No. 17A560

IN THE SUPREME COURT OF THE UNITED STATES

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

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.

REPLY IN SUPPORT OF APPLICATION FOR STAY PENDING APPEAL AND PENDING FURTHER PROCEEDINGS IN THIS COURT

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Respondents contend that this Court should deny a stay because the district court enjoined the Proclamation on terms that are similar to this Court's order in June 2017 concerning Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) (EO-2). Since then, however, much has changed. Multiple government agencies have conducted a comprehensive, worldwide review of the information shared by foreign governments that is used to screen aliens seeking entry to the United States. Based on that review, the Proclamation adopts tailored entry restrictions to address extensive findings that a handful of particular foreign governments have deficient information-sharing and identity-management practices, or other risk factors. As a result of those developments, respondents' legal claims are now much weaker,

because the Proclamation amply justifies the President's finding that the national interest warrants the exclusion of certain foreign nationals, and conclusively rebuts respondents' claims that the entry restrictions were motivated by animus rather than protecting national security. At the same time, the district court's injunction imposes much more severe harm on the government and the public interest, because it undermines the President's ability to address concrete national-security deficiencies and to conduct foreign policy by motivating foreign governments to adopt more secure practices. For all of those reasons, a complete stay of the district court's injunction is warranted.

I. THE EQUITABLE BALANCE HAS CHANGED AND FAVORS A STAY

Respondents deny that the findings of the government's review process alter the equitable balance, because EO-2 was also based on national security. Opp. 19. But EO-2 was adopted before an assessment of other countries' information-sharing practices and security threats was conducted. Now, however, the Executive has completed a comprehensive, multi-agency review that has identified countries with ongoing deficiencies in their information-sharing and identity-management practices, or other factors that present heightened risks. The Proclamation's tailored restrictions address these deficiencies by simultaneously protecting national security and encouraging foreign governments' cooperation.

The district court's injunction imposes a more severe burden on the government and the public interest than did the injunction

this Court partially stayed in Trump v. IRAP, 137 S. Ct. 2080 (2017) (per curiam), because this injunction prevents the President from excluding entry of aliens from countries that the President has now affirmatively found, after an extensive review, present specific, current security risks. Procl. § 1(h)(i). The injunction also impedes the President's ability to pressure foreign governments to improve their practices and prevents the Nation from speaking with one voice on this important issue of national security and foreign relations. Ibid. The district court's limitation of the injunction to aliens with a bona fide relationship in the United States does not ameliorate those harms, because most aliens seeking immigrant visas and many seeking nonimmigrant visas will have such a relationship.

Respondents' contention (Opp. 20-22) that the multi-agency review process did not demonstrate a genuine national-security problem is simply incorrect. First, respondents say that the government "has not offered any evidence that the ban would avert any security threat," Opp. 20, and that it can use a "wide range of other tools" to address security risks posed by aliens seeking to enter the United States, Opp. 21. But the Proclamation describes how the review process showed deficiencies in certain foreign governments' information-sharing and identity-management practices, as well as other risk factors, and as a result, the government currently lacks sufficient information to assess the risk posed by travelers from those countries. Procl. § 1(h)(i).

Similarly, respondents' suggestion that "consular or border officials" can address any potentially suspicious traveler (ibid.) is wrong. Individual adjudications would not create pressure on foreign governments to develop more secure practices. And in any event, the comprehensive review of the conditions in every country enabled the President to reach systemic conclusions about whether the United States has sufficient information to assess the risk posed by nationals traveling with documents from particular countries; individual immigration officers are not in a position to make those assessments. The fact that some former government officials disagree with the wisdom of the President's policies (ibid.) changes nothing about the equitable balance. The President is the one whom the Constitution and Congress have vested with responsibility to make those judgments, and his judgments were informed by the recent multi-agency review and recommendation.

Respondents also emphasize that, whereas EO-2 was a temporary measure to facilitate the review, the Proclamation is "indefinite." Opp. 20. But that feature has nothing at all to do with whether this Court should grant a temporary stay of the injunction pending the expedited appeal to the Fourth Circuit and any further proceedings in this Court. Respondents will suffer no immediate harm during that time with respect to individual aliens abroad who have not yet been denied a visa from a consular officer and a waiver under the Proclamation. And if a visa and waiver were denied during the stay period, any harm would not be

irreparable because the visa could be issued and entry allowed if respondents ultimately prevail.

Finally, although some respondents have sympathetic family circumstances, they have not shown that it is the Proclamation, as opposed to other steps in or requirements of the immigration process, that is keeping them separated from their relatives. If this Court grants a stay and the Proclamation takes effect, respondents would be able to pursue a waiver based on their particular family circumstances. See Procl. § 3(c)(i)(A)-(C). And even those respondents could not justify leaving in place the district court's injunction prohibiting applying the Proclamation around the world to any national of the covered countries with a bona fide relationship in the United States.

II. THERE IS AT LEAST A FAIR PROSPECT THAT THIS COURT WILL SET ASIDE THE INJUNCTION IN WHOLE OR IN PART

A. Respondents' Claims Are Not Justiciable

1. As we have shown (Stay Appl. 19-21), respondents' statutory challenges to the Proclamation fail at the outset under the general rule that the political Branches' decisions to exclude aliens abroad are "not subject to judicial review * * * unless Congress says otherwise." Saavedra Bruno v. Albright, 197 F.3d 1153, 1159 (D.C. Cir. 1999). Respondents assert (Opp. 26) that the Administrative Procedure Act (APA), 5 U.S.C. 702, authorizes

review. But they do not dispute that the APA itself incorporates existing limitations on review. See 5 U.S.C. 701(a)(1), 702(1).[1]

Respondents' efforts (Opp. 24-25) to evade the general nonreviewability rule and its application here lack merit. This Court's decision in United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950), involved an alien detained at Ellis Island, not an alien abroad, and thus Congress had authorized review through habeas corpus proceedings. Id. at 539-540. And Sale v. Haitian Centers Council, Inc., 509 U.S. 155 (1993), did not address reviewability.

Respondents alternatively argue (Opp. 25) that the general nonreviewability rule applies only to individual decisions of consular officers and not to a suspension of entry by the President based on national security and foreign policy. But the rationale for the rule is that "'any policy toward aliens is vitally and intricately interwoven with * * * the conduct of foreign relations, the war power, and the maintenance of a republican form of government,'" matters that are "'so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'" Saavedra Bruno, 197 F.3d at 1159 (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 588-589

[1] Respondents' passing assertion (Opp. 26) that equitable relief is available irrespective of the general nonreviewability rule is incorrect. The "judge-made remedy" of equitable suits challenging officials' actions does not authorize evasion of "express and implied statutory limitations" on review. Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1384-1385 (2015).

(1952)). That reasoning applies with greater force to the judgments of the Head of the Executive Branch.

Respondents offer no way to surmount the array of other barriers to review of their statutory challenge. Among other problems, they identify no "final agency action," 5 U.S.C. 704 (emphasis added), applying the Proclamation to the aliens whose entry they seek. Respondents' contention (Opp. 26-27) that their claims are ripe because some of their alien relatives have completed the interview process and are awaiting visas fails because it remains speculative whether those relatives will actually be denied entry based on the Proclamation. Finally, respondents fail to show how the statutory provisions they invoke here, 8 U.S.C. 1152(a)(1)(A) and 1182(f), grant respondents any judicially cognizable rights. Stay Appl. 21-22.

2. Respondents also fail to show that their Establishment Clause claims are justiciable. As respondents note (Opp. 29), this Court has twice engaged in limited review of claims by U.S. citizens that exclusion of aliens violated the citizens' own rights. Kleindienst v. Mandel, 408 U.S. 753 (1972); Kerry v. Din, 135 S. Ct. 2128 (2015). But the injuries respondents assert -- that the Proclamation subjects them to a religious "message" and hinders the organizational respondents' activities (Opp. 27-28) -- do not implicate respondents' own religious-freedom rights. Allegations that the application of a government policy to others causes a plaintiff to feel "stigmatize[d]" (Opp. 1) is insufficient

even to support Article III standing, see Allen v. Wright, 468 U.S. 737, 755-756 (1984), let alone state a cognizable Establishment Clause claim. Respondents' contention that styling their asserted harms as "condemnation injuries" (ibid.) renders them justiciable would reduce the principle this Court applied in Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982), to a hollow pleading rule. See In re Navy Chaplaincy, 534 F.3d 756, 764 (D.C. Cir. 2008) (Kavanaugh, J.), cert. denied, 556 U.S. 1167 (2009).

B. Respondents' Claims Lack Merit

1. The Proclamation is consistent with 8 U.S.C. 1152(a)(1)(A)

Respondents' argument that the Proclamation violates 8 U.S.C. 1152(a)(1)(A) lacks merit and in any event cannot support the injunction the district court issued. As we have shown, and as the district court previously concluded before reversing course, see IRAP v. Trump, 241 F. Supp. 3d 539, 556 (D. Md. 2017), Section 1152(a)(1)(A) does not limit the President's authority to suspend or restrict entry under 8 U.S.C. 1182(f) and 1185(a)(1) because it addresses only issuance of visas to aliens otherwise eligible to receive them. Stay Appl. 24-27. Respondents argue (Opp. 32) that Section 1182(f) does not expressly limit eligibility for visas. But the effect of a suspension under Section 1182(f) is that an alien is ineligible to enter, and 8 U.S.C. 1201(g) then prohibits issuance of a visa to an applicant who "is ineligible to receive

a visa * * * under [S]ection 1182," which includes Section 1182(f). The Department of State accordingly treats aliens covered by Section 1182(f) suspensions as ineligible for visas. U.S. Dep't of State, 9 Foreign Affairs Manual 302.14-3(B) (2016). For aliens who are otherwise found eligible to enter, Section 1152(a)(1)(A) then forbids discrimination in the issuance of immigrant visas on the basis of nationality.

Respondents further fail to show that, if the statutes did conflict, Section 1152(a)(1)(A) should control. They note (Opp. 32-33) that it was enacted after Section 1182(f), but cite nothing reflecting the requisite "clear and manifest" congressional intent to achieve an implied partial repeal. National Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 664, 662 (2007). Respondents argue (Opp. 32) that Section 1152(a)(1)(A) governs because it "applies categorically without reference to particular officials." But that generality only further underscores that Sections 1182(f) and 1185(a)(1) are more specific in the relevant sense: they address the unique authority of the President over entry of aliens, whereas Section 1152(a)(1)(A) sets a generic nondiscrimination rule for day-to-day visa-issuance decisions. Respondents also note (Opp. 33) that those provisions are not listed among Section 1152(a)(1)(A)'s exceptions, but neither are other statutes that expressly contemplate nationality-based distinctions in issuance of visas, see, e.g., 8 U.S.C. 1253(d).

Moreover, respondents do not dispute that construing Section 1152(a)(1)(A) to preclude the President from drawing nationality based distinctions would raise serious constitutional doubts. Cf. Stay Appl. 26-27. And they do not deny that past Presidents have invoked Sections 1182(f) and 1185(a)(1) to draw nationality distinctions, including President Reagan's order regarding Cuba and President Carter's order regarding Iran. Opp. 33; cf. Stay Appl. 26. Respondents attempt to answer the constitutional concerns and historical practice by reading into Section 1152(a)(1)(A) an unwritten exception for "national emergenc[ies]." Opp. 33. But they do not provide any legitimate textual basis for that exception nor any judicially manageable standards for applying it. The more straightforward way to harmonize Section 1152(a)(1)(A) is to conclude that it does not speak to the President's distinct authority to suspend or restrict entry, and that Sections 1182(f) and 1185(a)(1) supply the standards governing those Executive determinations.

Finally, respondents fail to show how Section 1152(a)(1)(A) can support the injunction the district court issued. They do not address the fact that, as the court acknowledged, Section 1152(a)(1)(A) by its terms has no application to nonimmigrant visas. Addendum 48. And as to immigrant visas, respondents do not attempt to defend the court's injunction insofar as it goes beyond prohibiting denial of visas -- which is addressed by Section

1152(a)(1)(A) -- to bar enforcement of the President's suspension of entry.[2]

2. The Proclamation is consistent with the Establishment Clause

a. Respondents contend (Opp. 42) that "[t]he purpose of the Proclamation is to disfavor and denigrate Islam and Muslims." The Proclamation, however, draws no distinctions based on religion, and it explains that its purpose is to address deficiencies in certain foreign government's information-sharing and identity-management practices, and other risk factors. Those national-security problems were shown in a review process conducted by officials in multiple government agencies whose good faith has not been questioned. Under Mandel, supra, courts do not "look behind" the "facially legitimate and bona fide reason" for the Proclamation. 408 U.S. at 770.

Nor does Justice Kennedy's concurring opinion in Din, supra, say that (Opp. 43), whenever a plaintiff attempts to plausibly show bad faith, the courts will search for pretext. See Gov't Reply Br. at 67-69, Trump v. IRAP, No. 16-1436 (Oct. 4, 2017). Instead, the Din concurrence states that, in an extreme case where

[2] The district court in this case rejected respondents' claims that the Proclamation violates 8 U.S.C. 1182(f) or 8 U.S.C. 1185(a)(1), so those claims provide no basis to sustain the injunction pending appeal. In any event, respondents' challenges under those provisions are meritless because their text grants broad authority to the President and the Proclamation amply justifies the President's findings, as the government has explained. See Gov't Appl. for Stay at 24-30, Trump v. Hawaii, No. 17A550 (Nov. 20, 2017).

a consular officer refuses to provide a U.S. citizen plaintiff with any "factual basis" for the denial of a visa, the citizen might be entitled to "additional factual details" about the basis for the denial. 135 S. Ct. at 2140-2141 (Kennedy, J., concurring). That hypothetical is not at issue here because the Proclamation describes in detail the factual basis for its conclusions regarding each covered country.

b. Even apart from Mandel, respondents' Establishment Clause claim fails. The Proclamation is entirely neutral with respect to religion. And respondents have no explanation for why the Proclamation, if it actually were intended to enact a "Muslim ban," would omit two majority-Muslim countries that were previously covered by prior orders, would omit several categories of nonimmigrant travelers from majority-Muslim countries, and would add two non-majority-Muslim countries and a third (Chad) that is only barely majority-Muslim. Nor can respondents explain why the Proclamation would exclude the vast majority of majority-Muslim countries in the world that do share adequate information with the United States. Respondents cannot extract any plausible inference of animus from the Proclamation's disparate impact on majority-Muslim countries (Opp. 46-47), because Congress and the Executive have previously singled out several of the covered countries for special scrutiny based on national security.

The review process underlying the Proclamation fatally undermines respondents' claims of animus, so they devote most of

their efforts to attacking it. But none of those criticisms is persuasive. Respondents say (Opp. 47), first, that the Proclamation "deviates" from its evaluation criteria. That is not so. The Acting Secretary of Homeland Security's recommendations and the President's judgments were based on a comprehensive evaluation of each country that took account of the baseline criteria as well as other several other factors -- though not religion. The Proclamation explains the particular circumstances in each country that led the President to conclude that more severe restrictions, less severe restrictions, or no restrictions were appropriate. Second and relatedly, respondents speculate (Opp. 48) about the possibility of "material inconsistencies" between the Acting Secretary's recommendations to the President and the Proclamation. But the President's selection of countries from which to restrict entry mirrors the Acting Secretary's recommendation, Procl. § 1(g)-(i), and the Proclamation's entry restrictions are "in accordance with" the Acting Secretary's recommendation, id. § 1(h)(iii). There is no material difference between the recommendations and the Proclamation. Third, respondents argue that the outcome of the review process was preordained by EO-2. As we have shown (Stay Appl. 33-34), that argument rests on an entirely implausible reading of EO-2 and is unsupported by the record.

Respondents seek to tarnish the efforts of the multiple government officials who conducted the review and prepared

recommendations to the President by labeling their work as a sham designed to cover up religious bigotry. Those efforts are misguided, and they are not strengthened by respondents' quotation of selected statements by the President regarding the need to protect national security by banning entry of persons from countries with deficient information-sharing or other risk factors. The Proclamation's entry restrictions are explicitly grounded on a review process that was conducted based on neutral criteria, not religious animus.

III. THE GLOBAL INJUNCTION IS OVERBROAD AND SHOULD BE STAYED TO THE EXTENT IT GRANTS RELIEF BEYOND RESPONDENTS THEMSELVES

Respondents do not attempt to show how the worldwide relief entered by the district court comports with Article III and equitable principles requiring that relief be limited to addressing the plaintiffs' own injuries. They contend (Opp. 51) that this Court's June 2017 ruling in IRAP implicitly rejected that well-settled limitation on injunctive relief. But the Court made clear that it was not addressing the appropriate reach of injunctive relief in the first instance, and that the stay the Court crafted based on "an equitable judgment of [its] own" was tailored to unique circumstances then presented, IRAP, 137 S. Ct. at 2087; see id. at 2088-2089. As explained above, pp. 2-5, supra, the equitable balance now tips decidedly in favor of staying the injunction here in its entirety.

Respondents further argue (Opp. 51) that narrower relief would be akin to "covering" a religious display temporarily when respondents "walk by." That analogy to religious displays fails because the injury respondents allege here is fundamentally different. The Ten Commandments display in McCreary County v. ACLU of Kentucky, 545 U.S. 844 (2005), and the school-prayer policy in Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000), were expressly religious and directed to audiences of which the plaintiffs were a part, and could realistically be addressed only by ending the practice or removing the display. Here, by contrast, there is no religious message found anywhere in the text of the Proclamation. Respondents cannot demonstrate a cognizable injury merely from observing the Proclamation and interpreting it to reflect animus notwithstanding its text -- that untenable theory would enable anyone claiming offense to sue. Rather, the only concrete irreparable injury that respondents assert depends on the Proclamation's potential application to particular aliens abroad. That purported harm would be fully redressed by an injunction limited to those aliens. Thus, at a minimum, as in United States Department of Defense v. Meinhold, 510 U.S. 939 (1993), the injunction here should be stayed except as to specific, identified aliens whose exclusion causes respondents irreparable injury while the injunction's legality can be properly adjudicated.

CONCLUSION

The injunction should be stayed pending proceedings in the court of appeals and, if necessary, in this Court.

Respectfully submitted.

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