No. 16-1436

IN THE

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,

Petitioners,

—v.—

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether plaintiffs have standing to challenge Section 2(c) of the Executive Order where the Order subjects them to religious condemnation in a particularized manner and interferes with their ability to be reunited with family members.

2. Whether, in light of the overwhelming evidence that the Executive Order was enacted to fulfill President Trump's promise of a Muslim ban, the Fourth Circuit correctly held that Section 2(c) likely violates the Establishment Clause's prohibition against government condemnation of a particular religion.

3. Whether Section 2(c)'s ban on more than 180 million noncitizens from six countries violates the Immigration and Nationality Act.

4. Whether a nationwide injunction was an appropriate exercise of discretion in light of the dispersed location of plaintiffs throughout the country, the nationwide scope of the Executive Order, and the nature of plaintiffs' claims and injuries.

5. Whether the challenges to Section 2(c) became moot on June 14, 2017.

CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, respondents refer the Court to the disclosures made in their Brief in Opposition.

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STATEMENT

1. On his eighth day in office, the President signed an unprecedented executive order banning hundreds of millions of people from entering the United States for 90 days. Effective immediately, it banned nationals of seven countries (Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen) whose combined population is more than 97% Muslim. J.A. 1404-1415. The ban bore no resemblance, in scale or justification, to any prior presidential immigration order.

The President issued the order "without consulting the relevant national security agencies," including the Department of Homeland Security ("DHS"), the Department of Defense, and the Department of State. J.A. 157-158, 224. The White House "actively shielded" the Acting Attorney General from learning its contents until after it was issued. J.A. 306.

Because of the order, the State Department summarily revoked 60,000 valid immigrant and nonimmigrant visas, including visas held by people in the United States. J.A. 609-610. Individuals were prevented from boarding planes abroad. Those who managed to reach the United States were detained at airports and land crossings.

2. The executive order enacted President Trump's campaign promise to ban Muslims from entering the United States.

In December 2015, then-candidate Trump released a "statement on preventing Muslim immigration" calling for "a total and complete

shutdown of Muslims entering the United States." J.A. 1050.[1] Mr. Trump repeatedly reaffirmed his ban proposal, asserting that "Islam hates us" and that "we're having problems with the Muslims, and we're having problems with Muslims coming into the country." J.A. 766, 772.

In May 2016, Mr. Trump announced that he was putting together an "immigration commission," headed by Rudolph Giuliani, that would "look at the 'Muslim ban,' or 'temporary ban' as we call it."[2] The day after the ban was issued, Mr. Giuliani was asked how the President had decided to ban nationals from the seven countries listed in the January order. Mr. Giuliani confirmed that, as a candidate, Mr. Trump had asked him to form a commission to come up with a way to "legally" implement a "Muslim ban," and the commission recommended using territory as a proxy for religion. J.A. 754.

In the months after the creation of the "commission," Mr. Trump explained that he would use geography as a proxy for religion. He said that he was now "talking territories instead of Muslim," because "[p]eople were so upset when I used the word Muslim." J.A. 700-701. When questioned about the constitutionality of a Muslim ban, he

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[1] The statement remained on President Trump's continuously-updated website well into the administration. It was selectively removed on May 8, the day this case was argued in the Fourth Circuit. J.A. 179-180 n.5.

[2] https://www.youtube.com/watch?v=abXAx_wCSoE&feature=youtu.be&t=3m9s; *see also id.* at 5:27 (agreeing that "it's a ban on Muslims, with exceptions").

replied, "So you call it territories. OK? We're gonna do territories." J.A. 150, 181, 220. And when asked whether he was "changing [his] position," Mr. Trump responded: "No. Call it whatever you want. We'll call it territories, OK?"[3] He denied that focusing on territories was a "rollback" of his proposed Muslim ban.[4]

Following his election, but before his inauguration, President-elect Trump was asked whether he still planned on banning Muslims. He responded: "You know my plans. All along, I've proven to be right. 100% correct." J.A. 750.[5]

3. The January 27 executive order ("EO-1")[6] "appeared to take th[e] exact form" that President Trump had promised as a candidate. J.A. 220. It operated on the basis of territory and targeted only countries that were overwhelmingly Muslim.

The order twice mentioned "'honor' killings," a "well-worn tactic for stigmatizing and demeaning Islam" that President Trump had repeatedly

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[3] https://www.cbsnews.com/news/60-minutes-trump-pence-republican-ticket/.

[4] *See also* https://youtu.be/YRez1hHA9Vg?t=2m52s ("talking about territories" because "[p]eople didn't want me to say Muslim").

[5] *Cf. Read Donald Trump's Speech on the Orlando Shooting*, Time.com (June 13, 2016) ("I called for a ban after San Bernardino and was met with great scorn and anger but now . . . many are saying that I was right to do so."), http://ti.me/1XSQ8YS.

[6] J.A. 1404-1415 (*Protecting the Nation from Foreign Terrorist Entry Into the United States*).

employed as a candidate and has nothing to do with international terrorism. J.A. 224 n.17. The order also provided preferential treatment for religious minorities in refugee processing. J.A. 1409-1410. The President explained on the day he signed the order that it was designed to give Christians priority over Muslims. J.A. 182; J.A. 307 (Thacker, J.). At the signing ceremony, President Trump read the title aloud, looked out at the audience, and said, "We all know what that means." J.A. 149, 182.

EO-1 was challenged by many parties. A district court in Washington enjoined the ban on February 3. On February 9, the Ninth Circuit declined to stay the Washington injunction, finding the order invalid principally on due process grounds. The Ninth Circuit also noted "significant constitutional questions" under the Establishment Clause and equal protection. *Washington v. Trump*, 847 F.3d 1151, 1168 (9th Cir. 2017) (per curiam).

President Trump announced that, rather than defend his initial ban, he would issue a revised one. He explained, "I keep my campaign promises," J.A. 494, and said the revised version would "get just about everything" that was in EO-1, "in some ways, more." J.A. 532. Senior White House officials echoed the President, explaining that the revised order would constitute the "same basic policy" and that the "principles" would "remain the same." J.A. 842, 545.

4. President Trump signed the revised executive order on March 6, 2017, with an effective date of March 16. J.A. 1416-1440 ("EO-2" or "the Order").

The two orders share a title, J.A. 1404, 1416; a list of banned countries (with the exception of Iraq), J.A. 1406, 1426 (§ 2(c)); a 90-day entry ban on individuals from those countries, *id.*; a worldwide review of vetting information provided by other countries, J.A. 1405-1407, 1425-1428 (§ 2); a mechanism to impose an indefinite ban following that review process, J.A. 1407, 1427 (§ 2(e)); a discretionary waiver provision, J.A. 1407, 1429-1431 (§ 3(c)); refugee-related provisions, J.A. 1409-1411, 1433-1435 (§ 6); and directions to publish the number of "honor killings" committed in the United States by foreign nationals, J.A. 1414, 1437 (§ 11(a)(iii)).

Like EO-1, EO-2 expressly linked the 90-day ban to the review of vetting information. J.A. 1405-1406, 1425-1426 (§§ 2(a), (c)). EO-1 had directed the DHS Secretary to initiate the first step of the review process described in both versions of the order "immediately" and submit a report to the President "within 30 days of the date of th[e] order" with a "list of countries that do not provide adequate information." J.A. 1405-1406 (§§ 3(a), (b)). The review and report provisions of EO-1 were never enjoined and remained in effect for 48 days, until the revised order took effect. DHS did not complete the study or submit the mandated report. *See* 4th Cir. Oral Arg. 7:55-8:45.[7] Without explanation, EO-2 restarted the ban and review periods from the beginning. J.A. 1426, 1433 (§§ 2(c), 6(a)).

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[7] https://www.c-span.org/video/?427706-1/fourth-circuit-hears-oral-argument-travel-ban.

EO-2 also exempted several categories of persons from the ban who had been the focus of the Ninth Circuit's due process ruling. President Trump explained that the revision was a strategic litigation decision and that he would prefer to "go back to the first one," describing EO-2 as "a watered-down" and "politically correct" version that he had signed at the urging of "the lawyers."[8]

5. Before issuing EO-2, President Trump directed the relevant agencies to "compile additional factual support," Gov't Stay Reply at 2-3, Doc. 102, No. 17-1351 (4th Cir. filed Apr. 5, 2017), to justify the ban. However, DHS's reports concluded that nationality is "unlikely to be a reliable indicator of potential terrorist activity," J.A. 1051, and that increased visa vetting is unlikely to reduce the risk of terrorism because an overwhelming majority of noncitizens who commit attacks are radicalized years after immigrating, J.A. 1059-1060. Those reports were not mentioned in EO-2. EO-2 also did not identify any deficiencies in existing visa vetting procedures.

Instead, EO-2 summarized information published in 2016 about conditions in the banned countries in 2015 relating to terrorism. J.A. 1420-1422 (§ 1(e)). It noted that Congress had recently revised entry requirements to require recent

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[8] J.A. 183, 1202; Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017), https://twitter.com/realDonaldTrump/status/871675245043888128; Donald J. Trump, *A Message From Donald J. Trump*, Facebook (June 5, 2017), https://www.facebook.com/DonaldTrump/videos/10159253902870725/; *Read President Trump's Response to the Travel Ban Ruling*, Time.com (Mar. 16, 2017), http://ti.me/2o09ixe.

visitors to the six countries (and Iraq), as well as dual nationals of Syria, Iran, Sudan, and Iraq, to obtain visas for any entry to the United States. J.A. 1416-1417 (§ 1(b)(i)); J.A. 176 n.4; 8 U.S.C. § 1187(a)(12). (Previously, those individuals were eligible in certain circumstances to come to the United States without applying for visas, under the Visa Waiver Program.) And EO-2 cited one instance of terrorism-related crime involving a national of a banned country: a Somali who entered the United States as a three-year-old and was convicted 16 years later. J.A. 1424 (§ 1(h)); *United States v. Mohamud*, 843 F.3d 420, 423 (9th Cir. 2016).[9]

6. The day the President signed EO-2, the Attorney General and Secretary of Homeland Security submitted a letter to the President recommending a "temporary pause" in the entry of nationals of "certain countries" while vetting procedures were reviewed. *See* Br. 7 n.3. As the Fourth Circuit observed, the reasons given in the letter "largely echo" those set out in EO-2 itself. J.A. 229. The letter—which EO-2 does not mention—did not name any particular countries whose nationals should be banned. The next day, the Secretary of Homeland Security said that there were "probably 13 or 14 countries, not all of them Muslim countries, not all of them in the Middle East, that have questionable vetting procedures" but were not included in the ban. J.A. 590; *see also* J.A. 755.

[9] EO-2 also cited another case involving Iraqis, but Iraq is not among the countries banned by EO-2.

7. The plaintiffs are U.S. citizens and lawful permanent residents whose relatives are beneficiaries of visa petitions or refugee applications and three organizations suing on behalf of themselves and their clients or members: the International Refugee Assistance Project ("IRAP"), HIAS, and the Middle East Studies Association ("MESA").

On March 16, the district court preliminarily enjoined Section 2(c) of EO-2—the 90-day entry ban. The district court found that extensive evidence established that "the purpose of [EO-2] remains the realization of the long-envisioned Muslim ban." J.A. 148-153. The court noted that the government did not "directly contest that this record of public statements reveals a religious motivation for the travel ban" and explained that "[i]n this highly unique case," the record established that any national security justification for the Order, even if legitimate, was secondary to its anti-Muslim purpose, and that as a result Section 2(c) likely violated the Establishment Clause. J.A. 157.[10]

The en banc Fourth Circuit affirmed the injunction in relevant part on May 25, by a 10-3 vote. The majority opinion, joined in full by seven judges and in substantial part by two more, applied the "facially legitimate and bona fide" standard of *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972), as explained by Justice Kennedy's controlling concurrence (joined by Justice Alito) in *Kerry v.*

[10] The district court did not reach the plaintiffs' equal protection claim. J.A. 161.

Din, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring in the judgment).

The court held that the plaintiffs had presented "ample evidence" that the reason "proffered by the government is not 'bona fide.'" J.A. 214-215. The majority concluded that EO-2's "primary purpose is religious," in violation of the Establishment Clause. J.A. 219. It found a "direct link" between the President's statements "promising a Muslim ban that targets territories," the first order signed "only one week into office executing that exact plan," and EO-2. J.A. 232-233.

Three judges who concurred in the majority's Establishment Clause holding wrote separately to explain that EO-2 also violated the Immigration and Nationality Act ("INA"). J.A. 249, 254-255 (Keenan, J.) (concluding that the Order "fail[s] to satisfy the threshold requirement" of 8 U.S.C. § 1182(f), as it "fails to articulate a basis for the President's conclusion that entry by any of the approximately 180 million individuals subject to the ban 'would be detrimental to the interests of the United States'"); J.A. 262-300 (Wynn, J.) (applying the constitutional avoidance canon to conclude that the Order exceeds the authority granted to the President by Congress); J.A. 301-320 (Thacker, J.) (concluding that the Order violates the INA's antidiscrimination provision, 8 U.S.C. § 1152(a)(1)(A), and that it violates the Establishment Clause even looking solely to post-inauguration evidence).

In parallel litigation (No. 16-1540), a panel of the Ninth Circuit affirmed on June 12 the Hawai'i district court's preliminary injunction as to Section

2(c) and two refugee-related provisions in Section 6. The Ninth Circuit held, in relevant part, that Section 2(c) violated the INA for reasons similar to those given by Judges Keenan and Thacker, and accordingly did not reach the constitutional claims. J.A. 1195-1205; 1209-1216. The court also vacated portions of the Hawai'i preliminary injunction that had halted the review procedures set forth in other parts of Sections 2 and 6. J.A. 1236.

8. The government petitioned for certiorari and moved for a stay of the injunction. Plaintiffs noted in their opposition that the ban would expire on June 14—90 days from the "effective date" of the Order. In response, President Trump issued a memorandum on June 14 declaring that "the effective date of each enjoined provision" of EO-2 would "be the date and time at which the referenced injunctions are lifted or stayed with respect to that provision." J.A. 1442.

The provisions of Section 2 relating to review and reporting went into effect on June 19, when the Ninth Circuit's mandate issued. Accordingly, the report required under Section 2(b) was completed on or about July 9.[11] And the 50-day period for countries to "begin providing" additional information under Section 2(d) ended on August 28.

On June 26, this Court granted certiorari, consolidated this case with No. 16-1540, and

[11] *See U.S. Demands Nations Provide More Traveler Data or Face Sanctions*, Reuters (Jul. 13, 2017), http://live.reuters.com /Event/Live_US_Politics/1012197528 (reproducing July 12, 2017 State Department cable stating that report had been completed).

partially stayed the preliminary injunctions in both cases. The Court held that the injunctions appropriately "covered not just respondents, but parties similarly situated to them," and stayed the injunctions only to the extent they applied 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, 2087-2088 (2017). Pursuant to the June 14 memorandum, the government began implementing the Section 2(c) ban 72 hours later. J.A. 1442.

SUMMARY OF ARGUMENT

One of the central promises of the President's campaign was his proposal to ban Muslims. When criticized for explicitly calling for a Muslim ban, he explained that he would do so by "talking territories" instead of using "the word Muslim." A week after taking office, and without consulting any of the relevant agencies, he did just that, barring nationals of a list of overwhelmingly Muslim countries for 90 days, and explaining on national television that the order was designed to favor Christians over Muslims. When that order was enjoined, he issued the revised order at issue here, EO-2. Section 2(c) of EO-2 likewise bans over 180 million people for 90 days—nearly all of them Muslim. The courts below correctly found that this unprecedented use of the immigration power to condemn a religion violates the Establishment Clause.

The government does not dispute that a ban based on religion violates the Establishment Clause. And it cannot really contest that the record in this case demonstrates that Section 2(c) is just

such a ban. But according to the government, no one can sue over the President's ban, no court can evaluate its legality, and if a court were to consider the ban at all, it would have to ignore the evidence demonstrating that its purpose was to single out Muslims. That vision of a President immune from judicial review, and free to override Congress's immigration judgments by proclamation, is fundamentally contrary to the Constitution, the INA, and this Court's precedent.

I. Plaintiffs' claims are justiciable. Muslim lawful permanent residents and citizens in the United States have sued because EO-2 violates their own rights under the Establishment Clause and exceeds the President's authority under the INA. EO-2 condemns plaintiffs' religion in a personal and particularized manner: It isolates and excludes them from the community, jeopardizes their visa petitions, separates their families, and upends their life plans. That is more than sufficient to support standing.

The organizational plaintiffs also have standing, both on behalf of their clients and members, and because the Order imposes concrete injuries on the organizations themselves. And, contrary to the government's contention, no principle of nonreviewability deprives this Court of power to decide plaintiffs' statutory claims; indeed, because the Court indisputably has authority to review plaintiffs' constitutional claims provided they have standing, it must also have authority to determine whether the President's actions are statutorily authorized.

Plaintiffs' claims did not become moot on June 14, because the President changed Section 2(c)'s effective date. A partial ban is currently in effect, and the government still seeks to ban those protected by the injunctions, including relatives, clients, and members of the plaintiffs. And even if the case were moot, vacatur would be inappropriate, because the case's mootness would be attributable to the government's choices.

II. The Order violates the Establishment Clause. As the district court and court of appeals found, the extraordinary record in this case demonstrates that Section 2(c) has the purpose and effect of banning Muslims from the United States. The Establishment Clause does not allow the government to erect a "Beacon [of intolerance] on our Coast." *Engel v. Vitale*, 370 U.S. 421, 432 n.16 (1962) *(*quoting James Madison, *Memorial and Remonstrance Against Religious Assessments*, II Writings of Madison, at 188 (June 20, 1785)) (internal quotation marks omitted). Government condemnation of a particular religion strikes at the very heart of the Constitution's guarantees of religious liberty and equality.

This Court's decisions in *Mandel* and *Din* confirm that the Court can and should look behind the face of the Order. Plaintiffs have made an "affirmative showing" that the President acted in "bad faith." The government urges the Court to ignore voluminous and remarkable evidence of intent. But this Court has repeatedly looked to comparable evidence in assessing the validity of government action under the Establishment Clause, and for good reason. Plaintiffs and the rest of the country cannot close their eyes to the

President's condemnation of Islam; this Court should not either.

III. The Court need not reach the constitutional question because Section 2(c) also violates the INA. The authority the President invokes, 8 U.S.C. § 1182(f), does not authorize him to reverse Congress's considered immigration policy judgments simply because he disagrees. Congress expressly considered the very concerns addressed by Section 2(c) and chose to subject nationals of the banned countries to the existing visa vetting process—not to ban them. *See* Pub. L. 114-113, div. O, tit. II, § 203, 129 Stat. 2242 (codified at 8 U.S.C. § 1187(a)(12)) (2015). Moreover, the ban operates by denying visas based on nationality, despite Congress's decision to prohibit such discrimination. 8 U.S.C. § 1152(a). The President cannot simply rewrite the parts of the INA he disagrees with.

IV. The nationwide injunction is appropriate. Enjoining the President's nationwide condemnation of Islam only as to individual plaintiffs would be as inadequate as ordering a city to cover a religious display only when the plaintiff walks by. Moreover, it would be nearly impossible to fashion a limited injunction that would address the widespread and varied injuries of the organizational plaintiffs and their clients and members.

ARGUMENT

I. THE PLAINTIFFS' CLAIMS ARE JUSTICIABLE.

Plaintiffs have standing to challenge the Order, and this Court has authority to review their claims. The Order, which the President has made clear was designed to implement a "Muslim ban," disparages the religion of the individual plaintiffs—citizens and lawful permanent residents who are Muslim. It isolates them as Muslims from the community, sending the message to them and others that their religion makes them outsiders. It also interferes with their petitions to bring their relatives here and injects uncertainty into their family relationships and life decisions. These injuries are more than sufficient to give the individual plaintiffs standing to sue. And the organizational plaintiffs have standing based both on similar injuries to their clients and members in the United States and on the severe harms the Order inflicts on the organizations themselves.

Contrary to the government's suggestion, plaintiffs are not asserting the rights of those outside the United States. Plaintiffs' *own* rights have been violated, because the Order singles out their own religion, their own visa petitions, and their own relatives. Their ability to sue to protect those rights is well established.

The government additionally argues that, even if courts can review plaintiffs' constitutional claims, they cannot review plaintiffs' statutory claims. But the government's sweeping proposed nonreviewability "principle" has never been adopted by any court, cannot be reconciled with

this Court's precedent, and would raise grave separation-of-powers concerns. Moreover, it would force the Court to reach plaintiffs' constitutional claims even if their statutory claims resolved the case.

A. The Plaintiffs Have Standing.

1. When the government conveys disfavor for one or more faiths—either expressly, by openly condemning one religion, or implicitly, by favoring others—the message of disparagement imposes injuries on members of the excluded faiths that are sufficiently real and concrete to establish Article III standing. This Court has, therefore, repeatedly reached the merits in Establishment Clause cases involving the claim that promotion of a particular religion implicitly treated nonadherents as outsiders, including in challenges to a crèche in a courthouse, *County of Allegheny v. ACLU Greater Pittsburgh Chapter,* 492 U.S. 573, 580 (1989), a Ten Commandments monument on the grounds of the state capitol, *see Van Orden v. Perry*, 545 U.S. 677, 681 (2005), and Bible readings and recitations of the Lord's Prayer in public schools, *School District of Abington Township v. Schempp*, 374 U.S. 203, 205, 224 n.9 (1963)*; see also Santa Fe Independent School District v. Doe*, 530 U.S. 290, 309-310 (2000) (policy permitting prayer at football game which would be perceived as approved by school sent message of exclusion). In these cases, the plaintiffs were exposed to an official message of religious exclusion based on the government's promotion of a particular faith. *See McCreary County v. American Civil Liberties Union of Kentucky*, 545 U.S. 844, 860 (2005) (citing *Santa Fe*, 530 U.S. at 309-310). Governmental

condemnation of a particular religion is an even starker and more targeted violation of the constitutional guarantees of religious liberty, and has no conceivable legitimate purpose. *See Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993) (collecting cases).

The unrebutted record evidence demonstrates that the Order has inflicted pain and undermined plaintiffs' dignity as full members of the community. The hostility engendered by the Order affects plaintiff Meteab and his family in their daily lives and has even made his wife, who wears the hijab, reluctant to leave the house. J.A. 446-447. Similarly, the Order has made plaintiff John Doe #3 "question whether I even belong in this country." J.A. 443. The other individual plaintiffs, and many clients and members of the organizational plaintiffs, have experienced similar injuries through their contact with the Order. *See, e.g.*, J.A. 432 (Muslim MESA members understand the Order "to be an attack on Islam"); J.A. 415 ("HIAS's Muslim clients have been marginalized in their communities as a result of the Executive Order.").[12] Those injuries are cognizable under the Establishment Clause.

Plaintiffs have been personally affected by the Order in a way that members of the general

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[12] The government does not contest that IRAP, HIAS, and MESA may assert the rights of their clients and members, including their Muslim clients and members inside the United States. *See, e.g.*, *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004); *United Food & Commercial Workers Union Local 751 v. Brown Group*, 517 U.S. 544, 553 (1996); J.A. 395-396, 415-416, 433.

public—even Muslim members of the general public—have not. The Order injected itself into the plaintiffs' lives: It directly jeopardized the visa petitions they filed in order to reunite with family members and threatened to delay or prevent those reunions. *See* 8 U.S.C. § 1154(a) (statutory right of persons in the United States to petition for visas for family members abroad). It threw their most fundamental plans—including, in some cases, their plans to continue living in the United States—into question. *See*, *e.g.*, J.A. 438 ("The ban forces me to choose between my career and being with my wife . . . ."), 441 ("We are delayed in starting our lives together and building our family."), 448-449 (ban threatens to prolong plaintiff's sister's exposure to life-threatening conditions).

The government's reliance on *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), is therefore misplaced. The *Valley Forge* plaintiffs sought to challenge a property transfer in Pennsylvania, hundreds of miles from their homes, which they had read about in a press release. *Id.* at 486-487. They were complete strangers to the challenged conduct, "abstractly disagreeing" with a transfer of property they had never seen, J.A. 202, and they claimed no injury of isolation, exclusion, or condemnation, 454 U.S. at 485. The plaintiffs in this case could not be more different; they have been condemned because of their faith by "the highest elected office in the nation," J.A. 201, and are personally affected by the operation of the Order, *cf. Awad v. Ziriax*, 670 F.3d 1111, 1122-1123 (10th Cir. 2012) (recognizing standing to challenge condemnation by a state constitutional amendment

singling out Sharia law for disfavor); *Catholic League for Religious & Civil Rights v. City & County of San Francisco*, 624 F.3d 1043, 1052 n.33 (9th Cir. 2010) (en banc) (holding that Catholics in San Francisco had standing to challenge a municipal resolution critical of Catholic doctrine based on their "daily experience of contact with a government that officially condemns [their] religion").[13]

2. Plaintiffs are and always have been "asserting violations of their own constitutional rights," Br. 26, and seeking redress for their own injuries, J.A. 56, 81, 95-104.

The government is wrong to suggest that because EO-2 denies visas to the plaintiffs' relatives, it cannot injure the plaintiffs themselves, or violate the plaintiffs' own rights. This Court has repeatedly decided the claims of individuals in the United States who allege that the government is injuring *them* and violating *their* rights through its use of the immigration power, even when the government does so by refusing to allow foreign nationals abroad to travel to the United States. *See*

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[13] For these reasons, *In re Navy Chaplaincy*, 534 F.3d 756 (D.C. Cir. 2008), is inapposite. The plaintiffs in that case, who asserted no condemnation injury, were in no way affected by the challenged action and acknowledged that on their theory anyone, even a judge on the panel, would have standing. J.A. 202-203 n.11. S*ee also Allen v. Wright*, 468 U.S. 737, 755 (1984) (injury in an *equal protection* case is "personal[] deni[al of] equal treatment") (citation and quotation marks omitted); *Smith v. Jefferson County Board of School Commissioners*, 641 F.3d 197, 207 (6th Cir. 2011) (en banc) (no condemnation injury asserted).

Mandel, 408 U.S. at 764-765; *Din*, 135 S. Ct. at 2040-2042; *cf.* Oral Arg., *Washington v. Trump*, No. 17-35105, 2017 WLNR 4070578 (9th Cir. Feb. 7, 2017) (conceding that "a U.S. citizen with a connection to someone seeking entry" would have standing to challenge EO-1).

This Court has also recognized that injuries resulting from government regulation targeting others are cognizable under the Establishment Clause. In *Two Guys From Harrison-Allentown v. McGinley*, 366 U.S. 582 (1961), the plaintiff company had standing to challenge a Sunday closing law, even though only the company's employees—not the company itself—had been regulated, prosecuted, and fined for violating the law. *Id.* at 585-586. Contrary to the government's suggestion, the companion case, *McGowan v. Maryland*, 366 U.S. 420 (1961), does not say that only direct regulation can cause an Establishment Clause injury. Instead, it explains that the plaintiffs in that case could not allege that their Free Exercise Clause rights were violated where they never even explained what their religious beliefs were. *Id.* at 429. And it goes on to find that plaintiffs *did* have standing to raise their Establishment Clause claims, since they had suffered a "direct economic injury" under the challenged law. *Id.* at 430. *McGowan* and *Two Guys* underscore that the question is whether the challenged action *injures* the plaintiff, not whether

it directly regulates him or her.[14] The Order plainly injures these plaintiffs.

3. The government contends that its issuance of visas to Doe #1's wife and Doe #3's wife, pursuant to the preliminary injunction in this case, renders their claims moot. The visas do not fully redress the injuries that these plaintiffs would suffer in the absence of the injunction. Section 2(c) would still condemn their religion and isolate them from the community. And, if the injunction were lifted, that condemnation would be directed with particular force at the plaintiffs and their families; the clear message to Does #1 and #3 would be that their spouses do not belong here and that they should have been excluded.

And other plaintiffs still have applications pending, including Mr. Mohomed, Jane Doe #2, and clients of the organizational plaintiffs in the United States and abroad. J.A. 387-88, 393-94, 410, 451, 453-54. The government notes that some of the other plaintiffs' relatives seek refugee status and so are subject to the refugee suspension in Section 6. Br. 28 n.10. But that is no answer: They are also from the six banned countries, and so also subject to Section 2(c). Because these plaintiffs' relatives are barred by both provisions—each of which the plaintiffs in this case have challenged—they have standing to challenge both. *See Vill. of Arlington*

[14] *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 16-17 (2004), is far afield from this case. In *Newdow*, the Court held as a prudential matter that a father could not sue on behalf of his daughter where it appeared that California's domestic relations law did not give him the right to do so.

Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 261 (1977) (standing to challenge "barrier" even where its removal would not "guarantee" ultimate success).

Moreover, all the plaintiffs, regardless of the stage of their relatives' applications, remain singled out by the Order's condemnation in a personal and particularized way. *Cf. Santa Fe*, 530 U.S. at 313-314 (policy facially enjoined despite "no certainty" that any prayer would occur because the policy's "mere passage" with religious purpose was an "equally important[] constitutional injur[y]").[15]

4. The government ultimately concedes that dignitary injuries are cognizable under some circumstances. Br. 31-32 (acknowledging "'spiritual'" injuries). But it posits without any reasoned justification that such injuries are not cognizable here because the Order "says nothing about religion, and does not subject [plaintiffs] to a religious exercise."

The law is clear, though, that the Establishment Clause "extends beyond facial discrimination." *Lukumi*, 508 U.S. at 534.[16] Official

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[15] The plaintiffs have filed a motion to add two individuals as plaintiffs in this case. Those individuals were and still are similarly situated to Doe #1 at the time the Fourth Circuit issued its opinion. Should the Court be in any doubt as to the standing of the current plaintiffs, it would be fair and appropriate to grant the motion and "remove the matter from controversy." *Mullaney v. Anderson*, 342 U.S. 415, 416 (1952).

[16] *Lukumi*, decided under the Free Exercise Clause, drew heavily on and further developed the Court's Establishment Clause jurisprudence.

condemnation of a particular religion "cannot be shielded by mere compliance with the requirement of facial neutrality." *Id.*; *see also Santa Fe*, 530 U.S. at 307 n.21; *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 699 (1994). That the President sought to express an anti-Muslim message without using the word "Muslim" in the Order itself does not alter plaintiffs' standing. Nor are the Establishment Clause's strictures limited to government involvement in religious *exercises*. *See, e.g.*, *Kiryas Joel*, 512 U.S. at 690 (law creating separate school district, without any religious exercise, violated the Establishment Clause).

The government dismisses *Lukumi* and *Kiryas Joel* as involving "religious gerry-mandering." Br. 73 n.21 (internal quotation marks omitted). But the Order is a religious gerrymander too. The countries selected for the ban are overwhelmingly Muslim, J.A. 173 n.2; direct evidence, including the President's own statements, demonstrates that nationality was used as a proxy for religion, *cf. Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1266-1268 (2015) (considering direct evidence of racial gerrymandering); and the face of the Order reflects "anti-Islamic dog-whistling," J.A. 224 n.17. And, in any event, no case suggests that a facially neutral law can *only* violate the Establishment Clause if it is a "religious gerrymander."

5. Section 2(c) also inflicts direct injuries on the organizational plaintiffs that do not derive from their relationship with their clients and members. The Order cognizably injures MESA, for example, by causing MESA members from the six

banned countries not to attend its annual conference. J.A. 429-430, 432-435. This undermines MESA's mission and imposes concrete financial harms. *Id.*; *see also Hawai'i v. Trump*, No. 17-16426, 2017 WL 3911055, at *12 (9th Cir. Sept. 7, 2017) (recognizing that interference with "organizational purpose" can confer standing). The government's only response is that the ban was originally intended to end before MESA's November conference. Br. 28 n.10. But the government ignores both the significant advance planning necessary to obtain a visa and arrange to attend an overseas conference and the unrebutted record evidence demonstrating that the Order has already discouraged MESA's Muslim members from traveling to the United States. *See* J.A. 432-433; *see also id.* at 434 (as of March, MESA received 133 fewer submissions to its conference than in 2014 as a result of the Order, representing a financial loss of $18,000); *Hawai'i*, 2017 WL 3911055, at *11-12.

The Order also injures IRAP and HIAS. Both organizations have clients from the six banned countries seeking to immigrate to the United States (as well as clients from those countries already in the United States). J.A. 387-388, 398-399. Not only will the ban frustrate each organization's purpose, *see* J.A. 387, 392-393, 397-398 (HIAS's religious commitment to "welcome, love and protect the stranger"), but these organizations will also be forced to divert resources to address its impact, waste unrecoverable resources already expended in responding to their clients' needs, and endure future financial losses, including the loss of grant funds, J.A. 388-391, 402-

403, 405-408; *see Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *Hawai'i*, 2017 WL 3911055, at *11-12.

B. This Court Can Review the Plaintiffs' Statutory Claims.

The government concedes that, if standing is established, the Court may review plaintiffs' constitutional claims. Br. 23 (agreeing that a claim "For A Violation Of A U.S. Citizen's Own Constitutional Rights" is justiciable), 26-27. But it advances the sweeping contention that courts cannot review whether executive branch policies governing visas or entry comply with statutory law. Br. 22-27. No court has ever adopted that view, and no statute remotely compels it.

1. There is no rule that entry policies are wholly immune from review of statutory claims. In *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), this Court considered the claim that a presidential proclamation barring entry under 8 U.S.C. § 1182(f), the same statute at issue here, violated the INA. *Id.* at 165-166, 172 & n.27. The Court rejected the government's arguments—strikingly similar to those advanced here—that the Court lacked authority to review the President's entry ban and reviewed the statutory claim on the merits. *Id.* at 170-189; *see* U.S. Br. 13-18 & n.9, 55-57, 1992 WL 541276, Reply Br. 1-4, 1993 WL 290141, *Sale v. Haitian Ctrs. Council, Inc.* (No. 92-344); *see also Dames & Moore v. Regan*, 453 U.S. 654, 669-688 (1981) (reviewing on the merits whether an executive order with major foreign policy implications complied with statute); *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S.

189, 196 (2012) (even in foreign affairs context, deciding whether the interpretation of a statute is correct is "a familiar judicial exercise").

Moreover, because the government's theory of nonreviewability goes only to the statutory claims, it would force courts to reach constitutional questions, contrary to the "well-established principle" that courts should not "decide a constitutional question if there is some other ground upon which to dispose of the case." *Nw. Austin Mun. Util. District No. One v. Holder*, 557 U.S. 193, 205 (2009) (internal quotation marks omitted). As then-Judge Ginsburg and Judge Bork agreed, where courts have authority to decide a constitutional challenge to a visa denial, they must also be able to decide whether Congress has authorized the denial before reaching the constitutional question. *Abourezk v. Reagan*, 785 F.2d 1043, 1052 (D.C. Cir. 1986) (Ginsburg, J.) (holding that statutory claim against exclusion decision was reviewable); *accord id.* at 1062 n.1 (Bork, J., dissenting) (disagreeing on merits, but concluding: "When the actions of the executive branch are challenged as violative of constitutional rights, the issue of the scope and source of executive authority necessarily becomes part of the analysis in which a court is required to engage.").

2. The government does not even acknowledge *Sale* or the reviewability analysis in *Abourezk*. It does not cite a single case (from this Court or any other) holding that entry or visa *policies* cannot be reviewed, as opposed to individual consular decisions. It points to no statute precluding review of entry policies. Instead, it invokes two lines of cases that come

nowhere near justifying the sweeping and ill-considered theory it asks this Court to announce.

The government first points to cases emphasizing the breadth of substantive congressional power to regulate admissions. Br. 23-24. But in several of those cases the Court actually reviewed statutory claims brought against exclusion policies *on the merits*. For instance, in *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), the Court reviewed two statutory claims against a presidential proclamation and regulations governing entry. *Id.* at 544-547 (rejecting, on the merits, the petitioner's challenge to her exclusion under the War Brides Act and a statute delegating authority to bar entry during a national emergency); *see also Harisiades v. Shaughnessy*, 342 U.S. 580, 583 & n.4 (1952) (rejecting, on the merits, claim that deportation proceedings violated the Administrative Procedure Act ("APA")).

The government also cites a lower court decision holding that individual consular decisions to deny visas abroad are usually nonreviewable. Br. 24-25 (citing *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999)). This Court has never endorsed that doctrine. Moreover, even the lower courts have applied it only to an individual "consular official's decision to issue or withhold a visa," *Bustamante v. Mukasey*, 531 F.3d 1059, 1061 (9th Cir. 2008) (internal quotation marks omitted), not to statutory challenges to executive orders or policy directives, *see Mulligan v. Schultz*, 848 F.2d 655, 657 (5th Cir. 1988); *Int'l Union of Bricklayers*

& Allied Craftsmen v. Meese, 761 F.2d 798, 801 (D.C. Cir. 1985).[17]

3. The government invokes statutes declining to create a cause of action to challenge individual visa denials or grants, restricting judicial review of individual visa revocations, and foreclosing APA suits challenging individual exclusion orders (but not suits challenging visa denials). Br. 25-26. But none of these provisions address the claims at issue here. More fundamentally, the government's claim that Congress has not "authorized any judicial review of visa denials" is beside the point. Br. 25. The question is whether Congress has manifested a "clear and convincing" intent to "restrict access to judicial review" for statutory challenges to a broad policy denying entry or visa issuance. *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 671 (1986) (internal quotation marks omitted). The government has cited no provision remotely barring such challenges. *Cf. Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State*, 45 F.3d 469, 471-472 (D.C. Cir. 1995) (holding that visa petitioners could challenge policy, and explaining that individuals personally

[17] The lower court cases rely on Congress's delegation of uniquely broad discretion to *consular officers*, who make millions of individual visa decisions each year, in most cases thousands of miles from the United States—circumstances that, at least historically, presented logistical challenges. *See, e.g.*, *United States ex rel. Ulrich v. Kellogg*, 30 F.2d 984, 986 (D.C. Cir. 1929); *Saavedra Bruno*, 197 F.3d at 1156; 8 U.S.C. §§ 1104(a)(1), 1201(a)(1); 6 U.S.C. § 236(b)(1). This case involves no similar problems.

connected to nonimmigrant visa applications can also sue) (citing *Abourezk*, 785 F.2d at 1050-1051), *vacated on other grounds*, 519 U.S. 1 (1996).

4. Finally, the government suggests that there is no cause of action to challenge the ban, because the President is not subject to the APA. Br. 41-42. But neither of the injunctions against Section 2(c) applies to the President himself, only to the agencies that would carry out the ban. J.A. 245, 1235. Their actions are clearly subject to review. *See* 5 U.S.C. § 702. That there is law to be applied is clear as well. *See infra* (addressing the INA's limitations on the President's proclamation authority). And even if the APA were inapplicable, injunctive relief would still be available. *See Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1384-1385 (2015) (describing "a long history of judicial review of illegal executive action" in equity); *Dames & Moore*, 453 U.S. at 669-688 (reviewing statutory claims against executive order). In short, the government has not overcome "the strong presumption in favor of judicial review of administrative action." *INS v. St. Cyr*, 533 U.S. 289 & n.9, 298 (2001) (collecting cases). As this Court did in *Sale*, and as the D.C. Circuit did in *Abourezk*, the Court may determine whether the executive's action complies with the INA.

C. The Case Is Not Moot, and in Any Event the Court Should Not Vacate the Judgment Below.

This case is not moot. As plaintiffs previously explained, Section 2(c) would have expired on June 14. *See* BIO 13-15. However, the President signed a memorandum that day directing

that the effective date for each separate provision would be the date and time an injunction of that provision is stayed or lifted. J.A. 1442. And a partial ban is currently in effect. The dispute therefore remains live.

The memorandum and ongoing litigation in this case underscore that the government intends to impose as much of the Section 2(c) ban as it can, whenever it can. Whether it does so under EO-2 as currently amended, or amends it further in response to further court orders, the "gravamen" of plaintiffs' injuries remains, and a decision declaring Section 2(c) invalid is necessary. *Northeastern Fla. Chapter of Assoc. Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 662 (1993); *see also City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 & n.11 (1982) (case was not moot where defendant indicated intention to reenact provision if the injunction were vacated on mootness grounds).

If the Court nonetheless does find the appeal is moot, it should not vacate the judgment below. Vacatur is an "equitable remedy" that is available only to "[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance." *Camreta v. Greene*, 563 U.S. 692, 712 (2011) (internal quotation marks omitted); *see also United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950). The government did not seek to obtain judgment in this Court before June 14. Were the Court to hold that the case became moot on June 14, that outcome would be entirely attributable to the government's choices in drafting the Order and in litigating this case. *See U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513

U.S. 18, 26 (1994) ("voluntary forfeiture of review" disentitled party from "the extraordinary remedy of vacatur").

II. THE ORDER VIOLATES THE ESTABLISHMENT CLAUSE.

The principles of the Establishment Clause are "fundamental to freedom" and "rooted in the foundation soil of our Nation." *Epperson v. Arkansas*, 393 U.S. 97, 103 (1968). Its "clearest command . . . is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982).

The Framers knew well the dangers of religious favoritism and exclusion. In the colonial era, Georgia attempted to exclude Catholics, and Virginia "enacted a law banning the unreasonable and turbulent sort of people, commonly called Quakers." Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2129, 2163 (2003) (internal quotation marks omitted).

As James Madison, the architect of the Establishment Clause, explained, and this Court later echoed, "the first step . . . in the career of intolerance" is to place "a Beacon on our Coast, warning" the "persecuted and oppressed of every Nation and Religion" that they must "seek some other haven." *Engel*, 370 U.S. at 432 n.16 (1962) (quoting James Madison, *Memorial and Remonstrance against Religious Assessments*, at 188) (internal quotation marks omitted).

President Trump's Order is a 21st century version of the "Beacon on our Coast" that the Framers foreswore. It seeks to keep Muslims out based on the belief that, in the President's own words, "Islam hates us." J.A. 766.

A. The Order Is Invalid Under the Establishment Clause Regardless of Whether the Court Applies *Mandel*.

1. The Establishment Clause creates both an individual right and a structural constraint on governmental power. *See Engel*, 370 U.S. at 430 (Establishment Clause "is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not"); *McCreary*, 545 U.S. at 876 (warning of "the civic divisiveness that follows when the government weighs in on one side of religious debate"); *McGowan*, 366 U.S. at 430.

Moreover, as *Engel* reminds us in quoting Madison, there has always been a special nexus between immigration and principles of religious neutrality. *See* McConnell, 44 Wm. & Mary L. Rev. at 2186 ("The animating purpose of the Puritan migration to America was, after all, religious: to find a place where they could practice their religion without suffering harassment and persecution."); *Everson v. Bd. of Educ.*, 330 U.S. 1, 8-9 (1947). Leaving a violation unchecked merely because it operates through the immigration system risks the very divisiveness that the Establishment Clause seeks to prevent. *See* Amicus Br. of Mormon History & Law Scholars 16-22 (describing the

lasting divisive effects of restrictions on Mormon immigration).

In this case, as in *INS v. Chadha*, 462 U.S. 919 (1983), the question is whether the government has overstepped its structural constitutional bounds. *See id.* at 940-941 (undertaking ordinary separation-of-powers analysis because "what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing" its immigration power); *see also Bond v. United States*, 564 U.S. 211, 223 (2011) ("If the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable injury may object."). Thus, as in *Chadha*, the Court need not apply any special immigration-related filter to its analysis—including the "facially legitimate and bona fide" requirement of *Mandel*, 408 U.S. 753.

2. If the Court does apply *Mandel*, that is no impediment to examining the Order's purpose. *Mandel* explains that where the government gives a "facially legitimate and bona fide reason" for excluding an alien, courts will not "look behind" the given explanation when considering the claims that result. 408 U.S. at 770. In contrast, as Justices Kennedy and Alito explained in their controlling concurrence in *Kerry v. Din,* when a challenger makes "an affirmative showing of bad faith," 135 S. Ct. at 2141, *Mandel* teaches that it *is* appropriate to "look behind" the face of the Order, *id.* (quoting *Mandel*, 408 U.S. at 770).

This is, as the Fourth Circuit found, just such a rare case: Plaintiffs have "ample evidence" of improper purpose. J.A. 214. Moreover, the Order

is not facially legitimate. For both of these reasons, applying *Mandel* requires the Court to "look behind" the face of the Order.

3. The government resists the conclusion that *Mandel* and *Din* mandate an analysis of bad faith, but only by misreading the cases. It maintains that courts may decide only whether "the reason is *facially* bona fide as well as facially legitimate," Br. 66 (emphasis added), but that is wrong. It is inconsistent with the controlling *Din* concurrence, which expressly contemplates looking beyond the face of an order where a plaintiff has made an affirmative showing of bad faith. *Din*, 135 S. Ct. at 2141. It would render *Mandel*'s "bona fide" element meaningless, because an order that is facially legitimate would necessarily also be "bona fide" on its face. And it does not reflect the natural meaning of "bona fide": A "bona fide" reason is given "sincerely," "honestly," and "with good faith." Bona Fide, *Black's Law Dictionary* 223 (4th rev. ed. 1968); *see* J.A. 212-213. In most instances, that cannot be assessed as a facial matter.

For similar reasons, the government's description of *Mandel*'s standard as an "objective 'rational-basis' standard" that forbids any inquiry into purpose is not consistent with *Mandel* or *Din*. Br. 64 (quoting *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1693 (2017)). The Court did not describe *Mandel*'s standard that way in *Morales-Santana*. Rather, the Court explained that *Fiallo v. Bell*, 430 U.S. 787 (1977)—not *Mandel*—applied "rational-basis" review. *Morales-Santana*, 137 S. Ct. at 1693. *Fiallo*, however, involved a challenge to congressional line-drawing on the face of the statute itself. 430 U.S. at 791. The plaintiff was

not seeking to "look behind" the statute's text to evidence of purpose, and thus the Court had no occasion in that case to address how such evidence would be treated. *See id.* at 798-799.

4. The government alternately proposes that the bona-fide inquiry may lead to an examination of the evidence, but only in situations where a statute specifies "factual predicates" for exclusion and the plaintiff has made an "affirmative showing" that those predicates were not met. In such cases, the government says, the inquiry might allow for additional "factual details" to be produced, but it could not consider whether the officer was acting with an improper *purpose*. Br. 67-68.

That reading is also contrary to the *Din* concurrence, and would turn *Mandel* and *Din* on their heads. In *Din*, the government supplied a "facially legitimate" reason for denying a visa to the noncitizen applicant by citing a specific statute. 135 S. Ct. at 2140. That statute, in turn, set out "specific criteria"—"discrete factual predicates"—for the denial. *Id.* at 2140-2141. Absent any evidence or allegation of bad faith, those circumstances indicated that the government "relied upon a bona fide factual basis for denying a visa." *Id.* at 2140.

Accordingly, the *Din* concurrence did *not* ask whether the plaintiff "ma[de] an 'affirmative showing' that [the] consular officer had no 'bona fide *factual basis*'" for the decision. Br. 68 (emphasis added). Instead, it asked whether she had "plausibly alleged with sufficient particularity" "an affirmative showing of *bad faith* on the part of

the consular officer." *Din*, 135 S. Ct. at 2141 (emphasis added). *That* was what the plaintiff would have had to show for the Court to "look behind" the government's stated reason in *Din*. And that is what the plaintiffs have shown here.

5. Underscoring that the "bona fide" inquiry encompasses inquiries into purpose, the *Din* concurrence cites a case in which the Court considered an improper-purpose allegation—that a government action was motivated by "conspiracy, fraud or deception." *United States v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926) (cited in *Din*, 135 S. Ct. at 2140). The lower courts have understood *Mandel*'s "bona fide" prong the same way—especially after *Din*. *See, e.g.*, *Cardenas v. United States*, 826 F.3d 1164, 1173 (9th Cir. 2016) (rejecting claim of racial discrimination because plaintiff did "not plausibly establish that the decision to deny [him] a visa was made on a forbidden racial basis"); *American Academy of Religion v. Napolitano*, 573 F.3d 115, 137 (2d Cir. 2009) (explaining that "a well supported allegation of bad faith . . . would render the decision not bona fide").

No court has ever adopted the government's position on *Mandel*, and for good reason. On the government's view, even irrefutable evidence that a government official had denied entry out of racial or religious animus, or in order to collect a bribe, could not be considered. And the government's version of *Mandel* would generate far more litigation, as it would allow individuals to bring claims that the government was factually wrong in applying specific exclusion grounds, while barring any consideration of the far rarer case in which

there is affirmative evidence that officials were acting with an unconstitutional purpose. That is the opposite of what *Mandel* and *Din* teach.[18]

B. Section 2(c) Fails Any Purpose Inquiry.

1. Both courts below, and the district court in *Hawai'i*, concluded that Section 2(c) was issued with the improper purpose of banning Muslims. J.A. 119-128, 147-161 (district court); J.A. 172-184, 214-236 (Fourth Circuit); *id.* at 219, 233 (citing "compelling" evidence in this "unique" case); J.A. 1104-1114, 1129-1139 (District of Hawai'i); *id.* at 1134 (noting the "remarkable facts at issue here"). Even a brief recital of the facts leaves no doubt about the purpose of the Order.

As a candidate, President Trump announced that he would ban Muslim immigration because, in his view, Islam "hates us." J.A. 766. He convened a commission to recommend how to effectuate a Muslim ban legally, then acted on its proposal of

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[18] Justice Marshall's dissent in *Mandel* is illustrative. Contrary to the government's contention, the dissent did not assert that the Court should have inquired into whether an official acted with an improper purpose. *Mandel*, 408 U.S. at 774-786. The plaintiffs in *Mandel* made no allegation of bad faith, much less an affirmative showing. The concern that Justice Marshall voiced in dissent was that he saw no *evidence* to support the Attorney General's decision not to grant Mandel a waiver. *Id.* at 778. Justice Marshall urged a "factual hearing to see if there is any support for the Attorney General's determination." *Id.* The *Mandel* majority rejected that proposed factual review, instead requiring that the determination be "facially legitimate *and* bona fide." *Id.* at 770 (emphasis added).

using nationality as a proxy. J.A. 754; *supra* n.2. He explained that he began "talking territories instead of Muslim," because "[p]eople were so upset when I used the word Muslim." J.A. 700-701. And he repeatedly denied that he was "changing [his] position" or that the shift to territories was a "rollback" from his proposed Muslim ban. *Id.*

A week into his presidency, without consulting any of the government agencies tasked with defending national security, President Trump signed an executive order that did the very thing he promised he would do as a candidate: suspend entry by nationals of overwhelmingly Muslim countries. J.A. 157-158, 224, 1404-1415. After the first order was enjoined, he issued a second. Aides made clear that it was the same fundamental policy. J.A. 545, 842. The President later explained that he only issued the "politically correct" second order because "the lawyers" said he should, and lamented that he did not stick with "the first one and go all the way," which is what he "wanted to do in the first place." J.A. 138, 1202, *supra* n.8.

EO-2, like EO-1, does exactly what President Trump promised: It uses nationality as a proxy to ban Muslims. It purports to do so on grounds relating to security and vetting, but it ignores the government's own conclusion that the ban would not advance those interests. J.A. 1051, 1059-1060; *see also* Amicus Br. of the Cato Institute 22-23 (noting that from 1975 to 2016, no national of any of the six countries was involved in a fatal terrorist attack); Amicus Br. of Former National Security Officials 5-13, Doc. 126-1, No. 17-1351 (4th Cir. filed Apr. 13, 2017); Amicus Br. of T.A. 18-23. And, on its face, the Order directs reporting on "honor

killings," which have nothing to do with international terrorism, but are a common way to denigrate Islam. J.A. 224 n.17, 312 n.7, 1437; Gerald Neuman, *Neither Facially Legitimate Nor Bona Fide—Why the Very Text of the Travel Ban Shows It's Unconstitutional*, Just Security, June 9, 2017.[19] As the Fourth Circuit held, "EO-2 would likely fail any purpose test." J.A. 236 n.22.

The unrebutted evidence in the record is more than enough to make out an Establishment Clause violation under this Court's precedent. Those cases do not require the Court to psychoanalyze the President or subject him to intrusive discovery, as the government contends. Br. 70-72. Rather, they require an *objective* assessment of whether a reasonable observer, aware of the public, "readily discoverable fact[s]" surrounding the Order, would view it as denigrating Islam. *McCreary*, 545 U.S. at 862; *see also Santa Fe*, 530 U.S. at 308.

Here, as both lower courts found, a reasonable observer—aware of the text and operation of the ban, its context, and the words of the President himself and his aides—could reach only one conclusion: The Order was designed to ban Muslims.

2. That evidence establishes that the Order is not bona fide. Fundamentally, it is not bona fide to use the immigration power to condemn a particular religion—and indeed, even the

[19] https://www.justsecurity.org/41953/facially-legitimate-bona-fide-why-unconstitutional-travel-ban/.

government has never asserted that it would be. Moreover, inventing post-hoc rationalizations and selectively ignoring relevant agency conclusions is the antithesis of honesty and good faith.

Cases that satisfy the requisite affirmative showing of bad faith are appropriately rare. *See, e.g.*, *Cardenas*, 826 F.3d at 1173. But if the facts of this case do not show "bad faith," it is difficult to imagine any circumstances that would. The government offers no real response except to argue for deference so radical that it amounts to abdication, and to claim that the President's revision of EO-1 "is the opposite of bad faith" because it was undertaken to address the Ninth Circuit's due process holding. But the President's own statements fatally undermine this assertion of a good faith response.[20]

3. In addition, the Order is not facially legitimate. As signed on March 6, it was religiously gerrymandered, illogical, factually incorrect, statutorily infirm, and invoked religious stereotypes about "honor killings." Accordingly, it was facially illegitimate from the outset.[21]

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[20] *See, e.g.*, Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017) (attributing the "watered down, politically correct" Order to the "Justice Dept." and saying the Department "should have stayed with the original"); Donald J. Trump, *A Message From Donald J. Trump*, Facebook (June 5, 2017) ("We need . . . a MUCH TOUGHER version" of the "Travel Ban").

[21] The Order's claim that banned nationals present an "unacceptably high" risk to our security under current vetting procedures, J.A. 1422-1423, is irrational on its face, since the Order allows tens of thousands of those nationals to enter the

Moreover, the Order in effect now has been modified by the June 14, 2017 Presidential memorandum. And that memorandum, by separating the 90-day ban from the review scheme it supposedly facilitates, renders the revised order even more irrational.

All of the reasons given for Section 2(c) in the Order are directly tied to the review process set forth in Section 2. According to EO-2's text, the 90-day ban will "reduce investigative burdens . . . during the review period"; "ensure the proper review . . . of available resources"; "ensure that adequate standards are established" post-review; and address the concern that "*until* the assessment of current screening and vetting procedures required by section 2 of this order is completed," the risk of allowing banned nationals into the country is "unacceptably high." J.A. 1422-1423,

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United States having received visas under current vetting procedures, J.A. 1428 (§ 3(a)(iii), (a)(ii), (b)(iii)), and grants *all* consular officials the ability to issue waivers, J.A. 1429-1431. Its operation belies its stated purpose: "if the conditions in the six countries" were the true motivation, the Order "would have based its ban on contact with the listed countries, not nationality." J.A. 311 (Thacker, J., concurring). It cites a patently irrational reason for banning 180 million people: a single terrorist plot, by a teenager from Somalia who had entered the country 16 years earlier as a three-year-old. J.A. 1424. And it mentions a concern that the six countries covered by Section 2(c) may be failing to provide information about their nationals to consular officials, J.A. 1419-1420, even though under existing procedures, consular officials must *already* deny visas whenever they lack sufficient information about an applicant. *See* 8 U.S.C. §§ 1201(g), 1361; 22 C.F.R. § 40.6.

1426 (emphasis added).

But the June 14 memorandum's modification means that instead of proceeding together, the ban and the review will proceed independently. Under Section 2(b) of EO-2, as modified, the worldwide vetting review was complete on July 9, 2017, and under Section 2(d), as modified, the 50-day post-review period for countries to provide additional information ended on August 28, 2017. *See also* Amicus Br. of T.A. 14-18 (explaining that the administration had already implemented a new extreme vetting policy pursuant to Section 5 of EO-2, which has never been enjoined, by the beginning of June).

The ban on people without connections to U.S. persons or entities, which is currently ongoing despite the review procedures' completion, expires on September 24, before the Court hears argument in this case. But the government is still litigating, evidently because it wants to impose a new ban on individuals *with* bona fide relationships with the United States. Any such ban will begin long after the vetting review and the post-review follow-up period are complete, and could not be justified by any of the reasons given in EO-2.

Nor is the ban's facial legitimacy saved by the government's newly added justification—"helping to persuade foreign countries to supply needed information about their nationals." Br. 45. This brand-new rationale is not even articulated on the Order's face.

C. The Court Should Not Ignore the Evidence Before It.

The government contends that the Court should ignore virtually all the evidence in this case. And, indeed, that is the approach the government takes in its brief. In 83 pages, it manages not to quote or acknowledge the content of *any* of the pre-inauguration statements and evidence demonstrating the ban's purpose. And it argues that even post-inauguration statements should essentially be ignored to the extent they undermine the government's case. Br. 76-77. But the plaintiffs and the public cannot ignore what the President has said about Islam, Muslims, and the ban. This Court should not either.

1. The government first proposes limiting review to the text of EO-2 itself. The government argues that, because "only an 'official objective' of favoring or disfavoring a religion" violates the Establishment Clause, courts are limited to examining the "operative terms" of the challenged governmental action. Br. 70 (quoting *McCreary*, 545 U.S. at 862).

The Fourth Circuit properly rejected this argument as "contrary to the well-established framework," J.A. 229, under which courts "refuse to turn a blind eye to the context in which [the challenged] policy arose," *Santa Fe*, 530 U.S. at 315. In analyzing governmental purpose under the Establishment Clause, the Court has, where relevant, relied on statements by private pastors, *McCreary*, 545 U.S. at 869; members of the public, *Lukumi*, 508 U.S. at 541; letters to the editor and newspaper advertisements, *Epperson*, 393 U.S. at

108 n.16; and invocations by students, *Santa Fe*, 530 U.S. at 295 & n.2, 297 n.4.

2. The government next contends that, even if courts can go beyond the text of Section 2(c), they may not consider any of the public statements made by President Trump and his close advisors because it "would require precisely the type of 'judicial psychoanalysis' that *McCreary* forecloses." Br. 71-72 (citation omitted).

Not so. Purpose under the Establishment Clause is assessed from the standpoint of an objective observer based on the readily discoverable facts, not on a subjective inquiry into the defendant's psyche. *McCreary*, 545 U.S. at 862. Here, there is no "*secret* motive." *Id.* at 863 (emphasis added). Just as in *McCreary*, "openly available data support[] a commonsense conclusion" regarding the Order's impermissible purpose. *Id.* Indeed, the statements the government seeks to exclude "are explicit statements of purpose . . . attributable either to President Trump directly or to his advisors." J.A. 222; *see also* J.A. 150-151 (finding the statements at issue to be "explicit, direct," and "clear statements of religious purpose"). Because President Trump and his agents have explained their purpose "on numerous occasions and in no uncertain terms," there is simply no need to "probe anyone's heart of hearts." J.A. 222. "The remarkable facts at issue here require no such impermissible inquiry." J.A. 1134.[22]

[22] For the same reason, the government's dire warnings about "intrusion on privileged internal Executive Branch

3. The government alternatively contends that the Court should ignore what it calls "campaign-trail comments." Br. 73; *cf.* J.A. 301-320 (Thacker, J.) (finding improper purpose without reference to campaign statements). To be clear, however, the statements at issue here were not peripheral, isolated, accidental, or off-hand. They were specific, repeated, never repudiated, confirmed post-election, immediately enacted, and amply corroborated in the Order's text, operation, and contemporaneous statements. They were a central feature of President Trump's campaign, with the core promise of a ban featured on the President's website well into his presidency.

This Court, moreover, has repeatedly considered statements made during political campaigns when they are probative of impermissible purpose. *See, e.g.*, *Washington v. Seattle School District No. 1*, 458 U.S. 457, 463, 471 (1982) (relying on referendum campaign statements in equal protection challenge); *Epperson*, 393 U.S. at 108 n.16 (relying, in Establishment Clause challenge, on materials from public campaign to pass statute); *see also Glassroth v. Moore*, 335 F.3d 1282, 1297 (11th Cir. 2003) (relying on campaign promises in Establishment Clause challenge). As the government previously explained, by way of a real-life example: "[W]hen people leading the movement to form a village openly express anti-Orthodox animus and

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deliberations" and "litigant-driven discovery" that "prob[es]" the President's "subjective views," Br. 72, are entirely beside the point, as the Fourth Circuit held. J.A. 228 n.19.

thereafter become cloaked with the color of law as the village's elected and appointed officials, their expressions of religious animus become highly probative evidentiary sources in assessing whether discriminatory intent underlay formation of the village and enactment of its zoning code." U.S. Reply Br. 6, *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412 (2d Cir. 1995) (Nos. 94-7103, 94-6048, 94-6125), 1994 WL 16181393. *Cf. Arlington Heights*, 429 U.S. at 266 (intent can be proved by circumstantial as well as direct evidence); *Hunter v. Underwood*, 471 U.S. 222, 229-233 (1985). The same is true here.

Virtually all the government's observations about campaign statements—that they are frequently "short-hand for larger ideas," and can be "explained, modified, [or] retracted," Br. 73 (quotation marks and citations omitted)—apply equally to post-campaign statements, and to evidence more generally. The fact that they "often are made without the benefit of advice from an as-yet-unformed Administration," *id.*, hardly minimizes their relevance to the Order's purpose—especially when the policy itself was set without agency consultation. J.A. 157-158, 224.

The government's contentions boil down to unsubstantiated speculation that courts might—in some *other* case—misuse campaign statements. *See* Br. 73-76. But "[e]xamination of purpose . . . makes up the daily fare of every appellate court in the country," *McCreary*, 545 U.S. at 861; *see* J.A. 234-235, and courts are well equipped to determine what weight to give to any particular statement. The government has not cited a single case where a court has adopted a bar on the

admission of campaign statements. This case—where those statements are highly relevant, closely tied to the President's actions, and known to everyone in the country—is certainly not the place to begin.

Likewise, the government's specter of "chill[ing] campaign speech" is a red herring. The government cites no setting where the fear of chilling speech has led courts to ignore direct evidence of unconstitutional intent. It would be a perverse rule that constitutional violations should go unremedied to ensure that candidates may freely promise to violate the Constitution.

Finally, the government claims that because the President has made a speech overseas that refrains from condemning Islam, it undermines foreign relations for the Court to consider his statements that directly condemn that religion—and to recognize the religious purpose of the Order. Br. 75-76. Yet the rest of the world already knows what the President said; this Court looking away will not obscure what is clear to everyone else.[23]

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[23] For example, in August 2017, after that overseas speech and long after his inauguration, the President revived his campaign trail suggestion that an effective way to fight terrorism is to summarily execute suspected terrorists using bullets dipped in pigs' blood. *See Trump Cites Fake Story to Endorse Racist Mass Murder as Anti-Terror Tactic*, Toronto Star (Aug. 17, 2017) (President "endorsed a fictional war crime against Muslims"), https://www.thestar.com/news/world/2017/08/17/donald-trump-endorses-racist-mass-murder-as-an-anti-terror-tactic-citing-fake-story.html; *see generally* Amicus Br. of MacArthur Justice Center 27-33 (collecting post-inauguration statements.

4. The government repeatedly cites dicta in *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999) ("*AAADC*"), implying that it requires deference to the executive's national security determinations in this case. Br. 42, 44, 64, 71-72. But the Court's holding was merely that Congress had expressly deprived it of jurisdiction over a selective-prosecution challenge. *AAADC*, 525 U.S. at 487. The Court went on in dicta to say that foreign nationals generally do not have a selective-enforcement defense to deportation, in part because such claims would involve "the disclosure of foreign-policy objectives and . . . foreign-intelligence products and techniques." *Id.* at 490-491. That was the context in which the Court declined to require the Executive to "disclose its 'real' reasons," which a court would be "ill equipped" to assess. *Id.* at 491.

The claims in this case do not raise any of those concerns. And here, unlike in *AAADC*, there is no statute precluding this Court's review. But in any event, even in *AAADC* the Court declined to "rule out the possibility of a rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations can be overcome." *Id.* This is such a case. And the government's attempt to read *AAADC* so broadly cannot be squared with this Court's refusal to defer to executive claims of national security even in times of war. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723, 797-798 (2008).

5. The government's remaining evidentiary objections amount to the contention that the lower courts gave too little weight to the religion-neutral reasons for the Order the

government proffered. Br. 76-78. The lower courts were right to discount these arguments.

For example, the government suggests throughout its brief that the entry ban is the product of "consultation with Members of [the] newly formed Cabinet," including the "Secretaries of State and Homeland Security and the Attorney General," who "recommend[ed]" that it be imposed. Br. 3, 74, 77; *see also* Br. 69. But the only evidence to support that assertion is a letter that: (1) was issued the same day the *second* entry ban was signed; (2) did not name any specific countries whose nationals should be banned; (3) was not mentioned in EO-2; and (4) was plainly prepared to further the government's litigation position. Particularly because it is undisputed that there was "no consultation" with the relevant agencies before the entry ban was first imposed, J.A. 120, the letter cannot outweigh the ample evidence of unconstitutional purpose.

Similarly, the government's invocation of the "'presumption of regularity'" is entirely unwarranted. Br. 78 (citation omitted). By any measure—procedurally, substantively, or historically—nothing about the efforts to impose the entry ban has been regular. Any "presumption" to the contrary has long since been rebutted.

The government has been forced to make extreme, categorical, and novel arguments in defense of the Order. That is a measure of how extreme the Order itself is. But the guideposts this case sets will, of course, shape the religious liberties of everyone, of every faith, well after this President leaves office. As the government has

conceded, in its view, if a President made repeated anti-Semitic statements, said he wanted to exclude Jews from the United States, explained that he was going to do it by focusing on geography, and then issued an executive order banning all travel from Israel, citing recent terrorism in that country in the Order itself, that ban would be valid. 4th Cir. Oral Arg. 1:55:20-1:58:00.

The Court should not adopt the government's arguments. Doing so would not only harm the plaintiffs and allow the government to condemn a major American religion, but the resulting ruling would, as Justice Jackson warned in *Korematsu v. United States*, "lie[] about like a loaded weapon," threatening yet more damage for decades to come. 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

III. SECTION 2(c) VIOLATES THE INA.

Before deciding a constitutional claim, the Court first determines whether resolving the case on statutory grounds makes "it unnecessary to reach the constitutional question." *Dep't of Commerce v. U.S. House of Reps.*, 525 U.S. 316, 343-344 (1999).

That is the case here. This is not a case in which the President and Congress speak with one voice. Instead, the President claims the sweeping power to arrogate Congress's immigration power to himself alone—and to exercise it free from judicial review. "Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952) (Jackson, J., concurring). Section

1182(f) does not give him that power, especially where, as here, § 1152(a) specifically prohibits the policy at issue. Section 2(c) of EO-2 thus violates the INA.

A. The Order Exceeds the President's Authority Under 8 U.S.C. § 1182(f).

1. The government asserts that there is no "meaningful" limit on the President's ability to rewrite our immigration system under 8 U.S.C. § 1182(f). Br. 42. And while it admits that the President must, under that provision, find "that entry [of a noncitizen] would be detrimental to the Nation's interests," it contends that a bare recitation of those words "should be the end of the matter." Br. 41, 44, 50.

Under the government's theory of § 1182(f), the President could use it to override swaths of the INA with which he disagreed. The President could find that immigrant workers were harming American workers, and then ban all entry on employment-based visas indefinitely. Or he could find that U.S. interests require solely a skills- or education-based immigration system, and then ban all entry on family-based visas. It would be no obstacle that Congress had enacted a detailed and extensive employment- and family-based immigration system. 8 U.S.C. § 1153(a) ("Preference allocation for family-sponsored immigrants"); § 1153(b) ("Preference allocation for employment-based immigrants"). As the government candidly admits, on its theory "the current President is entitled to look at the same information relied upon by . . . Congress . . . and to

make his own judgment." Br. 48 (emphasis omitted).

That cannot be right. As this Court explained in a prior immigration case, the Framers were "acutely conscious" of the danger posed by subjecting national policy decisions to the "arbitrary action of one person." *Chadha*, 462 U.S. at 951. Congress undoubtedly did not delegate wholesale its authority to make immigration law. U.S. Const. art. I, § 8, cl. 4. *See Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (holding that statute involving "travel controls" could not "grant the Executive totally unrestricted freedom of choice"); *see also Kent v. Dulles*, 357 U.S. 116, 129 (1958) (facially broad delegation "construe[d narrowly" in foreign affairs context in light of constitutional concerns). And it certainly did not do so through § 1182(f), which it enacted mere months after this Court had recognized limitations on Congress's ability to delegate its power in an immigration case. *See* Pub. L. 82-414, § 212, 66 Stat. 163 (1952); *Carlson v. Landon*, 342 U.S. 524, 542-544 (1952) (holding that a "delegation of legislative power" is "permissible" only when "the executive judgment is limited by adequate standards"); *see also Mahler v. Eby*, 264 U.S. 32, 40-41 (1924).

2. Section 2(c) rejects a specific policy judgment of Congress. In 2015, Congress considered and addressed the possibility, in light of recent events, that travelers from certain countries—including those banned in EO-1 and EO-2—might commit acts of terrorism in the United States. After declining to advance proposals to ban refugees, Congress decided to make certain visitors to and dual nationals of the

countries in question ineligible for the Visa Waiver Program. *See* Pub. L. 114-113, div. O, tit. II, § 203, 129 Stat. 2242 (codified at 8 U.S.C. § 1187(a)(12)); *see also, e.g.*, H.R. 3314, 114th Cong., *introduced* July 29, 2015 (rejected refugee ban); S. 2302, 114th Cong., *introduced* Nov. 18, 2015 (rejected ban on refugees from Iraq, Libya, Somalia, Syria, and Yemen). Thus, Congress decided to require all nationals of and visitors to those countries "to apply for a visa and go through the formal visa screening process" in "an abundance of caution." 161 Cong. Rec. H9051 (Dec. 8, 2015) (statement of Rep. Miller, principal sponsor of the 2015 provision).

In that stringent, individualized vetting process, consular officers must deny visas whenever the individual cannot produce sufficient information to satisfy the officer regarding any ground of inadmissibility, including a detailed terrorism bar "cover[ing] a vast waterfront of human activity." *Din*, 135 S. Ct. at 2145-2146 (Breyer, J., dissenting); *see* 8 U.S.C. §§ 1182(a)(3)(b), 1201(g); 22 C.F.R. § 40.6; *see also* Amicus Br. of the Cato Institute 9-17 (explaining burden borne by visa applicants and documenting the extreme rarity of vetting failures). And the 2015 Act was enacted against the background of Congress *already* having strengthened the visa vetting process multiple times since the September 11 attacks to address specific identified concerns. *See, e.g.*, Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. 107-173, tit. II, 116 Stat. 543 (providing for access to electronic information and training for consular officers in the "effective screening of visa applicants"); Intelligence

Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458, §§ 7201, 7203, 118 Stat. 3638 (similar); *see also* Amicus Br. of Former National Security Officials 9-12, Doc. 126-1, No. 17-1351 (4th Cir. filed Apr. 13, 2017); Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. 110-53, 121 Stat. 266.

The Order upends Congress's judgment about the proper response to the very same circumstances. It *bans* entry for nationals of the exact same countries (except Iraq) that Congress considered, even though Congress's response to the very same country conditions was to allow individuals to travel as long as they satisfactorily completed the vetting process and were issued visas. *See* J.A. 1419-1421; *compare* 161 Cong. Rec. H9049-9060 (Dec. 8, 2015); *see also* H.R. Rep. No. 114-369, at 3-4 (2015) (addressing countries that fail "to provide terrorism-related information"); *contra* Br. 58.

The Order does not provide *any* reason to think that the existing visa process is—or even might be—inadequate, and certainly no new information that Congress did not already consider. Rather, the President—acting in the first instance eight days into his term and without consulting the relevant agencies—simply concluded that Congress got it wrong, looking at "the same information" but making his "own judgment" about the proper policy response to that information. Br. 48. Congress did not, in § 1182(f) or anywhere else, authorize the President to disregard its policy judgment at will.

3. Since the enactment of § 1182(f) in 1952, many Presidents have issued suspensions of entry, but no other President has used the statute to override Congress's contrary policy judgment.

For example, President Reagan suspended the entry of certain Cuban nationals in 1986 (Br. 43-44) to retaliate against the Cuban government for its failure to abide by a migration agreement—a diplomatic event Congress did not and could not practicably address. Proclamation No. 5,517, 51 Fed. Reg. 30,470 (Aug. 26, 1986). President Bush's 1992 suspension of unauthorized entry by sea likewise responded to an urgent influx of unauthorized migrants. Exec. Order No. 12,807, 57 Fed. Reg. 23133 (May 24, 1992); *see Sale*, 509 U.S. at 163-164 (describing escalating crisis).

Other § 1182(f) suspensions have been far narrower, *see* Br. 43 n.15, most reaching only a handful of individuals who had contributed to specific and recent harmful situations abroad. *See generally* Kate M. Manuel, *Executive Authority to Exclude Aliens*, 6-10, Cong. Res. Serv., Jan. 23, 2017 (listing § 1182(f) suspensions); 9 *Foreign Affairs Manual* 302.14-3(B)(1)(b)(2)-(3) (2016) (observing that "[s]ome" proclamations are "based on affiliation" with foreign governments or militaries, and "other[s]" on "objectionable conduct"). In each case, the suspension addressed a threat to U.S. interests to which Congress had not already responded.

That makes sense: Section 1182(f) is meant to grant authority *consistent* with the INA, not to permit a President to unilaterally override Congress's immigration policy judgments. *Accord*

Abourezk, 785 F.2d at 1049 n.2 (explaining that § 1182(f) applies to "cases that [are] *not covered* by one of the categories in [the INA]") (emphasis added); *Allende v. Shultz*, 845 F.2d 1111, 1118-1119 (1st Cir. 1988) (same).

4. Almost in passing, the government also invokes 8 U.S.C. § 1185(a)(1), which allows the President to "prescribe" "reasonable rules, regulations, and orders" governing entry. But the government contends only that it "confirms" the President's § 1182(f) authority—not that it could independently authorize this Order. Br. 40. That is a sensible concession. The same separation-of-powers principles foreclose any sweeping interpretation; Section 1185(a)(1) does not even address suspension of entry explicitly; and, any event, it requires that any regulations be "reasonable." *See* Dep't of Justice, *Immigration Laws and Iranian Students*, 4A O.L.C. 133, 140 (1979). Accordingly, the Order is likewise unauthorized by § 1185(a)(1).

B. The Order Violates § 1152(a)(1)(A).

The Order also violates the INA's antidiscrimination provision, 8 U.S.C. § 1152(a)(1)(A). That is a separate reason why the Order is illegal, and further illustrates that the government's sweeping interpretation of §1182(f) is untenable.

1. Section 1152(a)(1)(A)'s anti-discrimination mandate is straightforward: Save for "specific[]" exceptions not applicable here, it forbids 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). EO-2's violation of that mandate is just as straightforward. As the government acknowledges, Section 2(c)'s "suspension is implemented by denying visas." Br. 51-52. And the suspension is based on nationality. It therefore directly violates § 1152(a)(1)(A).

The government contends, however, that § 1182(f) allows the President to override § 1152(a)(1)(A) entirely. The government reaches that conclusion by asserting that § 1182(f) allows a nationality-based entry ban, and then reasoning that if it does, there is no point in granting visas to banned individuals.

The government has it backwards. First, in practical terms, what the government has created is not an entry ban with an incidental effect on visas; it is almost entirely a visa ban. Under EO-2, individuals who have visas are exempt from Section 2(c). J.A. 1428 (§ 3(a)(ii)-(iii)). Thus, the Section 2(c) ban operates on individuals who do not have visas—that is, visa *applicants*. The work that Section 2(c) actually does is therefore to deny visas, not to turn people back at the border. And that work is directly outlawed by § 1152(a)(1)(A).

Second, 8 U.S.C. § 1201(g) and 8 U.S.C. § 1182 do not excuse the violation of § 1152(a)(1)(A). Section 1201(g) authorizes the government to deny a visa to an individual who is "ineligible to receive a visa . . . under section 1182." But § 1182(f) does not categorize anyone (or authorize the President to categorize anyone) as "ineligible to receive a visa." Section 1182(a), in contrast, sets forth specific categories of individuals who are "inadmissible" and thus explicitly "ineligible to receive visas."

Finally, even if the government only banned entry, not visas, that too would violate § 1152(a)(1)(A), because it would render those visas meaningless during the ban period—which could be indefinite. By nullifying visas based on nationality, the government would do the precise thing that § 1152(a)(1)(A) forbids.

If § 1152(a)(1)(A) could be so easily circumvented, it would serve no real purpose. *Accord* J.A. 1212. But the antidiscrimination provision is no throwaway: It was enacted in 1965 along with other major civil rights legislation and represented a fundamental transformation of the INA. J.A. 1209-1210. That transformation closed the book on the previous national-origins immigration system, which maximized immigration from northern and western Europe while restricting immigration from southern and eastern Europe and barring immigration from Asia. J.A. 292-295 (Wynn, J.); *see generally* Commission on Immigration and Refugee Policy, U.S. Immigration Policy and the National Interest 161-216, *excerpted in* T. Alexander Aleinikoff, Immigration and Citizenship 14-21 (2016). It reflects what is now a basic principle of our law: Reducing individuals to such group-based characteristics is "odious to a free people whose institutions are founded upon the doctrine of equality." J.A. 264-265 (Wynn, J.) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (internal quotation marks omitted)); *cf. Rice v. Cayetano*, 528 U.S. 495, 517 (2000) ("One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and

worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.").

2. Section 1182(f) does not extend so far as to come into conflict with § 1152(a)(1)(A). But if there were any conflict between the two, § 1152(a)(1)(A) would control. It is later-enacted and, contrary to the government's contention, more specific, in that § 1152(a)(1)(A) specifically addresses nationality discrimination in the issuance of visas, while § 1182(f) is silent as to visa issuance in general and discrimination in particular. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 & n.7 (1976).

That is not to say that § 1152(a)(1)(A) "repeal[ed]" § 1182(f). Br. 55-56. But the government's repeal argument is telling. On the government's theory, the President—at least absent an explicit "repeal" of his § 1182(f) authority through a specific prohibition like § 1152(a)(1)(A)—would have the unreviewable power to reinstate precisely the national-origins system Congress emphatically rejected in 1965, by issuing entry-ban proclamations targeted at visa issuance in Africa, Asia, and Latin America. The government's argument cannot be reconciled with the INA.

IV. THE NATIONWIDE INJUNCTION IS APPROPRIATE.

The unique facts and circumstances of this case warrant nationwide relief. *See, e.g., United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 358 n.8 (1961)("Equitable remedies . . . are distinguished by their flexibility [and] their adaptability to circumstances.") (internal quotation marks omitted).

1. The Order inflicts condemnation, exclusion, and isolation on the plaintiffs. Those injuries set this case apart from others that might be remedied by a narrow injunction. Just as one could not remedy the Establishment Clause violation from an unconstitutional religious display by covering it with a curtain only when plaintiffs walk by, so too here, the injury would not be remedied by allowing the anti-Muslim EO-2 to remain in place as to everyone but the individual plaintiffs. The message of condemnation would remain, and a limited injunction would thus fail to provide plaintiffs with "complete relief." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Indeed, Section 2(c)'s condemnation of Islam has already caused widespread harm, sending a discriminatory message to Muslim Americans with friends and relatives affected by the ban. *See, e.g.*, Amicus Br. of Interfaith Coalition 1 (explaining that "the Order is anathema to th[e] core tenet [of religious tolerance]" shared by a wide range of religious organizations). It is thus appropriate to enjoin the ban altogether. *Cf. Santa Fe*, 530 U.S. at 313-314 (facially invalidating a policy instituting school elections regarding prayer at football games, even though no prayer had taken place).

2. Moreover, it would be exceptionally difficult, if not impossible, to effectively tailor an injunction to the organizational plaintiffs. For example, MESA and its members are harmed by the Order in myriad and complex ways: Members will be blocked from obtaining visas to attend conferences, including MESA's annual meeting; the absence of scholars at those conferences because of the Order will hinder the

collaboration and exchange of ideas that is so important to MESA and its members; and U.S.-based members will lose the opportunity to arrange for students to study in this country, which will undermine the members' academic work and the organization's mission. JA 429-433. IRAP also works with a wide range of individuals harmed by the Order: While EO-1 was in effect, for instance, IRAP responded to more than 800 emergency email queries and coordinated its network of over 2,000 pro bono attorneys and law students nationwide. J.A. 388, 390. And the Order's legal flaws infect all of its applications. *See* J.A. 244, 1234. The government has never suggested how a court might structure an injunction to address all of these harms. The "systemwide impact" here warrants a "systemwide remedy." *Lewis v. Casey*, 518 U.S. 343, 359 (1996) (internal quotation marks omitted).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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