No. 16A-1191

IN THE

Supreme Court of the United States

DONALD J. TRUMP, *et al.*,
Applicants,

v.

STATE OF HAWAII, *et al.*,
Respondents.

SUPPLEMENTAL BRIEF OPPOSING THE GOVERNMENT'S APPLICATION FOR A STAY AND PETITION FOR CERTIORARI

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TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES

Page(s)

CASES:

STATUTES:

CONSTITUTIONAL PROVISIONS:

REGULATIONS AND EXECUTIVE MATERIALS:

OTHER AUTHORITIES:

INTRODUCTION

Two Courts of Appeals are now united in enjoining Executive Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017) (the "Order")—a policy that flouts the limits of Executive power, denigrates Muslim-Americans, and threatens the Nation's reputation as a place of refuge for immigrants and refugees alike. In those courts, the Government grounded its (unsuccessful) defense of the Order on one key rationale: The travel and refugee bans are allegedly necessary stopgap measures while the Administration conducts a review and upgrade of existing vetting procedures. Both courts saw that rationale for the sham that it was, one that can neither mask the Order's denigration of Muslims nor justify ignoring the immigration laws' finely reticulated limits.

Two days after the Ninth Circuit's decision, the President removed any doubt that the courts were correct. On June 14, he issued a memorandum instructing agencies to begin the 90- and 120-day vetting review within days, but to put the Order's bans into effect whenever the remaining injunctions are lifted. This memorandum conclusively severs the already tenuous relationship between the bans and their ostensible rationale by making clear that the Order's travel and refugee restrictions may begin even *after* the vetting reviews are completed. Indeed, the President himself has claimed that the Government is already engaged in the "EXTREME VETTING" the Order was purportedly designed to facilitate.

The President's memorandum also empties the present petition for certiorari of any compelling justification. The Government does not explain why this Court's

review would be warranted once the supposed purpose of the Order—the completion of the vetting upgrade—has lapsed, as it almost surely will have by the time this case is heard in October.

Instead, the Government doubles down on a breathtaking vision of unreviewable Executive power. It asserts that the Ninth Circuit's detailed analysis of the ways in which the Order conflicts with the immigration laws is irrelevant because 8 U.S.C. § 1182(f) gives the President unfettered power to disregard Congress's immigration scheme at will. Further, the Government continues to claim that, under *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972), courts may not even *begin* to evaluate the constitutionality of the Order.

The Government is wrong. As this Court has long explained, the Framers did not intend to endow the President with the sort of unreviewable "'prerogative exercised by George III.'" *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring); *see also Dames & Moore* v. *Regan*, 453 U.S. 654, 662 (1981) (quoting same). Thus, contrary to the President's assertions, Section 1182(f) could not—and assuredly does not—give him an absolute right to control immigration. And *Mandel* does not allow the President to wield a national security rationale like a "talisman used to ward off inconvenient claims—a label used to cover a multitude of sins." *Ziglar* v. *Abbasi*, No. 15-1358, Slip Op. at 20 (June 19, 2017) (internal quotation marks omitted).

The Government's argument to the contrary is predicated on an implicit threat: In these difficult times, when religiously-motivated terrorists attempt

unspeakable harms against our citizens and our government, any judicial interference in the national security determinations of the President puts our country at risk. Yet while these are no doubt difficult times, they are not unprecedented. At the time of the Founding, England was rife with violent religious plots—both real and imagined. *See, e.g.*, Alan Haynes, *The Gunpowder Plot* (2011). As a consequence, Catholics, Puritans, and other dissenters faced harsh treatment from their government, which viewed non-conformist religious beliefs as a threat to the state. *Id.* at 98-108; Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2112–2114 (2003). Many of those who chafed under this persecution became the United States' first colonists, eager to avoid the excesses of the oppressive government they were fleeing. McConnell, *supra*, at 2115-2116.

Our Founders were thus familiar both with the violent threat posed by religious zealots and with the threat to our liberties posed by governments acting in the name of national security. Our Constitution is designed to guard against them both. It makes the President Commander-in-Chief, entrusted with the responsibility to protect the Nation. *See* U.S. Const. art. II § 2. But it also bars the establishment of religion, and gives Congress—a deliberative and diverse body—the governmental powers that are most likely to be used in the service of religious discrimination. One of those powers is control over immigration. U.S. Const. art. I § 8; *see* McConnell, *supra*, at 2116-2117.

In this case, courts have done nothing more than fulfill their "emphatic[] * * * duty" to preserve the balance our Framers struck. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). They have prevented the President from overriding the will of Congress and arbitrarily wielding the immigration power, and they have enforced the fundamental dictates of the First Amendment. There is no need for this Court to intervene, particularly in this interlocutory posture. The Courts of Appeals have correctly found the Order grossly unlawful. And the Government has revealed by word and deed that even it no longer believes there is any need for the policy currently enjoined. The Nation's fundamental laws and liberties have been protected and this dispute has run its course. Both the petition for certiorari and the stay request should be denied.

STATEMENT

Hours after respondents filed their opposition to the Government's stay application, the Ninth Circuit issued a unanimous per curiam opinion confirming the invalidity of the travel and refugee bans contained in Executive Order 13,780. The Ninth Circuit held that it need not even reach the constitutionality of the Order because it exceeded the President' statutory authority in multiple ways.

The Court of Appeals explained that "immigration, even for the President, is not a one-person show." Suppl. Add. 2. Congress holds the immigration power, and Congress has not granted the President the power to disregard the express textual commands of the Immigration and Nationality Act ("INA"), or to undermine the immigration scheme Congress has so carefully crafted. Yet the Order does just

that, by failing to make the requisite findings before excluding millions of people and by flouting Congress's specific determinations with respect to nationality-based discrimination and the admission of refugees. Suppl. Add. 35-62.

As a result, the Ninth Circuit "affirm[ed] in large part the district court's order preliminarily enjoining Sections 2 and 6 of the Executive Order." Suppl. Add. 3. It narrowed the injunction in two ways, both of which are compatible with respondents' position before this Court. First, the Ninth Circuit concluded that the injunction must preclude Executive Branch officials from enforcing the President's travel and refugee bans, rather than running against the President himself. Suppl. Add. 76. Second, the court held that the President is free to review and upgrade the existing vetting procedures as stipulated in Sections 2 and 6, but is barred from implementing the travel and refugee bans or the refugee cap. Suppl. Add. 70-72.

Shortly after the Ninth Circuit issued its opinion, the President issued a memorandum purporting to clarify the "effective date" of the provisions in Sections 2 and 6. *See* Presidential Memorandum, Effective Date in Executive Order 13,780, 82 Fed. Reg. 27965 (June 14, 2017) (attached as Respondents' Supplemental Addendum). The memorandum explains that each separate provision will become effective 72 hours after any applicable injunction is lifted.

On June 19, 2017, the Ninth Circuit issued its mandate. C.A. Dkt. No. 318. The District Court issued a narrowed injunction on the same day, lifting the injunction on the "inward facing" provisions of the Order. D. Ct. Dkt. No. 291. As a consequence, the vetting and review provisions in Sections 2 and 6 will go into force

by the end of this week. By contrast, the travel and refugee bans and the refugee cap will not go into force unless and until the remaining injunctions are lifted.

ARGUMENT

In their initial opposition to the Government's stay application, respondents made clear that the Government cannot meet the requirements for obtaining the exceptional relief of a stay. Since then, the Government's position has weakened in three significant ways.

First, the Ninth Circuit has issued an opinion establishing that the President's Order plainly exceeds his statutory authority. The Order has now been held unlawful by a total of thirteen Circuit Judges and two District Judges, in opinions cataloguing the multiple and varied ways the Order runs afoul of our statutes and our Constitution. These decisions make it exceedingly unlikely that the Government will succeed on the merits of its case.

Second, the Ninth Circuit has made clear that the injunction does not interfere with any Executive Branch review of vetting procedures. Indeed, the Secretary of the Department of Homeland Security called the Ninth Circuit decision a "big win" for that reason,[1] even though respondents had taken pains to point out that the injunction never covered internal Executive Branch reviews in the first place. *See* Stay Opp. 35-38. A stay is obviously no longer warranted on that basis.

Finally, the President's June 14 memorandum divorces the travel and refugee bans from their asserted national security rationale. Because the

[1] Tal Kopan, *First on CNN: 9th Circuit Travel Ban Ruling 'Big Win' for Administration, Kelly Says*, CNN (June 15, 2017), https://goo.gl/2t9Vw4.

Presidential Memorandum declares that each provision of Sections 2 and 6 will go into force 72 hours after an applicable injunction is lifted, it is virtually assured that the travel and refugee bans will not run contemporaneously with the review and upgrade of vetting procedures.

That is baffling because the stated rationale for the bans, both in the text of the Order and throughout this litigation, assumes that the bans will run contemporaneously with the upgrade period. *See, e.g.*, Order § 2(c) (travel ban is necessary to lighten the strain on resources "during the review period"); *id.* § 6(a) (refugee ban will help the Administration "determine what additional procedures should be used" for vetting). Yet the President has now formally severed the imposition of the bans from the implementation of the vetting upgrade they were designed to facilitate. In doing so, he has further undercut the merits of the Government's claims and nullified the Government's assertions of irreparable harm.

In these circumstances, there is no basis for this Court to issue a stay of the injunction in whole or in part. Indeed, there is no need for the Court to grant review at all. The Government has not even requested that this Court hear the case until October. By that point, the Government will have had almost nine months to complete the review and upgrade of immigration procedures that the Order was allegedly designed to accomplish. Even when faced with important issues, this Court does not review cases that no longer have any practical urgency.[2] There is no

[2] The Government misses the point when it responds in its *IRAP* reply brief (at 2 n.1) with a cite to *United States* v. *Munsingwear*, 340 U.S. 36, 39-41 (1950). The

reason to depart from that rule here. If, however, the Court nevertheless decides to review the validity of the Order, respondents acquiesce in the Government's request to have this case heard in tandem with *International Refugee Assistance Project ("IRAP")* v. *Trump*. *See infra* p. 40.

I. THE DECISION BELOW IS CORRECT.

In order to obtain a stay or certiorari, the Government must first convince the Court that it has at least some likelihood of succeeding on the merits. It cannot.

A. The Order Is Reviewable.

1. The Court Has A Constitutional Duty To Ensure The Executive Order Is Lawful.

The Government's primary argument (at 7) is that the courts are powerless to hear this case because of the "general rule barring judicial review of the denial of entry to aliens abroad." This Court has resisted similar calls for the judiciary to abdicate its fundamental role in saying "what the law is." *Marbury*, 5 U.S. (1 Cranch) at 177; *see Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 34 (2010) (the fact that the President makes a foreign policy judgment does not compel "abdication of the judicial role"). Indeed, it has gone further, emphasizing that the judiciary has a constitutional obligation to fulfill that role, even when the issues are delicate, and even when they involve enforcing limits on the foreign policy powers of the other branches. *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 566 U.S. 189, 195-96 (2012).

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point is not that this case will be formally moot, but only that this Court's review will not be needed because the alleged rationale for the bans will have been fulfilled.

Thus, while recognizing the tremendous difficulty a President faces in "exercising the executive authority in a world that presents each day some new challenge," this Court has reaffirmed its own duty to review whether an Executive Order implementing foreign policy is consistent with the President's statutory and constitutional powers. *Dames & Moore*, 453 U.S. at 662. It has not shrunk from that duty when the Executive Order in question involves the immigration power. *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187-188 (1993). Nor has it evaded its constitutional obligation merely because the Executive claims a national security rationale. *United States* v. *Robel*, 389 U.S. 258, 263 (1967).

As the Ninth Circuit recognized below, courts may owe deference to "the President's immigration and national security policy judgments." Suppl. Add. 32. But "deference does not mean abdication." *Rostker* v. *Goldberg*, 453 U.S. 57, 70 (1981). Particularly when constitutional or individual rights are at stake, courts must review the governmental policy at issue and determine whether its intrusion on liberties can be justified under the Constitution or the relevant statute. *See Hamdi* v. *Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality op.) ("Whatever power the United States Constitution envisions for the Executive *** it most assuredly envisions a role for all three branches when individual liberties are at stake."); *United States* v. *U.S. Dist. Court for E. Dist. of Mich.*, 407 U.S. 297, 320 (1972) ("We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation."); *Robel*, 389 U.S. at 263 ("[T]he phrase

'war power' cannot be invoked as a talismanic incantation to support any exercise of * * * power which can be brought within its ambit.").

In fact, the few cases the Government claims discourage review in this case actually do the opposite. Take, for instance, *Dalton* v. *Specter*, 511 U.S. 462 (1994). That case says explicitly that, while some statutory provisions preclude review, courts *may* consider a statutory claim "concern[ing] 'a want of [Presidential] power,'" or a "constitutional claim[]." *Id*. at 474-75 (quoting *Dakota Cent. Tel. Co.* v. *South Dakota ex rel. Payne*, 250 U.S. 163, 184 (1919) (second alteration in original)); *see also Webster* v. *Doe*, 486 U.S. 592, 601-03 (1988) (rejecting APA challenge to Executive action but allowing constitutional challenge to same Executive action); *Franklin* v. *Massachusetts*, 505 U.S. 788, 801-04 (1992) (same). That is precisely what the courts below have done in enjoining the Order.

2. The Plaintiffs Have Standing To Challenge The Order On Both Statutory And Constitutional Grounds.

a. There is also no support for the Government's attack on respondents' standing. Dr. Elshikh certainly has standing to raise his statutory claims. His mother-in-law is seeking an immigrant visa from Syria. Stay Opp. 14. She interviewed at the consulate in May and her application is currently in administrative processing. *Id*. If the travel ban were to go into effect, her visa application would be denied and her admission to the United States delayed, if not denied outright.

There is no question that Dr. Elshikh's separation from his mother-in-law, and the effect that separation has on the rest of his family, qualify as injuries-in-

fact. The Government does not contest that; instead, it argues that "no such injury was imminent when the operative complaint was filed." Suppl. Br. 9. That is clearly wrong. At the time the Complaint was filed in March, Dr. Elshikh's mother-in-law had a visa application pending. If the travel ban had gone into effect as planned, her application would have been denied or tabled and she would not have been allowed into the country. Indeed, her visa interview was on May 24, fewer than 90-days after the original effective date of the travel ban, so the ban would (at the very least) have delayed her application. If there were there any doubt, during the brief period that the first Order was in effect, her application was *in fact* put on hold, and the hold was only lifted when the Order was enjoined. Suppl. Add. 19. The Order thus threatened imminent harm when the Complaint was filed, just as it threatens imminent harm now.

The Government also contends that Dr. Elshikh's claim is unripe, because his "mother-in-law may obtain a waiver." Suppl. Br. 9. Wrong again. The Government does not contest that the waiver process would impose additional delay; that alone makes the injury ripe. Stay Opp. 14. But even putting that aside, the Order states clearly that it "is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States." Order § 16(c). The waiver provision is thus an illusory promise. As the President himself explained, "the lawyers * * * can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!" Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017, 3:25 AM), https://twitter.com/

realdonaldtrump/status/871674214356484096. The remote possibility of a waiver from the "BAN" does not undo Dr. Elshikh's present injury.[3]

The Government also argues that Dr. Elshikh "has no injury from Section 6's refugee provisions" because his mother-in-law is not seeking "refugee admission." Suppl. Br. 9. That simply ignores other concrete harms that Dr. Elshikh has shown. He is the Imam of a mosque in Hawaii that counts refugees as members. Stay Opp. 14-15. And the Order in its entirety stigmatizes Islam and therefore disfavors his faith, conferring Establishment Clause standing. C.A. E.R. 96; 131-32.

b. Hawaii also has standing to bring its statutory claim. The State's ability to recruit students and faculty to its University is constrained by the Order, and has been constrained since the moment the Order was announced. The University of Hawaii has 23 graduate students, multiple faculty members, and 29 visiting faculty from the six designated countries. C.A. E.R. 120-121. The University has made 14 offers of admission to graduate students located in the six countries targeted by the Order, and three of those students have accepted their offers of admission. Second Suppl. Decl. of Risa E. Dickson ¶¶ 3-5, C.A. Dkt. No. 307-2. Those students have to be on campus by August. The Order thus inflicts a clear harm on Hawaii.

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[3] The Government does not contest—and has never contested—that Dr. Elshikh falls within the zone of interests protected by the statute. For good reason: As Judge Sentelle has explained, "[t]he INA authorizes the immigration of family members of United States citizens and permanent resident aliens." *Legal Assistance for Vietnamese Asylum Seekers* v. *Dep't of State*, 45 F.3d 469, 471-72 (D.C. Cir. 1995). "Given the nature and purpose of the statute," resident family members of those aliens "fall well within the zone of interest Congress intended to protect." *Id*. at 472. And any Government argument to the contrary is now waived.

Once again, the Government does not dispute that Hawaii has suffered injuries-in-fact. Rather, the Government claims that these injuries are "post-complaint developments [that] are irrelevant to standing," because the "90-day suspension would have expired but for the injunctions in this case." Suppl. Br. 10. Nonsense. At the moment the Complaint was filed, the University was in the process of selecting its students for the following year. The Order interfered with that process. C.A. E.R. 118-128. It would have banned students who had applied to the University for admission, and whom the University was actively considering. But for the injunction, the University would have had to choose what students to accept and prospective students would have had to decide whether to enroll while a travel ban—which by its terms may be indefinitely expanded, *see* Order § 2(c)—was in place. The impact on the University was thus "concrete" and "imminent" at the time the Complaint was filed. *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

That does not mean that the supplemental declaration filed after the Complaint with updated information about admitted students is, as the Government would have it, "irrelevant." Suppl. Br. 10. Rather, it provides further detail on a harm that was already occurring at the time of filing, elaborating on the situation of the very same students referred to generally in the initial declaration. Suppl. Add. 22-23 (the "declaration merely provides greater detail regarding the students who may be unable to join the academic community this fall * * * .").

The Government also suggests—in one conclusory sentence—that "nothing in the INA supports the notion that a public university has a cognizable right to

compel the entry of an alien abroad." Suppl. Br. 10-11. Not so. The INA has numerous provisions addressing nonimmigrant visas for students, scholars, and teachers. *See* 8 U.S.C. §§ 1101(a)(15)(F), (a)(15)(J), (a)(15)(H), (a)(15)(O); *see also* 8 C.F.R. § 214(f). Accordingly, the University's "claims of injury it suffered as a result of the statutory violations are, at the least, '*arguably* within the zone of interests' that the [INA] protects." *Bank of Am. Corp.* v. *City of Miami*, 137 S. Ct. 1296, 1303 (2017). As the Ninth Circuit put it, "[t]he INA leaves no doubt that the State's interests in student- and employment-based visa petitions for students and faculty are related to the basic purposes of the INA." Suppl. Add. 27.

As for the harm to the State's refugee program stemming from the refugee ban and cap, the Government has only one response: Hawaii has no standing because "'[t]he authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government.'" Suppl. Br. 11 (quoting *Arizona* v. *United States*, 567 U.S. 387, 409-410 (2012)). In fact, the Court in *Arizona* noted that "[t]he pervasiveness of federal regulation does not diminish the importance of immigration policy to the States." 567 U.S. at 397. That is why "*both* the National and State Governments have elements of sovereignty that the other is bound to respect"—even in the immigration context. *Id*. at 398 (emphasis added). And here Hawaii has a distinct sovereign interest in effectuating its refugee policies. Moreover, Hawaii will suffer a straightforward pocketbook harm in the loss of federal money for its refugee program. *See* Haw. Administrative Code §§ 17-661-6 to -21 (State refugee resettlement program); 45 C.F.R. §§ 400.45 to 400.69 (federal

refugee cash assistance program); *see also id.* §§ 400.4 to 400.13 (grants to states for refugee resettlement). Nor is the refugee program the only state policy the Order undermines. It also interferes with the State's sovereign right to establish and enforce policies barring discrimination on the basis of national origin or religion.

c. Finally, the Government makes a half-hearted attempt to rebut respondents' strong showing of Establishment Clause standing. It bizarrely claims that respondents "never explain how the Order's application to aliens abroad violates respondents' *own* rights under that Clause." Suppl. Br. 26. That is simply untrue. *See* Stay Opp. 13-18. The Order denigrates Dr. Elshikh's faith, harms his religious community, and separates and stigmatizes his family. It also harms the University of Hawaii, decreases Hawaii's tax revenue, impairs its ability to welcome refugees, and undoes the State's sovereign right to bar the establishment of a religion. Those harms are real, and undoubtedly cognizable under the Establishment Clause. *See McGowan* v. *Maryland*, 366 U.S. 420, 430-431 (1961).

In the end, the Government's approach to standing is Kafka-esque: Dr. Elshikh's claim is now unripe, but if he waits until the consular official acts it will be either moot or blocked by consular nonreviewability. The State lacked standing when the suit was filed because the harm to its University was too speculative, but the Court may not consider the concrete evidence Hawaii submitted that proves admissions were and are being affected. The harms respondents would imminently suffer were this Court to grant the stay are irrelevant, because if the District Court had just let the ban go into effect the 90-day suspension would be up. And so on.

The only time the Government has conceded that *anyone* would have standing to challenge the Order—during oral argument in the first Ninth Circuit appeal[4]—it moved the goalposts when a plaintiff fitting that exact description (Dr. Elshikh) joined this suit. Justiciability is not a shell game.

B. The Order Exceeds The President's Statutory Authority.

The Ninth Circuit correctly held that the President exceeded his statutory authority by purporting to forbid every alien from six nations, and all refugees, from entering the United States. As the Court of Appeals explained in detail, that sweeping ban contravenes Congress's will as expressed in four statutes, exceeds the scope of Section 1182(f) itself, and flouts the structure of the immigration laws and the uniform practice of Presidents for six and a half decades. Suppl. Add. 33-61. The Government responds with a claim of staggering breadth: that this little-used subsection of the immigration laws in fact confers on the President limitless authority—an "absolute right," in the President's words[5]—to seal the Nation's borders to whomever he wishes, whenever he wishes, regardless of what the statutes enacted by the People's representatives say and without so much as a patina of judicial review. That is not the law, nor does that unbridled claim to authority have any home in a nation governed by the rule of law.

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[4] In response to a question, the Government conceded that "a U.S. citizen with a connection to someone seeking entry" would have standing to "make a constitutional challenge" to a Muslim ban. *Washington* v. *Trump*, No. 17-35105 (9th Cir.), Oral Arg. Rec. 24:28-24:47.

[5] Sopan Deb, *Trump Continues To Question Obama's Commitment to Fighting Terror*, CBS News (June 14, 2016), https://goo.gl/TzQ5aj.

1. The President's Authority Under Section 1182(f) Is Subject To Statutory Limits.

The proper starting-point in reviewing the Order is not, as the Government asserts, the President's unilateral "assessment of the national interest." Suppl. Br. 2. It is the Constitution. And that document says clearly that "[t]he *Congress* shall have Power * * * to establish an uniform Rule of Naturalization." U.S. Const. art. I, § 8 (emphasis added); *see Arizona*, 567 U.S. at 409 (explaining that the immigration power is given "*exclusively* to Congress" (quoting *Galvan* v. *Press*, 347 U.S. 522, 531 (1954)) (emphasis added)). In times of war or true "national emergency," or where Congress cannot swiftly act, the President of necessity has a measure of independent constitutional authority and his powers are at their zenith. *U.S. ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 543, 546 (1950); *see also Dames & Moore*, 453 U.S. at 678 ("Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take" in response to a national emergency); *Mathews* v. *Diaz*, 426 U.S. 67, 81 (1976). Otherwise, however, the President must act within the scope of authority that Congress delegated him—authority that, whatever its breadth, cannot be (and assuredly is not) so broad as to abdicate Congress's immigration authority wholesale to the Executive.

Section 1182(f) accords with these fundamental separation-of-powers principles. Congress enacted this provision principally to "authorize the executive to exercise the [exclusion] power * * * for the best interests of the country during a time of national emergency." *Shaughnessy*, 338 U.S. at 543 (discussing precursor of Section 1182(f)). The provision thus grants the President wide latitude in

responding to circumstances that Congress did not or could not address. Stay Opp. 29; *Dames & Moore*, 453 U.S. at 669 (Congress often authorizes the President to act "in response[] to international crises the nature of which Congress can hardly have been expected to anticipate in any detail"). The President, however, does not claim to invoke Section 1182(f) in response to any exigency, and for good reason: Congress has legislated regarding the precise circumstance this Order purports to address, *see* 8 U.S.C. § 1187(a)(12), and the problems the Order describes are years or decades old, *see* Order § 1(e), (h).

Accordingly, as respondents and the Ninth Circuit have explained, the President must adhere to several basic limits in exercising his 1182(f) authority. Under ordinary principles of statutory construction, he cannot use Section 1182(f) to circumvent other parts of the immigration code or render Congress's extensive handiwork "mere suggestions." *Gonzales* v. *Oregon*, 546 U.S. 243, 260-261 (2006); *see* Stay Opp. 28; Suppl. Add. 61. Nor can he invoke that provision in a manner antithetical to the structure or policies of that statute. *See* Stay Opp. 31. Furthermore, the President must comply with the express precondition for invoking 1182(f), by "find[ing]" that the entry of the covered "class of aliens * * * would be detrimental to the interests of the United States." *Id.* at 32; *see* Suppl. Add. 35-48.

Remarkably, the Government appears to reject all of these limits on the President's Section 1182(f) authority—or any others besides. It asserts that the President may invoke Section 1182(f) for as long as he wishes, and for any reason he chooses. *See* Suppl. Br. 13, 20-21. It contends that Section 1182(f) takes precedence

over even express text limiting the President's authority. Suppl. Br. 22, 26 & n.6. And it strenuously argues that courts may not even examine whether the President has made the "find[ing]" that Section1182(f) requires. *Id.* at 13-14. In its view, "[n]othing more is required" to unlock this power than the President's say-so that any or all aliens would be "'detrimental' to the Nation's interests." *Id.* at 21.

If the Government prevailed, Section 1182(f) would thus grant the President something the Constitution denies him: a unilateral and practically limitless immigration power. He could invoke this provision to revive the "national origins" system Congress abolished in 1965, to block unmarried aliens from the country, or to categorically exclude university professors, all in direct contravention of Congress's will. *See* 8 U.S.C. § 1152(a)(1)(A) (prohibiting nationality discrimination); *id*. § 1153(a)(1) (allocating visas to unmarried children of citizens); *id.* § 1153(b)(1) (allocating visas to aliens with advanced degrees). He could exclude vast swathes of aliens from the country based on whim or personal pique. In effect, he could establish his own Executive immigration system, exempt from constraint by Congress or oversight by the federal judiciary.

That breathtaking position has no basis in law or precedent. In *Sale*, the Court closely scrutinized the President's exercise of his 1182(f) power to ensure it complied with the text and structure of other provisions of the immigration laws. 509 U.S. at 171, 187. Similarly, in *Kent* v. *Dulles* and *Zemel* v. *Rusk*, the Court reviewed the President's exercise of even broader discretion than Section 1182(f) grants—to "designate and prescribe [rules for granting passports] for and on behalf

of the United States"—to ensure it was fundamentally reasonable and accorded with the statutory scheme. *Kent*, 357 U.S. 116, 123, 128 (1958); *Zemel*, 381 U.S. 1, 7-8, 17-18 (1965); *see also United States* v. *Witkovich*, 353 U.S. 194, 195, 199-200 (1957). As then-Judge Ginsburg explained in *Abourezk* v. *Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987), Section 1182(f) permits the President to exclude a "class of [aliens] that is *not* covered by one of the categories" Congress elsewhere addressed; he cannot use it (any more than other broad grants of authority) to "evade" or "nullify" the limits Congress imposed. *Id.* at 1049 n.2, 1057 (emphasis added); *see also Allende* v. *Shultz*, 845 F.2d 1111, 1118 (1st Cir. 1988) (Bownes, J., joined by Breyer, J.).

2. The Order Is Irreconcilable With The Statute.

Once subjected to any statutory review, the Order falls. As respondents have explained, and as the Ninth Circuit agreed, the Order contravenes numerous provisions of the immigration laws and fails to satisfy the preconditions for invoking Section 1182(f) itself. The Government ignores most of these arguments, and the few responses it musters are meritless.

a. The Government offers no rejoinder to respondents' argument that the Order unlawfully circumvents and "render[s] superfluous" for 180 million aliens the finely reticulated terrorism bar Congress codified in Section 1182(a)(3)(B). Suppl. Add. 61-62 (explaining that the Order is "incompatible with the expressed will of Congress" as embodied in "§ 1182(a)(3)(B)'s criteria for determining terrorism-related inadmissibility"). The Government simply cites two pages of its Court of

Appeals brief in which it observed that the Order does not claim that all prohibited aliens are "potential terrorists," only that the Government is unsure which of them might be terrorists. C.A. Reply Br. 24-25; *see* Suppl. Br. 26 n.6. That is an empty distinction. The terrorism bar expressly addresses itself to situations of uncertainty: It permits the Executive to exclude aliens if there a "reasonable likelihood" they may be terrorists. 8 U.S.C. § 1182(a)(3)(B)(i)(II). Furthermore, Congress explicitly considered the terrorism risk posed by nationals of these countries, and decided that visa-vetting procedures were adequate to address them. Suppl. Add. 42-43 (citing 8 U.S.C. § 1187(a)(12)). The President cannot ignore those judgments, and render both statutes effective nullities, by adopting a "contrary" policy. *Id.* at 42.

b. The Government also fails to rebut—indeed, entirely ignores—respondents' argument that the Order is irreconcilable with the structure and policies of the modern immigration system. Contrary to every other provision of the immigration laws, the Order excludes aliens based on "'invidious discrimination'" founded on their nationality or refugee status, rather than each alien's own "'fitness to reside in the country.'" Stay Opp. 31 (quoting *Judulang* v. *Holder*, 565 U.S. 42, 53 (2011)); *Wong Wing Hang* v. *INS*, 360 F.2d 715, 719 (2d Cir. 1966) (Friendly, J.)). The Government (at 22) depicts *Sale* as if it approved nationality discrimination, but that is grossly misleading; the Order at issue in *Sale* was entirely neutral, and did not single out Haitians in any way. *See* 509 U.S. at 165 n.13. The Government also claims (at 15) that past orders have engaged in similar discrimination. The

sole example that the Government identifies, however, is a 1986 order, never reviewed by courts, that halted some immigration from Cuba. That order did not exclude Cubans because of generalizations about their dangerousness or potential harm to the country, but rather because Cuba itself had breached an immigration agreement with the United States. Proclamation No. 5517, 51 Fed. Reg. 30,470 (Aug. 22, 1986). It provides no precedent for the dragnet ban the President seeks to impose. *See* Suppl. Add. 39-40 n.13.

c. Moreover, as the Ninth Circuit explained in detail, the Order fails to satisfy the prerequisite for invoking Section 1182(f) itself. Suppl. Add. 35-48; *see* Stay Opp. 32. The President and his attorneys have offered three sets of rationales for the Order's bans on entry. None constitute a "find[ing]" of any link whatsoever between the "entry of the class[es] of aliens" excluded by the Order and a "detriment[] to the interests of the United States."

First, the Order justifies its entry ban on the ground that it will free up resources to conduct an administrative review of vetting procedures. Order § 2(c) (restricting entry in order to "temporarily reduce investigative burdens on relevant agencies" while vetting procedures are reviewed). As the Ninth Circuit explained, this rationale offers no basis for distinguishing the classes the President has singled out for exclusion. Suppl. Add. 37. Furthermore, it does not relate to a harm that the "*entry*" of those aliens would cause. And the new Presidential Memorandum proves that the review can proceed without the bans. Rightly, then, the

Government does not even attempt to defend this "find[ing]" as a basis for invoking Section 1182(f).

Second, the Order claims at length that the covered aliens are more likely to engage in terrorism because the countries the President singled out have become safe havens for terrorists. *See* Order §§ 1(e), (h), 2(c); *see also* Exec. Order 13,769 §§ 1, 3(c), 82 Fed. Reg. 8977 (Jan. 27, 2017). The Government's unhurried pace throughout this litigation has already exposed this rationale as a sham: If the Government truly believed the Order was necessary to exclude terrorists from the country, it would surely not have agreed to months-long delays in the Courts of Appeals or invited this Court to wait until October (or later) to adjudicate the merits of this case. In any event, as the Ninth Circuit explained, this rationale provides no basis for thinking that all *nationals* of the six covered countries, let alone all refugees, pose a threat of terrorism. The Order extends to millions upon millions of nationals who do not reside in the covered countries and have not lived there for decades (if ever), making the conditions in those countries irrelevant to any threat they pose. Suppl. Add. 41; *IRAP et al. v. Trump, et al.*, 857 F.3d 554, Slip Op. at 87 (4th Cir. May 25, 2017) (Keenan, J., concurring). It also extends to residents of those countries who could not be terrorists under any definition. And the local conditions the Order describes provide no basis for a worldwide ban on refugees or an annual cap on refugee admissions at 50,000. The Government appears to acknowledge as much, as it now claims that this second rationale "fundamentally misunderstands" the basis for the Order, too. Suppl. Br. 18.

Instead, the Government hinges its defense on a third rationale, one almost entirely absent from the Order itself. It now says that admitting these aliens would be "detrimental" to U.S. interests because immigration officers may not possess adequate information to determine whether those aliens are terrorists. *Id.* This post-hoc explanation collapses on the slightest scrutiny. The immigration laws already forbid immigration officers from admitting aliens to the United States if they lack information to determine whether they are inadmissible, as terrorists or otherwise. *See* 8 U.S.C. § 1361 (imposing burden of proof on alien to show he is "not inadmissible"); *id.* § 1202(b)-(d) (requiring alien seeking admission to produce specified documents or "other satisfactory evidence" regarding his background). This newly minted rationale therefore purports to correct with an axe a problem that the immigration laws have already solved with a scalpel. It is akin to the President deeming a class of aliens inadmissible because it may include aliens who will become public charges, even though the law already requires the exclusion of any alien who cannot prove that he will be able to support himself. *Id.* § 1182(a)(4).

Furthermore, the Order's design contradicts this new rationale. It expressly permits immigration officers to admit aliens on a case-by-case basis. Order §§ 3, 6(a). That scheme necessarily presumes officers *would* have adequate information to determine whether they are terrorists; otherwise, the admissions would in fact be illegal. There is no logical reason why the Government would be able to obtain adequate information concerning the numerous groups eligible for waivers but not the remaining aliens the Order covers.

In any event, even granting the Government its premise, this justification does not provide any basis for what the President now seeks in this litigation: a fresh 90-day ban whenever the injunction is lifted. *See* Resp. Suppl. Add. 1-2. The Government has already had well more than 90 days to conduct the review it claims is necessary to determine what information it needs to vet the covered aliens and to adjust its vetting procedures accordingly. Indeed, by the time the Court issues a decision on the merits, it will have had at least nine months do so. The President's "find[ing]" has by its own terms lapsed; even if at one point it could have satisfied the prerequisite for invoking Section 1182(f), it can no longer do so.

Unable to meaningfully defend the Order's "findings," the Government claims that courts cannot review whether Section 1182(f)'s textual requirements are satisfied because the statute vests the President with discretion to "find[]" whether the entry of a class of aliens "would be detrimental to the interests of the United States." Suppl. Br. 13-14. That is a *non sequitur*. The President of course has broad discretion to determine whether aliens would harm the national interest if admitted. But the President does not have discretion to dispense with Section 1182(f)'s explicit requirement that he actually *find* that the aliens he has chosen to exclude would harm the United States. Under well-established principles of reviewability, courts have the duty to ensure that this "compulsory prerequisite[]" is satisfied. *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1648 (2015). Moreover, they must ensure that the President "actually, and not just purportedly" satisfies that prerequisite. *Id.* at 1653. The President could not, for instance, discharge his

"finding" obligation—and unlock the broad powers Section 1182(f) grants—by "find[ing]" that the Irish must be excluded because they are incorrigible criminals or "find[ing]" that all immigration must be halted because visas are printed on paper of the wrong color. No more can he assert that the entry of all nationals of six countries, and all refugees worldwide, is "detrimental" to the United States by asserting a series of justifications that bear no rational relationship to the ordered exclusions. *Cf. Bowen* v. *Am. Hosp. Ass'n*, 476 U.S. 610, 626-627 (1986).

d. Finally, as the Ninth Circuit correctly held, the President's Order flatly violates two other express statutory limits. First, Section 2(c) of the Order contravenes 8 U.S.C. § 1152(a)(1)(A)'s clear prohibition on discrimination in the issuance of immigrant visas because of nationality. The Government seeks to engage in such discrimination twice over: It says that nationals from six countries may not obtain immigrant visas, and that even if they do, the Government will deny those visas any legal effect. Stay Opp. 32; *see* Suppl. Add 51-52. The Government does not dispute that this blatant discrimination violates Section 1152; it simply claims (at 22) that Section 1182(f) should take precedence over 1152. Every available canon of construction instructs otherwise: Section 1152 is more specific, later in time, and includes several detailed and highly specific exceptions that do not include Section 1182(f). Suppl. Add. 52-53. Reading Section 1152 according to its terms does not impliedly repeal Section 1182(f); it is simply a normal part of

"reconciling many laws enacted over time, and getting them to 'make sense' in combination." *United States* v. *Fausto*, 484 U.S. 439, 453 (1988).[6]

Second, Section 6 of the Order violates Section 1157. Suppl. Add. 56-60. That statute sets a detailed, forward-looking process the President must follow before setting the number of refugees that "may be admitted" in an upcoming fiscal year: He must, *inter alia*, consult with various interest stakeholders and Congress, 8 U.S.C. §§ 1157(a)(3), (e); provide notice of, and typically an opportunity for hearing on, his "proposed determination," *id.* § 1157(d)(2)-(d)(3)(A); and announce what the number "shall be" before the beginning of the fiscal year, *id.* § 1157(a)(3). President Obama followed precisely that process and determined that 110,000 refugees "may be admitted" in fiscal year 2017. Suppl. Add. 56-57. In the Order, the President purports to overturn that decision, but without following any of the timing or consultation procedures that Section 1157 requires. He simply states that the number of refugees that "may be admitted" this year shall now be zero for four months, and then 50,000 for the remainder of the year. Order § 6(a)-(b). Section 1157 plainly bars the President from treating its requirements as optional in this manner. The Government's only defense (at 24) is that Section 1157's procedures do not apply because the President is *lowering* the refugee target. There is no textual basis for this distinction. When lowering the refugee target, no less than

[6] The Government's claim (at 23) that this reading would raise constitutional concerns is meritless. Congress has given the President authority to draw nationality distinctions if the Nation is at war or on the verge of war. 50 U.S.C. § 21. And as Judge Sentelle has explained, Section 1152 would plainly not prohibit nationality distinctions necessary to meet a "most compelling" need like a national emergency. *Legal Assistance for Vietnamese Asylum Seekers*, 45 F.3d at 473.

when raising it, the President is altering the number of refugees that "may be admitted," and thus the statute's procedures control.

In short, because the Constitution grants Congress, not the President, the power to regulate immigration, and because the Order plainly transgresses Congress's will, the Government has no likelihood of success on the merits.

C. The Order Is Unconstitutional.

The Government's failure to recognize that *Congress* holds the plenary immigration power also infects its strained defense of the Order's constitutionality. The Government claims (at 27) that *Mandel* must apply to sweeping Executive policies because in *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977), the Court applied a similar standard to a *statute* enacted by Congress. There is, of course, every reason for courts to afford greater deference to the immigration policies of the body the Constitution entrusts with authority over immigration. *See* U.S. Const. art. I § 8. Further, when Congress legislates, it is operating within its traditional constitutional sphere, and the Constitution's structural checks apply in full force. The need for heightened judicial review is accordingly diminished because the threat of arbitrary or unlawful government action is curtailed by the very fact that Congress is a diverse body that must act through regular processes, including bicameralism and presentment. *See INS* v. *Chadha*, 462 U.S. 919, 958 (1983); *see also Salazar* v. *Buono*, 559 U.S. 700, 727 (2010) (Alito, J., concurring) (explaining that "our country's religious diversity is well represented" in Congress). But when the President unilaterally exercises broad policymaking power, the danger of

arbitrary or improperly motivated action is much higher, and the Court's standard of review must be more searching. *Chadha*, 462 U.S. at 958.[7]

The Government also continues to misread *Mandel*, focusing on a strained reading of that case's dissent that would grossly expand Executive power at the cost of individual rights. The Government argues (at 27) that *Mandel* must have foreclosed any consideration of officials' "motivations," *but see Kerry* v. *Din*, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring), because the *Mandel* dissent asserted that the Government's rationale in that case was a "sham." But, even if it were appropriate to interpret the majority through a dissent, the Government is still missing Justice Marshall's point. He was not imploring the Court to consider statements by Executive officials suggesting they were pursuing another, unconstitutional purpose, because *there were none*. Stay Opp. 23. Instead, Justice Marshall wanted the majority to consider the absence of facts supporting the Government's asserted purpose. 408 U.S. at 778 (Marshall, J., dissenting). That is very different from a case—like this one—where the Executive has made statements indicating that his purported rationale is pretextual. And, more importantly, the Government still has not explained why the Court should adopt a standard that would permit the Executive to engage in all manner of unconstitutional acts merely by asserting a remotely plausible national security rationale. *See* Stay Op. 22.

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[7] For the same reasons, the Government's citation (at 27) to *Sessions* v. *Morales-Santana*, No. 15-1191 (June 12, 2017), does not advance its cause. In *Sessions*, the Court acknowledged only that something akin to rational basis review might be appropriate for a *statute*, not a sweeping Executive policy.

In any event, the Government's constitutional problems have only increased since respondents filed their stay opposition because the Government's stated national security rationale can no longer pass muster even under its own misguided reading of *Mandel*. At a bare minimum, *Mandel* requires a "facially legitimate" rationale for a challenged policy, 408 U.S. at 770, and the Government no longer has one. As noted, the Government's national security rationale for the travel and refugee bans depended on their running contemporaneously with the review and upgrade of vetting procedures. *See, e.g.*, Stay Appl. 10 ("The temporary suspension's explicit purpose is to enable the President * * * to assess whether current screening and vetting procedures are adequate to detect terrorists seeking to infiltrate the Nation." (citing Order § 1(f)). But the President's June 14 memorandum decouples the bans from the vetting upgrade they allegedly facilitate. *See supra* pp. 1-2, 5-7. Because there is *no* remaining facially legitimate secular rationale for the Order, the Government can no longer dispute what has always been obvious: The travel and refugee bans represent an unconstitutional effort by the President to fulfill his campaign promise to enact a Muslim ban.

The Government's supplemental brief offers *nothing* to refute that. In its *IRAP* briefing, the Government repeats its mantra that courts may not consider campaign statements. But the Government has previously taken exactly the opposite position, arguing that pre-election assertions of religious animus are "highly probative evidentiary sources in assessing whether [there is] discriminatory intent." U.S. Reply Br. at 6, *LeBlanc-Sternberg* v. *Fletcher*, 67 F.3d 412, Nos. 94-

7103-94-6048, 94-6125 (2d Cir. 1995)(1994 WL 16181393). And again, the extensive post-inauguration evidence is sufficient to demonstrate the President's impermissible purpose, particularly in light of the fact that his asserted secular rationales have proved illusory.

II. THIS COURT SHOULD NOT STAY THE INJUNCTION.

Because the decision below is correct, the Government cannot show that this Court is likely to grant certiorari and vacate the underlying judgment. For that reason alone, a stay should be denied. But a stay is also unwarranted because the harm to the respondents that the Order would inflict justifies preserving the entirety of the injunction the Ninth Circuit affirmed.

A. The Equities Favor Maintaining The Injunction.

The harms threatened by the Order are imminent and real: If the Court grants a stay, Dr. Elshikh and his family will be separated from his mother-in-law. He and the members of his mosque will suffer the "indignity of being singled out for special burdens on the basis of [their] religious calling"—a "concrete harm" that "can never be dismissed as insubstantial." *Locke* v. *Davey*, 540 U.S. 712, 731 (2004) (Scalia, J., dissenting). Admitted students will be blocked from attending the University of Hawaii, tourists will be unable to visit, and the State's refugee program will be halted.

On the other side of the scale, the only harms the Government has identified are either abstract or nonexistent. First, it says that the injunction "interferes with the President's judgments." Suppl. Br. 28. That is a variant of the argument that

any injunction of Federal Executive action is *ipso facto* irreparable harm, which is belied by this Court's repeated refusals to grant a stay merely because some federal law or policy has been enjoined. *See, e.g.*, *Ruckelshaus* v. *Monsanto Co.*, 463 U.S. 1315, 1317 (1983) (Blackmun, J., in chambers); *Commodity Futures Trading Comm'n* v. *British Am. Commodity Options Corp.*, 434 U.S. 1316, 1320 (1977) (Marshall, J., in chambers). The Government also claims that, while it has in fact proceeded with "implementing new screening procedures," that is "different from * * * ensuring that foreign *governments* are willing and able to 'share or validate important information about individuals seeking to travel to the United States.'" Suppl. Br. 29 (quoting Order § 1(d)). That is of course true, but there is *nothing* in the present injunction that prohibits the Federal Government from working with foreign governments to improve the information it receives. And the Executive retains the ability—indeed, the obligation—to deny a particular visa application if it feels that information is inadequate. *See supra* p. 24.

Moreover, a stay would dramatically upend the status quo, and usher in the very chaos that attended the rollout of the first iteration of this Order. "[T]he maintenance of the status quo is an important consideration in granting a stay," and "here it can be preserved only by denying one." *Dayton Bd. of Educ.* v. *Brinkman*, 439 U.S. 1358, 1358-59 (1978) (Rehnquist, J., in chambers)).

B. The Scope Of The Injunction Is Proper.

There is also no reason to limit the injunction in the dramatic fashion the Government proposes. The Ninth Circuit has already narrowed the injunction and

obviated the concern at the heart of the Government's objection in its stay application. The Government now argues—in a mere two sentences—that the injunction "goes far beyond redressing violations of respondents' own rights," and that it should be confined to "Dr. Elshikh's mother-in-law." Suppl. Br. 30.

That is false. In the Establishment Clause context, this Court has made clear that when a government policy is motivated by an impermissible purpose, *all* applications of that policy are tainted, and therefore all are illegal. *See Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 314 (2000). The same goes for the statutory violation. If an Executive Branch policy itself contravenes a statute, it is invalid in all its applications, and the policy should be struck down on its face. In *Gonzales* v. *Oregon*, for instance, the Court held that an "Interpretive Rule" of the Department of Justice was inconsistent with a statute, and therefore affirmed a "permanent injunction against the Interpretive Rule's enforcement"—not just against the parties, but against anyone. 546 U.S. at 254, 274-275. That is the Court's general practice, and it should be followed here. *See Dole* v. *United Steelworkers of Am.*, 494 U.S. 26, 42-43 (1990); *Pittston Coal Grp.* v. *Sebben*, 488 U.S. 105, 113-119 (1988); *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 430-432, 448-449 (1987).

The Government has also suggested that facial relief is not appropriate at the preliminary injunction phase. That is untrue. "The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success." *Winter* v. *Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008) (quotation

marks omitted). Where a plaintiff has shown a likelihood of success on an issue that would warrant facial relief, a court should award facial relief.

Indeed, this Court has awarded facial relief at the preliminary injunction phase in the First Amendment context before. *Reno* v. *Am. Civil Liberties Union*, 521 U.S. 844, 861-862 (1997). It has also affirmed a pre-enforcement preliminary injunction of a State abortion law. *Thornburgh* v. *Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 753-754 (1986). And it has even *issued* an injunction pending certiorari blocking the nationwide enforcement of statutory amendments that would have had a "pervasive impact * * * on every state and municipal government in the United States." *Nat'l League of Cities* v. *Brennan*, 419 U.S. 1321, 1322 (1974) (Burger, C.J., in chambers), *stay continued*, 419 U.S. 1100 (1975).

The Court should accordingly uphold the full scope of the preliminary injunction as narrowed by the Ninth Circuit. Nothing less would remedy the constitutional and statutory violations or adequately guard against harm to the respondents. The application of the Order to *anybody* would denigrate the Muslim faith, and harm Dr. Elshikh, his family, and his mosque. And a partial stay that only allows in the students that have already committed to attend the University would leave unremedied the harm inflicted on the State as a result of the countless other students, tourists, and refugees who would be blocked or chilled from traveling to Hawaii. Indeed, to grant a stay of any sort would effectively hand the Government a victory on the merits, since, on the Government's proposed schedule,

the case would likely not be decided until the travel and refugee bans have expired. The Court should preserve the status quo and deny the stay application.

III. CERTIORARI IS NOT WARRANTED.

1. There is no need for the Court to grant certiorari to review the Ninth Circuit's interlocutory order. Even an "intrinsically important" legal issue does not warrant review in this Court when "time w[ill] soon bury the question." Robert L. Stern *et al.*, *Supreme Court Practice* 243, 245 (8th ed. 2002). For example, the Court generally will not grant review when a statutory provision that has engendered a circuit split is no longer in force. *See United States* v. *Varca*, 896 F.2d 900, 906 n.9 (5th Cir. 1990) (noting 5-4 circuit split regarding repealed parole statute), *cert. denied*, 498 U.S. 878 (1990).

Here, the dispute over whether the President may implement his travel and refugee bans will soon become largely academic. As noted, the President's June 14 Memorandum clarifies that the "effective date" for each provision in the Order is the date on which any injunction is lifted. Because the Ninth Circuit vacated the injunction of the "internal-facing" parts of the Order last week, it is virtually certain that the internal reviews contemplated by Sections 2 and 6 will be complete within the next several months. Once those reviews are complete, even the Government's pretextual rationale for the bans will have disappeared and this Court's review will serve no practical purpose. *Cf. Honig* v. *Students of Cal. Sch. for the Blind*, 471 U.S. 148, 149 (1985) (holding that a dispute regarding the propriety of an injunction is moot where "[n]o order of this Court could affect the parties' rights").

This Court reserves certiorari jurisdiction for legal problems that are of ongoing significance and that demand resolution by the Court—not for issues merely "academic or * * * episodic." *Rice* v. *Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). Certiorari is unwarranted.

2. In any event, the Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting denial of certiorari) (collecting cases). The Court sometimes deviates from that rule in order to review a preliminary injunction that creates a circuit split or inflicts irreparable harm on the defendant. But where, as here, neither of these conditions apply, there is no reason for this Court's review.

a. There is quite obviously no split of authority in the Courts of Appeals. To the contrary, both the Fourth Circuit, sitting *en banc*, and a unanimous Ninth Circuit panel have upheld the need for a preliminary injunction of the Order's entry ban, the common question reviewed by both. While the Government repeatedly emphasizes that the Ninth Circuit upheld the injunction on statutory rather than constitutional grounds, it appears to misunderstand the implication of that holding. The Ninth Circuit did not eschew a constitutional ruling because it believed the Order was constitutional. It did so because it was "[m]indful of the Supreme Court's admonition that 'courts should be extremely careful not to issue unnecessary constitutional rulings'" and because the statutory violations were sufficiently blatant that there was no need to reach the constitutional question at all. Suppl.

Add. 14-15. When an Order has been held unlawful for multiple independent reasons, the need for certiorari review is diminished, not increased, because it is less likely that a decision of this Court would change the bottom-line outcome.

b. The case for granting certiorari at this interlocutory stage therefore depends entirely on the Government's assertion that it will be irreparably harmed by the delay in implementation of its Executive Order if the Court denies review. But the Government's litigation conduct eviscerates that claim. The Government asserts (at 28) that it has acted with haste, but the record clearly indicates otherwise. After the Ninth Circuit declined to stay the Washington District Court's injunction of the first Order on February 9, 2017, the Government could have filed an immediate appeal or moved for a stay. Instead, it waited nearly a month to issue a revised Order. C.A. E.R. 156. When the Hawaii District Court enjoined Sections 2 and 6 of the Revised Order on March 15, the Government could have stipulated to the conversion of the TRO to a preliminary injunction and sought emergency review in the Ninth Circuit and subsequently in this Court. Instead, it drew out proceedings in the District Court, and then agreed to brief its stay motion on the same schedule as its merits appeal. The Government proposed a similar briefing schedule in the Fourth Circuit.

These stall tactics are all the more confounding given that the lower courts have bent over backwards to facilitate accelerated consideration of challenges to the first and second Order. Recognizing the Government's professed need to protect the Nation's security, lower courts have set expedited briefing schedules and rendered

their judgments swiftly. *See, e.g.*, Order, *Washington* v. *Trump*, No. 17-35105 (9th Cir. Feb. 4, 2017) (setting a three day briefing and argument schedule); Order, *IRAP* v. *Trump*, No. 17-1351 (4th Cir. Apr. 10, 2017) (granting initial en banc review); Add. 1-2, 25-26 (entering TRO and PI orders within hours of oral argument). It is the Government that has prolonged the litigation.

Perhaps most strikingly, it is the Government that has pursued a schedule under which this Court would not even begin to consider the merits of the preliminary injunction until *six months* after the injunction was issued. The Government could have sought a stay of the injunction from this Court as soon as the lower court ruled. It also could have sought a stay or even certiorari before judgment from this Court as soon as it became clear that the court of appeals process would take months. The Government did neither. And, even after both the Ninth and Fourth Circuits affirmed the preliminary injunctions of the Order's travel and refugee bans, the Government still has not asked for expedited review on the merits, declaring itself content to wait until the beginning of the next October Term whether or not a stay is granted.

This is not how the Government behaves when it believes that an Executive Order must be implemented immediately. For example, in *Dames & Moore*, a case arising from the Iranian hostage crisis, the petitioner filed for certiorari before judgment in this Court to insist that it immediately enjoin the United States and Secretary of Treasury from implementing executive actions that would block the transfer of certain Iranian assets. 453 U.S. at 654. The petition was filed on June

10, 1981; the Solicitor General then requested that this Court order expedited briefing and argument, alerting the Court that "unless the Government [transferred the contested assets to Iran] by July 19, 1981, Iran could consider the United States to be in breach" of their executive agreement. 453 U.S. at 660, 667-668. The Court complied, ordering briefing and argument to be completed within two weeks. On July 2, 1981, it decided the case. *Id.*; *Dames & Moore* v. *Regan*, 452 U.S. 932, 932-933 (1981) (granting petitions); *see also United States* v. *Nixon*, 418 U.S. 683, 686-690 (1974) (after the district court entered judgment on May 20, 1974, the United States petitioned for certiorari before judgment and requested expedited briefing, argument was heard on July 8, and the Court rendered judgment on July 24); *United States* v. *United Mine Workers of Am.*, 330 U.S. 258, 269 (1947) (similar).

By contrast, the Government has made clear through its actions that there is no deep urgency to the implementation of its travel and refugee bans. For that reason, there is no need for this Court to depart from its usual practice of declining certiorari until there is a final judgment from the lower courts. To the extent there are any compelling constitutional or statutory issues after final judgment, this Court can grant certiorari then.

c. Moreover, there is little danger that denying review will leave in place precedent that constrains the Executive in the future. As *Dames & Moore* explained, cases regarding the permissibility of an exercise of Executive power "afford little precedential value for subsequent cases" because the analysis is highly fact specific. 453 U.S. at 661; *accord id.* at 661-662 (stressing that the Court's

decision regarding this "one * * * episode" of executive action "lay[s] down no general 'guidelines'" and is "confine[d]" to the specific case). That is particularly true here. The decisions of the Ninth and Fourth Circuits below apply to a *sui generis* set of facts, never before seen in this country and unlikely to be seen again. Simply put, this case will serve as precedent in only one set of circumstances: those in which a President issues a blatantly unlawful and unconstitutional Executive Order, while openly professing that he has no obligation to adhere to the statutory dictates of Congress and freely indicating that he is pursuing unconstitutional religious discrimination. There is no reason to grant certiorari in this case.

3. However, should the Court grant review in *IRAP*, respondents consent to the Government's request that the Court also "grant certiorari [here] so that this case may be considered in tandem with *IRAP*." Suppl. Br. 2. Without granting certiorari in this case, the Court would not have the full range of issues before it. First, the injunction in this case, unlike *IRAP*, covers the refugee ban in Section 6 and is therefore broader. Second, the briefing and opinions below have touched on a wider range of statutory and constitutional arguments. And finally, the respondents here—a State and an Imam—present different cases for standing than the respondents in *IRAP*. In short, granting review in this case in tandem with *IRAP* is essential to enable the Court to explore the full range of jurisdictional and merits questions raised by the Order.

CONCLUSION

The application for a stay and the petition for certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

As required by Supreme Court Rule 29.5, I, Neal Kumar Katyal, a member of the Supreme Court Bar, hereby certify that one copy of the foregoing Supplemental Brief was served via electronic mail and Federal Express on June 20, 2017 on:

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