Proclamation §§ 1-2. The Proclamation therefore already provides whatever process may be due, as it publicly announces the "facially legitimate and bona fide" invocation of the President's 8 U.S.C. § 1182(f) national-security and foreign-affairs powers to restrict entry. *Mandel*, 408 U.S. at 770.

Conclusion

The Court should reverse the district court's order enjoining the Proclamation.

Respectfully submitted.

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I hereby certify that on November 3, 2017, I electronically filed the foregoing document 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.

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