Nos. 17-2232, 17-2233

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

IRANIAN ALLIANCES ACROSS BORDERS, JANE DOE #1, JANE DOE #2, JANE DOE #3, JANE DOE #4, JANE DOE #5, JOHN DOE #6, IRANIAN STUDENTS' FOUNDATION
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, ELAINE C. DUKE, in her official capacity as Acting Secretary of Homeland Security, KEVIN K. MCALEENAN, in his official capacity as Acting Commissioner of U.S. Customs and Border Protection, JAMES MCCAMENT, in his official capacity as Acting Director of U.S. Citizenship and Immigration Services, REX TILLERSON, in his official capacity as Secretary of State, JEFFERSON B. SESSIONS III, in his official capacity as Attorney General of the United States,
Defendants-Appellants.

EBLAL ZAKZOK, SUMAYA HAMADMAD, FAHED MUQBIL, JOHN DOE #1, JANE DOE #2, AND JANE DOE #3,
Plaintiffs-Appellees,

v.

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

On Appeal From The United States District Court For The District Of Maryland
Hon. Theodore D. Chuang, District Judge (Nos. 8:17-cv-02921-TDC, 1:17-cv-02969-TDC)

IAAB AND ZAKZOK PLAINTIFFS-APPELLEES' OPPOSITION TO MOTION FOR AN EMERGENCY STAY PENDING EXPEDITED APPEAL AND ADMINISTRATIVE STAY

Johnathan Smith
Sirine Shebaya
MUSLIM ADVOCATES
P.O. Box 66408
Washington, DC 20035

Mark H. Lynch
Mark W. Mosier
Herbert L. Fenster
José E. Arvelo
John W. Sorrenti

(202) 897-2622
Richard B. Katskee
Eric Rothschild
Andrew L. Nellis
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
1310 L St. NW, Ste. 200
Washington, D.C. 20005
(202) 466-3234

Kathryn E. Cahoy
Rebecca G. Van Tassell
Karun Tilak
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Avenue, NW
Washington, DC 20001
(202) 662-6000

Counsel for IAAB Plaintiffs-Appellees

Faiza Patel
Michael Price
BRENNAN CENTER FOR JUSTICE
120 Broadway, Suite 1750
New York, NY 10271
(646) 292-8355

Charles E. Davidow
Robert A. Atkins
Andrew J. Ehrlich
Liza Velazquez
Steven C. Herzog
PAUL, WEISS, RIFKIND WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 273-3000

Lena F. Masri
Gadeir Abbas
COUNCIL ON AMERICAN-ISLAMIC RELATIONS
453 New Jersey Avenue SE
Washington, DC
(212) 488-8787

Jethro Eisenstein
PROFETA & EISENSTEIN
45 Broadway
New York, NY 10006
(212) 577-6500

Counsel for Zakzok Plaintiffs-Appellees

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INTRODUCTION

This Court upheld a preliminary injunction against the second version of the President's travel ban ("EO-2") because EO-2 "drip[ped] with religious intolerance, animus, and discrimination" against Muslims. *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 572 (4th Cir. 2017) (en banc), *vacated as moot*, 2017 WL 4518553 (U.S. Oct. 10, 2017) ("*IRAP*").[1] The Court concluded that the plaintiffs were likely to succeed on their Establishment Clause claim, because they "made a substantial and affirmative showing that the government's national security purpose was proffered in bad faith," and they had presented "a compelling case that EO-2's primary purpose is religious." *Id.* at 603.

The *IRAP* decision persuasively demonstrates why the Government's motion to stay the injunction of the third version of the President's travel ban (the "Proclamation") should be denied. The motion relies heavily on the same arguments that this Court squarely rejected five months ago. None of the Government's arguments is any stronger now, and many of them are weaker. EO-2 contemplated a 90-day suspension of entry by individuals from the targeted Muslim-majority countries, and this Court held that this delay caused a cognizable injury because it would result in the plaintiffs' prolonged separation from their family members.

[1] This Court's *IRAP* decision is no longer binding, but the parties agree that it remains persuasive authority. Op. 13 n.1 (ECF No. 46). "ECF No." refers to the district court docket in *IAAB v. Trump*, No. 17-2921.

IRAP, 857 F.3d at 607. The Proclamation causes even greater injury because it has no end date, which means that individual Plaintiffs would be separated indefinitely from their family members and organizational Plaintiffs face indefinite interference with their core activities.

The Government's sole new theory is that the Proclamation withstands constitutional scrutiny because it is based on a "worldwide review" of data-sharing practices conducted by the Department of Homeland Security ("DHS"). But as the district court correctly recognized, the Proclamation and DHS's review cannot be viewed in isolation. They must be analyzed in the context of the President's repeated promises to impose a Muslim ban and his two previous failed attempts to impose that ban. When viewed in context, the evidence shows that the Proclamation is another attempt by the President to deliver on his campaign promise to ban Muslims from entering the United States.

The district court acted well within its discretion in granting Plaintiffs' motion for preliminary injunction. Like the executive orders before it, the Proclamation likely violates the Establishment Clause and the Immigration and Nationality Act ("INA"), and enforcement of the Proclamation would cause substantial and irreparable harm to Plaintiffs. The Government's motion for a stay should be denied.

ARGUMENT

The Government bears a heavy burden in establishing that a stay is justified. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). The Government must show that it will suffer irreparable harm if the district court's injunction is not stayed during this Court's review. The standard for this showing is high; a mere "possibility of irreparable injury" to the government is insufficient. *Nken v. Holder*, 556 U.S. 418, 434 (2009). The Government must also make a "strong showing that [it] is likely to succeed on the merits" of its appeal. *Id.* at 426. Even if the Government establishes these two factors, the Court must also consider the harm to the Plaintiffs and to the public interest that would result from staying the district court's injunction. None of these elements supports a stay pending appeal.

I. The Balance of Harms Does Not Favor A Stay.

A. The Government Has Not Shown That It Will Be Irreparably Harmed Absent A Stay.

The district court's preliminary injunction will not irreparably harm the Government. The injunction does little more than preserve the status quo that existed prior to the Proclamation. After this Court and the Ninth Circuit upheld preliminary injunctions against EO-2, the Supreme Court declined to stay the injunctions with respect to foreign nationals who had a credible claim of a bona fide relationship with a person or organization in the United States. *Trump v. IRAP*, 137 S. Ct. 2080, 2087 (2017). The district court followed that approach, limiting

its injunction to foreign nationals with a bona fide relationship with a person or entity in the United States. Op. 88. The Government offers no credible reason why it would be irreparably harmed by an injunction that is already limited in the way that the Supreme Court concluded was adequate to protect the Government on nearly identical facts.

The Government also does not contend that a stay is necessary to protect against any specific threat to national security. Rather, it simply invokes general principles about the weight given to national-security interests. Mot. 8.[2] This "rote invocation of harm to 'national security interests'" is not a "silver bullet that defeats all other asserted injuries." *IRAP*, 857 F.3d at 603. Here, the Government cannot argue that the injunction creates an immediate threat to national security. Just as it has done for decades, the Government may continue to make case-by-case determinations of whether visa applicants have satisfied their burden to prove that they are eligible for visas and are not inadmissible on national-security or any other grounds established by Congress. *See* 8 U.S.C. §§ 1182(a), 1361. The Government fails to explain how it could be irreparably harmed while this expedited appeal is pending, when it can continue to make individualized determinations of whether a particular visa application poses a security threat.

[2] Because the Government did not include page numbers in its motion, we cite to the page numbers provided in the ECF header.

The record also refutes the Government's claimed need for urgency in implementing the Proclamation. By its terms, the Proclamation would not take effect until 24 days after it was issued. *See* 82 Fed. Reg. 45,161, 45,171. The Government has not offered any evidence to suggest that a national-security threat would arise in the next few months if the Proclamation does not take effect. In contrast, Plaintiffs have submitted substantial, unrebutted evidence that the Proclamation will not make the nation safer. *See, e.g.*, Joint Dec'l of Former Nat'l Sec. Officials, J.R. 770 (ECF No. 54, Ex. 14) (declaration of 49 former government officials concluding that the Proclamation is "unnecessary" "[a]s a national security measure"). This evidence is entirely consistent with an assessment of the President's first travel ban conducted by the DHS Office of Intelligence and Analysis, which concluded that "country of citizenship is unlikely to be a reliable indicator of potential terrorist activity." *Id.* 771 ¶ 10.

Rather than citing specific national-security concerns, the Government contends that it will be irreparably harmed without a stay pending appeal because the preliminary injunction will delay the President's exercise of his constitutional and statutory authority. Mot. 8. If such an abstract, institutional concern were sufficient to establish irreparable harm, the government could obtain a stay whenever the other factors for a preliminary injunction were satisfied. Courts have repeatedly rejected this view, holding instead that these types of institutional interests may

be vindicated "in the full course of this litigation." *Washington v. Trump*, 847 F.3d 1151, 1168 (9th Cir. 2017); *Texas v. United States*, 787 F.3d 733, 767-68 (5th Cir. 2015) ("[I]t is the resolution of the case on the merits, not whether the injunction is stayed pending appeal, that will affect [separation-of-powers] principles.").

The Government's argument also fails because it assumes that the President is acting within his authority, despite the district court's holding that he is not. This Court has repeatedly held that the Government is "in no way harmed by issuance of a preliminary injunction which prevents [it] from enforcing restrictions likely to be found unconstitutional." *Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 191 (4th Cir. 2013); *see also IRAP*, 857 F.3d at 603. Because the Proclamation is likely to be found unconstitutional, *see* Part II *infra*, the government's purported institutional injury does not support a stay pending appeal.

B. Plaintiffs Will Suffer Substantial, Irreparable Harm If The Preliminary Injunction Is Stayed.

Unlike the Government, Plaintiffs will suffer immediate and irreparable harm if the preliminary injunction is stayed. A stay would harm the individual Plaintiffs by preventing them from reuniting with their family members. Although the Government attempts to diminish this injury, Mot. 8, the evidence shows that the harm would be severe.

IAAB Plaintiff Jane Doe #5 provides a good example. She is a 79-year-old Lawful Permanent Resident of the United States. She resides in Maryland with her

oldest son, who is a U.S. citizen, and her 90-year-old husband, who is also a Lawful Permanent Resident. *See* Jane Doe Decl. ¶¶ 2, 6 (ECF No. 26-7). In 2010, she began the process of sponsoring her youngest son's immigration from Iran to the United States. *Id.* ¶ 4. He has now completed his consular interview and is awaiting final approval for an immigrant visa. *Id.* ¶ 5. Given her and her husband's age and their serious health issues, *see id.* ¶ 6, Jane Doe #5 reasonably fears that she will never see her youngest son again if the Proclamation takes effect. *Id.* at ¶ 7.

The *Zakzok* Plaintiffs similarly face severe and irreparable harm if the injunction were stayed. As one example, Fahed Muqbil is an American citizen of Yemeni descent. Muqbil Decl. ¶ 1 (*Zakzok* ECF No. 6-1). His daughter, an American citizen who was born with spina bifida, is currently receiving medical treatment in American hospitals for several critical medical conditions, and is expected to undergo further surgery. *Id.* ¶¶ 6-8. Should the Proclamation take effect, Fahed Muqbil's wife, who has completed her consular interview and is awaiting the issuance of a visa, will be indefinitely barred from the United States and prevented from seeing her daughter, and her husband will be forced to care for his daughter without his wife. The harm to these individual plaintiffs is both concrete and irreparable.[3]

[3] This Court should again reject the Government's suggestion (at 9) that Plaintiffs are not harmed until their family members are denied a waiver. *See IRAP*, 857 (continued…)

The organizational Plaintiffs also face significant and irreparable harm. The Proclamation would "prevent Iranian nationals from attending IAAB's International Conference on the Iranian Diaspora, scheduled for April 2018 in New York, at which scholars, students, journalists, artists, and community leaders gather to exchange ideas on issues affecting the worldwide Iranian community." Op. 27. Members of Plaintiff Iranian Students' Foundation would be injured because their families would not be able to obtain visas to attend graduation ceremonies. *See* Pashai Decl. ¶ 11 (ECF No. 38-3). As University of Maryland President Wallace Loh explained, "[t]he banning of a student's family from his or her college graduation ceremony is a type of harm that is irreparable not just because of the absence of the family participation in one of the great milestones in that student's life, but also because of the stigmatization and isolation of that student from the full experience of and participation in the ceremonies as experienced by his or her classmates." Loh Decl. ¶ 15 (ECF No. 38-4).

Plaintiffs also suffer irreparable injury because the Proclamation deprives them of their rights under the Establishment Clause. The "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes

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F.3d at 587 ("Plaintiffs will suffer undue hardship . . . were we to require their family members to attempt to secure a waiver before permitting Plaintiffs to challenge" the travel ban); *Bostic v. Schaefer*, 760 F.3d 352, 372 (4th Cir. 2014) ("denial of equal treatment from imposition" of discriminatory barrier constituted injury).

irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion); *see also IRAP*, 857 F.3d at 601-02 (concluding that Establishment Clause violations create "immediate, irreparable injury").

John Doe #6 explained that the Proclamation makes him feel "personally attacked, targeted, and disparaged" because it "show[s] hostility to Iranians generally and to Muslims in particular." John Doe #6 Decl. ¶ 9 (ECF No. 26-8). Plaintiff Sumaya Hamadmad likewise believes that the Proclamation is "an attack on [her] Islamic faith and all Muslims." Hamadmad Decl. ¶ 18 (*Zakzok* ECF No. 6-3). This Court has held that "[f]eelings of marginalization and exclusion are cognizable forms of injury" under the Establishment Clause. *Moss v. Spartanburg Cty. Sch. Dist. Seven*, 683 F.3d 599, 607 (4th Cir. 2012); *see also IRAP*, 857 F.3d at 584-85 (plaintiffs are injured by EO-2's "state sanctioned message that foreign born Muslims . . . are 'outsiders'"). The district court correctly held that Plaintiffs had demonstrated that they would suffer irreparable injury if the Proclamation took effect. Op. 84-85.

C. The Public Interest Will Be Harmed If The Injunction Is Stayed.

The public interest also weighs in favor of upholding the preliminary injunction, because "upholding constitutional rights surely serves the public interest." *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002). The district court's injunction not only upholds the Constitution, but it also furthers the public

interest "in free flow of travel, in avoiding separation of families, and in freedom from discrimination." *Washington*, 847 F.3d at 1169.

Given the Government's failure to show that the preliminary injunction would undermine any vital national-security interests, and the unrebutted record evidence demonstrating that the Proclamation will separate families on a discriminatory basis and impede the free flow of travel and ideas from the affected countries, the public interest tips in Plaintiffs' favor.

II. The Government Is Unlikely To Succeed On The Merits.

A. Plaintiffs' Claims Are Justiciable.

The Government presents the same justiciability arguments that have been rejected time and again in the travel-ban litigation. *See IRAP*, 857 F.3d at 587-88; *Hawaii v. Trump*, 859 F.3d 741, 768-69 (9th Cir. 2017), *vacated as moot*, 2017 WL 4782860 (U.S. Oct. 24, 2017). Without identifying any intervening change of law, the Government boldly predicts that this Court will reach a different result on the same legal arguments that it rejected just five months ago. The Court correctly rejected these arguments in *IRAP*, and it is likely to do so again here.

1. The Government again relies on *Saavedra Bruno v. Albright*, 197 F.3d 1153 (D.C. Cir. 1999), to argue that the doctrine of consular non-reviewability bars Plaintiffs' claims. Mot. 10. But this Court has already explained why *Saavedra Bruno* does not help the Government: There, the D.C. Circuit acknowledged "that

judicial review was proper in cases involving claims by United States citizens rather than by aliens . . . and statutory claims that are accompanied by constitutional ones." *IRAP*, 857 F.3d at 587. The Supreme Court has never applied the broad non-reviewability doctrine that the Government advances here, despite many cases in which the Government's theory would have precluded review. *See, e.g.*, *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187-88 (1993); *Kerry v. Din*, 135 S. Ct. 2128 (2015). Because Plaintiffs seek review of the Proclamation, not individual consular visa decisions, the Court should again hold that the claims are reviewable. *See IRAP*, 857 F.3d at 857.

2. The Government again contends that Plaintiffs' Establishment Clause claims are not reviewable because Plaintiffs do not allege that their own rights are violated. Mot. 11. That is incorrect. Plaintiffs allege that the Proclamation violates their own rights and that it directly injures them in at least two ways. First, Plaintiffs' "'personal contact' with the alleged establishment of religion" will injure them by "prolong[ing] their separation" from family members. *IRAP*, 857 F.3d at 583. In other words, the plaintiffs will be indefinitely separated from their family members because of their Muslim faith. For example, Jane Doe #5 reasonably fears that, if the Proclamation takes effect, she may never see her son again on account of their religion. Jane Doe #5 Decl. ¶ 6-7 (ECF No. 26-7). Second, the

Proclamation "sends a state-sanctioned message condemning [Plaintiffs'] religion and causing [them] to feel excluded and marginalized in [their] community." *IRAP*, 857 F.3d at 583; *see also Moss*, 683 F.3d at 607. Numerous Plaintiffs provided declarations demonstrating that they have suffered this type of injury as a result of the Proclamation. *See, e.g.*, John Doe #6 Decl. ¶ 9 (ECF No. 26-8); Zakzok Decl. ¶ 18 (*Zakzok* ECF No. 6-2); Muqbil Decl. ¶ 15 (*Zakzok* ECF No. 6-1).

The Government contends that the Court is likely to hold that Plaintiffs' claims are unreviewable based on *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), and *In re Navy Chaplaincy*, 534 F.3d 756 (D.C. Cir. 2008). Mot. 14-15. But those are the same cases on which the Government relied in the prior appeal, and this Court explained why the travel-ban litigation "bears little resemblance to" those cases. *IRAP*, 857 F.3d at 585. Far from "roam[ing] the country in search of governmental wrongdoing," Plaintiffs "feel[] the direct, painful effects of" the Proclamation—"both its alleged message of religious condemnation *and* the prolonged separation it causes between" Plaintiffs and their loved ones. *Id.*

B. The Proclamation Violates The Establishment Clause.

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456

U.S. 228, 244 (1982). This Court held that EO-2 likely violated the Establishment Clause because it "cannot be divorced from the cohesive narrative linking it to the animus that inspired it," and because "the reasonable observer would conclude that EO-2's primary purpose is to exclude persons from the United States on the basis of their religious beliefs." *IRAP*, 857 F.3d at 601. The district court held that the latest version of the travel ban is also based on anti-Muslim animus. Op. 83. The Government has failed to show that this Court is likely to reverse that decision.

The Government contends that the Proclamation does not violate the Establishment Clause because, unlike the prior executive orders, the Proclamation's alleged national-security purpose is supported by a "worldwide review" of data-sharing practices and engagement with foreign countries. Mot. 18.

The Proclamation cannot be divorced from the context in which it arose. The district court explained that "[b]ecause 'reasonable observers have reasonable memories,' past Establishment Clause violations are relevant to the assessment of present government actions." Op. 71 (quoting *McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 866, 876 (2005)). The district court acknowledged that "past actions do not 'forever taint' present ones," but when an Establishment Clause violation is found, subsequent efforts to achieve a similar goal must include "curative actions" that "'disassociate the [government action] from its previous religious effect.'" Op. 72 (quoting *Felix v. City of Bloomfield*,

841 F.3d 848, 863 (10th Cir. 2016)). These curative actions are important to show that the government's purpose has truly changed, and that the "new statements of purpose" are not merely "a litigating position." *McCreary*, 545 U.S. at 871.

The district court correctly found that the Proclamation is a continuation of the President's attempt to fulfill his campaign promise to ban Muslims from entering the country. The President expressly stated that he would impose a Muslim ban by "looking at territories" because "people were so upset when [he] used the word Muslim." J.R. 220 (ECF No. 54, Ex. 11). The President has never disavowed his earlier statements. He has instead repeatedly confirmed them by expressing his preference for the original version of the travel ban—the version adopted without consulting the relevant national-security agencies and intended to give preference to Christian refugees. *See* J.R. 652-53, 664, 705 (ECF No. 54, Ex. 13). Following this Court's *IRAP* ruling, the President complained that "[t]he Justice Dept. should have stayed with the original Travel Ban, not the watered down, politically correct version they submitted to [the Supreme Court]." Op. 14. He also instructed people to "[s]tudy" an apocryphal story of General John J. Pershing massacring Muslims with bullets dipped in pigs' blood as a way to treat "terrorists when caught." *Id.* at 14-15. And just last month, the President again insisted that "the travel ban into the United States should be far larger, tougher and more specif-

ic – but stupidly, that would not be politically correct!" *Id.* at 15.[4] It is hard to imagine a clearer indication that the Proclamation's supposedly new purpose is only a "litigating position." *McCreary*, 545 U.S. at 871-72.

The district court also correctly found that "the outcome of the DHS Review was at least partially pre-ordained." Op. 76. The DHS review was performed based on a directive by the President in EO-2. *Id.* That directive "telegraphed the expected recommendations" by instructing the Secretary of Homeland Security to "submit to the President a list of countries recommended for inclusion in a Presidential proclamation that would prohibit the entry of appropriate categories of foreign nationals." *Id.* And DHS conducted a review that produced those expected recommendations. When the President issued the executive orders, he relied on the fact that the targeted countries had been "previously identified" under the Visa Waiver Program, 8 U.S.C. § 1187, as "warrant[ing] additional scrutiny in connection with our immigration policies because the conditions in these countries present heightened threats." EO-2 § 1(d). Although the DHS review is purportedly based on a new "baseline" test, this new test relies on the same criteria used for the Visa Waiver Program. *Compare* Proclamation § 1(c), *with* 8 U.S.C. § 1187(a)(12)(A)(i)(III), (c)(2)(B)-(E). By adopting a test that incorporated the Vi-

[4] The White House has stated that President Trump's tweets are "official statements by the president of the United States." Op. 14.

sa Waiver Program criteria, DHS ensured that many of the countries subject to the EO-2 travel ban would also fail the baseline test.

The Government's claim that the Proclamation is unrelated to the prior executive orders is also undermined by its unwillingness to accept the results of the baseline test. Rather than implementing the baseline-test results, the Acting DHS Secretary accepted results that were consistent with the EO-2 ban, and ignored those that were not. For example, Somalia passed the baseline test. But it was included in the EO-2 ban, and so it remained in the Proclamation's ban. *See* Proclamation § 2(g). In contrast, Iraq failed the baseline test. But it was excluded from the EO-2 ban, and so it remained out of the Proclamation's ban. *Id.* § 1(g). The President also made the Proclamation more consistent with EO-2 by departing from the baseline-test results for Venezuela. *Id.* § 2(f)(i). Venezuela failed the baseline test, but (with the narrow exception of certain government officials) the President chose not to impose any restrictions on Venezuela—a country with few Muslims that was not included in the EO-2 ban.[5]

In sum, the Proclamation and DHS review do not provide a different or better rationale for the ban against nationals from the targeted Muslim-majority

[5] The President did not impose travel restrictions on Venezuelans because he asserted (but did not identify) "alternative sources for obtaining information" about them. Proclamation § 2(f). The President gave no explanation for why Venezuelans received such favorable treatment while nationals from other countries did not.

countries. They do not eliminate the bad faith that has infected the entire effort to ban Muslims from entering the United States, and they do not shield the Proclamation from constitutional scrutiny. The district court correctly concluded that Plaintiffs are likely to succeed on their Establishment Clause claim, and the Government has not shown that this Court is likely to reach a different result.

C. The Proclamation Violates The INA.

The Government also has failed to show it is likely to succeed on the merits of Plaintiffs' statutory claims.

1. The district court held that the Proclamation violates § 1152(a) of the INA, which prohibits discrimination "in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a)(1)(A). Congress enacted this provision contemporaneously with the Civil Rights Act of 1964 to eliminate the "national origins system as the basis for the selection of immigrants to the United States." H.R. Rep. No. 89-745, at 8 (1965). "Congress could not have used more explicit language in unambiguously direct[ing] that no nationality-based discrimination shall occur." *Hawaii*, 859 F.3d at 777. Yet, as the district court concluded, the Proclamation effectively bans the issuance of visas for certain people based solely on their nationality, and thus violates § 1152(a). Op. 48.

The Government seeks to avoid this anti-discrimination provision by claiming that the Proclamation bans "entry," whereas § 1152(a) prohibits discrimination only in the "issuance of an immigrant visa." Mot. 15. Put another way, so long as the Government does not discriminate in issuing visas, the President is free to discriminate on the basis of race, sex, or national origin in deciding whether to honor the visa and allow the noncitizen to enter the country. The district court correctly rejected this argument, holding—as the Ninth Circuit did—that "'Congress could not have intended to permit the President to flout § 1152(a) so easily.'" Op. 45 (quoting *Hawaii*, 859 F.3d at 777).

The Government's contention that the Proclamation is limited to regulating entry is incorrect. The Proclamation also bars the issuance of visas to groups of people based on their nationality. *See* Proclamation § 3(c)(iii) (specifying that nationals of the targeted countries must obtain a waiver from agency officials in order to secure the "issuance of a visa"). In fact, the Proclamation specifically allows individuals with preexisting valid visas to enter the United States, making even clearer that it functions as a ban on visa issuance, and not on entry of individuals who already have visas.

2. The Proclamation also exceeds the authority delegated to the President under § 1182(f). The district court acknowledged that "Plaintiffs are correct that there must be some limit on § 1182 authority," Op. 60, and that "[i]f there is an ex-

ample of a § 1182(f) order, past or present, that exceeds the authority of that statute, it would be this one," *id.* at 59. But because a "line" limiting § 1182(f) authority "has yet to be drawn," the court concluded that Plaintiffs are unlikely to succeed on this claim. *Id.* at 61.

This Court should draw that line and hold that the Proclamation exceeds the President's authority under § 1182(f). The Constitution vests the legislative power, including the power to make "[p]olicies pertaining to the entry of aliens[,] . . . exclusively to Congress." *Arizona v. United States*, 567 U.S. 387, 409 (2012); *see also Galvan v. Press*, 347 U.S. 522, 531 (1954). The Supreme Court repeatedly has read immigration statutes narrowly, refusing to "impute to Congress . . . a purpose to give [executive officials] unbridled discretion." *Kent v. Dulles*, 357 U.S. 116, 128 (1958); *see also United States v. Witkovich*, 353 U.S. 194, 199-200 (1957) (holding that Attorney General's apparently "unbounded authority to require whatever information he deems desirable of aliens" authorized only those demands consistent with the "purpose of the legislative scheme").

The Proclamation exceeds the President's statutory authorization to suspend entry of a "class of aliens" for a particular "period" of time. 8 U.S.C. § 1182(f). No President has ever before invoked § 1182(f) to impose a categorical bar on entry based on a generalized assertion that entry by some members of the barred class might be detrimental to the interests of the United States. But here the Proclama-

tion indefinitely bans entry of more than 157 million individuals, including all nationals from six Muslim-majority countries who seek to come to the United States as immigrants, without any showing that their entry would be detrimental to the United States. In enacting the INA and in repeatedly amending it, Congress has created a detailed statutory scheme with precise rules for determining visa eligibility and identifying certain classes of noncitizens as inadmissible. *See, e.g.*, 8 U.S.C. § 1182(a). Given the historical practice and Congress's detailed legislation in this area, § 1182(f) cannot be read to authorize the President to replace Congress's immigration system with a nationality-based immigration system of his own.

3. The Government is also unlikely to succeed on the merits of its appeal, because the President did not make the requisite finding to invoke his authority under § 1182(f). Congress granted the President authority to act under § 1182(f) only upon a "*find[ing]* that the entry of any aliens or of any class of aliens . . . *would be* detrimental to the interests of the United States." 8 U.S.C. § 1182(f) (emphasis added). Although the district court found this argument unpersuasive, another district court has enjoined the Proclamation on this ground. *See Hawaii v. Trump*, 2017 WL 4639560, at *12 (D. Haw. Oct. 17, 2017).

The Ninth Circuit held that EO-2 exceeded the President's § 1182(f) authority because it made "no 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. EO-2 also lacked a sufficient factual finding because it failed to "tie these nationals in any way to terrorist organizations within the . . . designated countries" or to "provide any link between an individual's nationality and their propensity to commit terrorism." *Id.* The Proclamation fails for the same reason. There still has been no finding that nationality alone can demonstrate that a person is a security risk; indeed, a DHS report refutes that claim. J.R. 771 ¶ 10. (ECF No. 54, Ex. 14).

III. The Preliminary Injunction Should Not Be Limited To Plaintiffs.

The Government contends that the preliminary injunction is overbroad because it is not limited to Plaintiffs and their family members. Mot. 25. The Government made the same argument in challenging the EO-2 injunction, and both this Court and the Supreme Court rejected it. The Supreme Court refused to stay the EO-2 injunction as to anyone who had "a credible claim of a bona fide relationship with a person or entity in the United States." *Trump*, 137 S. Ct. at 2088. The district court did not abuse its discretion by entering an injunction that applies to similarly situated individuals.

"It is well-established that 'district courts have broad discretion when fashioning injunctive relief.'" *Ostergren v. Cuccinelli*, 615 F.3d 263, 288 (4th Cir. 2010). In upholding the EO-2 injunction, this Court explained that "nationwide

injunctions are especially appropriate in the immigration context, as Congress has made clear that 'the immigration laws of the United States should be enforced vigorously and *uniformly*.'" *IRAP*, 857 F.3d at 604 (quoting *Texas*, 809 F.3d at 187). And "enjoining it only as to Plaintiffs would not cure the constitutional deficiency" because EO-2's "continued enforcement against similarly situated individuals would only serve to reinforce the message that Plaintiffs are outsiders, not full members of the political community." *Id.*

The district court acted well within its discretion by not limiting the preliminary injunction to Plaintiffs. The court carefully balanced the equities of this case and applied the injunction nationwide to all individuals from Libya, Chad, Iran, Somalia, Yemen, and Syria with a "credible claim of a bona fide relationship with a person or entity in the United States." Op. 88. This Court's reasons for upholding the nationwide EO-2 injunction apply equally here.

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Respectfully submitted,

s/ Mark W. Mosier
Mark H. Lynch
Mark W. Mosier
Herbert L. Fenster
José E. Arvelo
John W. Sorrenti
Kathryn E. Cahoy
Rebecca G. Van Tassell
Karun Tilak
COVINGTON & BURLING LLP

Johnathan Smith
Sirine Shebaya
MUSLIM ADVOCATES
P.O. Box 66408
Washington, D.C. 20035
Tel: (202) 897-2622
Fax: (415) 765-1774
johnathan@muslimadvocates.org

sirine@muslimadvocates.org

Richard B. Katskee
Eric Rothschild
Andrew L. Nellis^
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
1310 L St. NW, Ste. 200
Washington, D.C. 20005
Tel: (202) 466-3234
Fax: (202) 466-3353
katskee@au.org
rothschild@au.org
nellis@au.org

One City Center
850 10th Street, NW
Washington, D.C. 20001
Tel: (202) 662-6000
Fax: (202) 662-6302
mlynch@cov.com
mmosier@cov.com
hfenster@cov.com
jarvelo@cov.com
jsorrenti@cov.com
ktilak@cov.com

Counsel for IAAB Plaintiffs-Appellees

Charles E. Davidow
Robert A. Atkins
Liza Velazquez
Andrew J. Ehrlich
Steven C. Herzog
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000
Tel.: (212) 373-3000
Fax: (212) 757-3990
ratkins@paulweiss.com
lvelazquez@paulweiss.com
aehrlich@paulweiss.com
sherzog@paulweiss.com

Lena F. Masri
Gadeir Abbas*
COUNCIL ON AMERICAN-ISLAMIC RELATIONS
453 New Jersey Avenue SE
Washington, D.C. 20003
Tel.: (202) 488-8787
Fax: (202) 488-0833
lfmasri@cair.com
gabbas@cair.com

Faiza Patel
Michael Price
BRENNAN CENTER FOR JUSTICE AT NYU

Jethro Eisenstein†
PROFETA & EISENSTEIN
45 Broadway, Suite 2200
New York, New York 10006

SCHOOL OF LAW
120 Broadway, Suite 1750
New York, NY 10271
Tel.: (646) 292-8335
Fax: (212) 463-7308
faiza.patel@nyu.com
michael.price@nyu.com

Tel.: (212) 577-6500
Fax: (212) 577-6702
jethro19@gmail.com

Counsel for Zakzok Plaintiffs-Appellees

^ Admitted only in New York; supervised by Richard B. Katskee, a member of the D.C. Bar.

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the type-face requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2)(A). This motion contains 5,172 words, excluding the parts of the motion excluded by Federal Rules of Appellate Procedure 27(d)(2) and 32(f).

s/ Mark W. Mosier
Mark W. Mosier

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of October, 2017, I filed the foregoing motion by use of the Fourth Circuit's CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Mark W. Mosier
Mark W. Mosier