No. 17-15589

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF HAWAII; ISMAIL ELSHIKH,

Plaintiffs – Appellees,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; DEPARTMENT OF HOMELAND SECURITY; DEPARTMENT OF STATE; JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; REX W. TILLERSON, in his official capacity as Secretary of State; UNITED STATES OF AMERICA,

Defendants – Appellants.

On Appeal from the United States District Court
for the District of Hawaii
(1:17-cv-00050-DKW-KSC)

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INTRODUCTION

The decision below is fundamentally wrong. It enjoins nationwide an Executive Order of the President of the United States acting at the core of his constitutional and statutory authority to protect the Nation and secure its borders. The basis for that remarkable relief is a challenge to the denial of entry to aliens abroad, who lack constitutional rights, by two plaintiffs, Hawaii and Dr. Elshikh, who likewise lack any constitutional rights in those aliens' entry.

Plaintiffs defend that result by ignoring foundational legal rules: stigmatic or indirect injuries from government actions directed at third parties are not judicially cognizable; constitutional challenges to the federal government's exclusion of aliens abroad are subject at most to limited review for a facially legitimate and bona fide reason; the government and public suffer irreparable injury when the President's official acts are enjoined; and injunctive relief must go no further than necessary to redress cognizable injuries to particular individuals whose rights are violated.

Plaintiffs' contrary arguments principally flow from a flawed notion of Establishment Clause exceptionalism: that they can evade the ordinary rules by labeling their claim as a challenge to the Order's supposed anti-Muslim "message" rather than to the actual operation of Sections 2 and 6. Plaintiffs alternatively raise due-process and statutory claims, but those arguments equally lack merit. The preliminary injunction should be vacated.

ARGUMENT

I. Plaintiffs' Challenge To Sections 2 And 6 Is Not Justiciable

Dr. Elshikh alleges psychological injuries, Hawaii alleges sovereign injuries, and both allege injuries from the suspension of entry for certain third-party aliens abroad. None of these injuries is legally cognizable.

A. Dr. Elshikh's Alleged "Condemnation" Injury Is Not Cognizable

1. Plaintiffs do not attempt to square Dr. Elshikh's asserted "dignitary harms" (Br. 14-15) with the general rule (Gov't Br. 26-27) that "abstract stigmatic injury" from invidious discrimination is insufficient because Article III standing requires "personal injury" from the discriminatory treatment. Plaintiffs thus effectively assume without explanation that religious stigma is unique, but the Supreme Court has rejected that notion. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982) ("[W]e know of no principled basis on which to create a hierarchy of constitutional values or a complementary 'sliding scale' of standing.").

Plaintiffs contend (Br. 14-15) that Dr. Elshikh has standing because the Order allegedly conveys "a government message" of "condemnation of his religion." But as the government has explained (Br. 27-28), plaintiffs' cases each involved a personalized injury from actual government speech rather than an abstract objection to government policy. The plaintiffs in those cases were exposed to (1) expressly

religious official speech (2) that was directed towards them by their own local government. *Id.* Here, neither element is present. Sections 2 and 6 of the Order do not expose Dr. Elshikh (or anyone else) to any religious message, because they say nothing about religion. And they are not directly targeted at Dr. Elshikh (or any other U.S. person), because the entry suspension and refugee restrictions apply only to aliens abroad.

Plaintiffs also have no answer to the cases (Gov't Br. 27-28) foreclosing their message-of-condemnation theory. Plaintiffs ignore *Newdow v. Lefevre*, 598 F.3d 638 (9th Cir. 2010), which held that an atheist lacked Article III standing to challenge a federal statute that "recognize[d] 'In God We Trust' [as] the national motto"; despite his allegation that "the national motto turns Atheists into political outsiders," the statute did not force him to come into "unwelcome direct contact" with that exclusionary message. *Id.* at 643. Plaintiffs likewise ignore *In re Navy Chaplaincy*, 534 F.3d 756 (D.C. Cir. 2008), which held that certain Protestant chaplains lacked Article III standing to challenge the Navy's alleged discrimination against other Protestant chaplains; those plaintiffs' attempt to "re-characterize[]" an abstract injury from "government *action*" directed against others as a personal injury from "a governmental *message* [concerning] religion" directed at themselves would have "eviscerate[d] well-settled standing limitations." *Id.* at 758-60, 764. Finally, plaintiffs suggest that the challenge in *Valley Forge* to the federal government's

transfer of property to a Christian college merely reflected a non-religious "disagree[ment]" with the transfer, Br. 15-16 (emphasis omitted), but that challenge easily could have been characterized as an objection to the transfer's alleged "message" of "endorsement" of Christianity. *See* 454 U.S. at 466-68, 486-87.

2. Plaintiffs' attempts to limit their "condemnation" theory fail. Their assertion (Br. 15) that the Order subjects Dr. Elshikh to condemnation in his own "community" is no limit at all. By characterizing Sections 2 and 6 as targeting his "community," even though those restrictions apply only to aliens abroad, plaintiffs effectively contend that any Muslim in the country can sue, contrary to the constitutional requirement of a "concrete and particularized" injury. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). Plaintiffs also highlight (Br. 15) Dr. Elshikh's emotional distress concerning his family's ability to reunite with his mother-in-law, but that is irrelevant to the "condemnation" theory of standing. As explained below (*infra* pp. 6-7), Plaintiffs' concern about the entry of a relative or others is not "fairly traceable" to Section 2(c) because they cannot show a cognizable threat that those individuals' entry will be impeded. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1151 (2013).

B. Hawaii's Alleged Sovereign Injuries Are Not Cognizable

Plaintiffs additionally allege (Br. 17, 21) that Hawaii has standing based on injuries to its sovereign interests. The district court did not adopt that theory, E.R. 9-10, 40-45, which is fundamentally flawed.

First, plaintiffs allege (Br. 17) that States are injured directly whenever the federal government violates the Establishment Clause. Plaintiffs rely solely on a single-Justice concurrence asserting that the Clause originally protected state establishments of religion from the federal government. *Zelman v. Simmons-Harris*, 536 U.S. 639, 677-80 (2002) (Thomas, J., concurring). But States no longer have the right to establish their own religions in light of the Fourteenth Amendment, *id.* at 679 n.4, and thus Hawaii is not directly injured by the federal government's alleged violation of the Establishment Clause rights of the State's residents (let alone aliens abroad). And as the Supreme Court has held, "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government" to protect its residents from discrimination. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982).

Second, although Hawaii may have a "sovereign" interest in enforcing its own antidiscrimination policies, *Snapp*, 458 U.S. at 601; Pltfs. Br. 21, the Order does not impair that interest. Rather than regulating the treatment of aliens within Hawaii, it restricts certain aliens abroad from entering the country. And Hawaii has no

sovereign interest in regulating such entry, because "[t]he authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government." *Arizona v. United States*, 567 U.S. 387, 409-10 (2012).

C. Plaintiffs' Alleged Injuries Based On Suspension Of Entry Are Not Cognizable

1. Article III bar

a. Plaintiffs do not meaningfully respond to the government's contention (Br. 22-25, 29) that it is speculative whether any of the third-party aliens at issue would be eligible for entry during Section 2(c)'s 90-day suspension. Plaintiffs' stay opposition notes (Opp. 15) that Dr. Elshikh's mother-in-law has a visa-application interview scheduled for May 24 in Lebanon, but they do not say that she will actually be able to travel there from Syria, which is notable given that she was forced to cancel a May 21 interview in Jordan due to travel conditions in Syria. Elshikh Amicus Br. 8-9, *IRAP v. Trump*, No. 17-1351 (4th Cir. Apr. 19, 2017) (ECF No. 146-1). Likewise, although plaintiffs observe (Br. 18) that eleven students from the covered countries "have been admitted for the 2017-2018 academic year" at the University of Hawaii, they disregard the government's point (Br. 23) that they have identified no prospective student who wishes to enter the country during Section 2(c)'s 90-day period. Similarly, plaintiffs assert (Br. 20) that Hawaiian tourism from the Middle East in January and February 2017 decreased compared to 2016, but they disregard the government's point (Br. 24-25) that this decrease cannot plausibly be

deemed the likely effect of the Order if it had not been enjoined, because Hawaii's data covers a broader geographic area and a broader time period than the Revoked Order did before it was enjoined.

Unable to show actual injury from Section 2(c)'s operation, plaintiffs claim (Br. 19-20) that the Order will "chill" students and tourists from seeking entry. As the government explained (Br. 23 n.4, 25), however, this alleged "chill" is not imminent, "fairly traceable" to the Order, or "redressable" by the preliminary injunction, because it merely reflects "speculat[ion]" about the "personal choice[s]" of unidentified individuals who do not face any certainly impending injury caused by the Order.[1]

b. Plaintiffs also fail to respond to the government's contention (Br. 23, 29) that their alleged injuries are not ripe given Section 3(c)'s waiver process. Although Plaintiffs contend (Br. 16, 19) that the waiver process imposes a discriminatory "barrier," they offer no answer to the objection that they are not personally subject to the allegedly discriminatory barrier, and the aliens abroad who

[1] Although *Lexmark International, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1384-86 (2014), noted that a plaintiff may generally allege at the motion-to-dismiss stage that the defendant's wrongful conduct is causing it harm based on the effects on related third parties, Pltfs. Br. 19-20, Hawaii "[a]t the preliminary injunction stage" must "make a clear showing" that there are aliens abroad whose failure to enter is in fact fairly traceable to the Order's actual application to them, *Townley v. Miller*, 722 F.3d 1128, 1133 (9th Cir. 2013).

are subject to the entry suspension have no constitutional rights against discrimination concerning entry. Gov't Br. 29-31; *infra* pp. 9-10.

c. The foregoing points also refute plaintiffs' repeated assertions (Br. 17-19) that Hawaii's standing allegations are indistinguishable from those upheld in *Washington v. Trump*, 847 F.3d 1151, 1159-60 (9th Cir. 2017). As the government explained (Br. 23-24), the *Washington* stay panel emphasized that the States there, unlike Hawaii here, had specifically identified students and employees who actually "were not permitted to enter the United States" because of the Revoked Order.

d. Finally, plaintiffs do not meaningfully respond to the government's explanation (Br. 25) that their alleged injuries are not caused by the refugee-related provisions in Section 6 or the provisions in Sections 2 and 6 calling for a review of internal-government and diplomatic processes. Plaintiffs include these provisions within their flawed "condemnation," "sovereign," and "chill" arguments (Br. 15, 17, 20-21, 59-60), but they do not and cannot show that these provisions impose distinct concrete injuries on Dr. Elshikh or Hawaii. Indeed, as in their briefing below, plaintiffs never specifically address the refugee cap and barely mention either the refugee suspension or the internal-review provisions.

2. Prudential-standing bar

Plaintiffs also have no answer to the independent prudential-standing defect in their Establishment Clause claim. They do not dispute that, unlike in *Washington*,

the aliens abroad who are subject to Sections 2 and 6 do not even arguably possess constitutional rights to entry that plaintiffs here could assert on the aliens' behalf. Gov't Br. 30; Pltfs. Br. 21-22. Instead, plaintiffs insist that their *own* Establishment Clause rights are being violated, but they conflate (Br. 21-22) the Article III standing question of whether they have suffered injuries in fact with the prudential standing question of whose constitutional rights have been violated by the conduct causing those injuries. Plaintiffs never address the government's fundamental point (Br. 30) that any *indirect effects* on them from alleged religious discrimination directed at third parties—including economic, academic, and familial effects—are not violations of plaintiffs' own religious rights.

Indeed, plaintiffs' position is irreconcilable with *McGowan v. Maryland*, 366 U.S. 420 (1961), which both (1) reaffirmed that indirectly injured individuals ordinarily lack standing to challenge alleged religious discrimination against third parties under the Free Exercise Clause, and (2) explained that bringing the same substantive third-party religious-discrimination claim under the Establishment Clause label does not alter the normal standing rule. *See id.* at 429-30. Although *McGowan* held that an Establishment Clause challenge can be based on economic injuries in certain circumstances, that narrow holding is inapposite because the challengers there, unlike plaintiffs here, were "direct[ly]" subjected to (indeed, prosecuted under) a Sunday-closing law regulating their own conduct. *See id.* at

422, 430-31; *cf. Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15-18 & n.8 (2004) (non-custodial parent lacked prudential standing to challenge Pledge of Allegiance recitation at daughter's school because his "standing derive[d] entirely from his relationship with his daughter," despite his own resulting direct exposure to the Pledge).[2]

3. Consular-nonreviewability bar

Finally, in response to the government's showing (Br. 32-33) that principles reflected in the consular-nonreviewability doctrine also foreclose their claims, plaintiffs suggest (Br. 22) that those principles are inapplicable because this is a challenge to the "*promulgation* of sweeping immigration policy," not an "*individual* consular decision[]." That approach would turn this fundamental aspect of immigration law upside-down by granting the President, the Secretary of State, and Congress less deference in their decisionmaking than individual officers. Consular nonreviewability is premised on the broader principle that "any policy toward aliens" is "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Saavedra Bruno v. Albright*,

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[2] Unlike plaintiffs' Establishment Clause claim, their due-process claim is based (Br. 57-58) on their own alleged rights regarding certain aliens' entry. In these circumstances, however, plaintiffs have no applicable due-process rights, and due-process standards are satisfied regardless. *Infra* pp. 26-28. As for plaintiffs' statutory claims (Br. 26-42), those are barred by consular-nonreviewability principles and also meritless. *Infra* pp. 10-11, 20-26.

197 F.3d 1153, 1159-60 (D.C. Cir. 1999). That principle at most has a limited exception for a U.S. citizen or alien in the U.S. whose own constitutional rights are allegedly violated by a particular alien's challenged exclusion or treatment. *Id.* at 1163-64; Gov't Br. 32-33; *see* Pltfs. Br. 16-17 (noting government's acknowledgement that certain U.S. citizens may have "a route to make a constitutional challenge"). Besides plaintiffs' due-process claim, that exception is inapplicable here.

II. Plaintiffs Are Unlikely To Succeed On The Merits

A. The Order Does Not Discriminate On The Basis Of Religion

Plaintiffs incorrectly contend that *Kleindienst v. Mandel*, 408 U.S. 753 (1972), is inapplicable to their Establishment Clause claim and permits disregarding the Order's stated purpose. In any event, the Order is valid even apart from *Mandel*.

1. *Mandel* governs plaintiffs' challenge to the Order

First, plaintiffs assert (Br. 43) that *Washington* "held that *Mandel* does not apply" to presidential immigration-policy directives. The passage plaintiffs cite addressed only whether the Revoked Order was reviewable. 847 F.3d at 1162-63; Gov't Br. 39. The government does not contend that *Mandel* forecloses any review of the Order. Rather, *Mandel* supplies the substantive standard that governs where U.S. citizens allege that their own constitutional rights are violated by the exclusion of aliens abroad. Gov't Br. 35.

Second, plaintiffs wrongly claim (Br. 43-46) that *Mandel* "does not apply to broad-scale Executive policymaking." They do not dispute that *Mandel* applies to the President. Br. 45 ("[T]he relevant distinction is not the level at which the decision is made."). Plaintiffs argue instead (*id.*) that "the scope of the action" is dispositive. But they concede (Br. 43) that *Mandel* applies to "immigration *statutes*," which necessarily establish "broad-scale" policies. Plaintiffs argue (*id.*) that Congress alone deserves deference in adopting broad immigration policies because it has "plenary power" over immigration, whereas the President exercises only delegated power. "The right to" exclude aliens, however, "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950). Thus, "[w]hen Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent *executive* power." *Id.* (emphasis added). That Congress has augmented the President's inherent power by conferring additional authority makes applying *Mandel* more appropriate, not less. *See Andrade-Garcia v. Lynch*, 828 F.3d 829, 834 (9th Cir. 2016).

Plaintiffs' own authority (Br. 41) confirms that *Mandel* applies to Executive policies. *Rajah v. Mukasey*, 544 F.3d 427 (2d Cir. 2008), applied *Mandel*'s test to an Executive policy requiring certain non-immigrant aliens from specific countries

to appear for registration and fingerprinting. *Id.* at 432, 438-39. Plaintiffs distinguish *Rajah* (Br. 41) because the policy itself did not "exclud[e] (or deport[]) aliens." But that policy's implementation resulted in the deportation of the aliens there. 544 F.3d at 433-34. Plaintiffs assert (Br. 44) that *In re Reyes*, 910 F.2d 611 (9th Cir. 1990), "review[ed] [an] Executive Order regarding immigration without any mention of *Mandel*." The government "concede[d]" that the order there was invalid, *id.* at 613, and thus *Reyes* had no occasion to address *Mandel*'s scope.

Third, plaintiffs erroneously assert (Br. 44-45) that Establishment Clause claims are exempt from *Mandel*. Although the Supreme Court has not previously applied *Mandel* specifically to that Clause, both it and this Court have applied *Mandel* to claims that the exclusion of aliens violated the First Amendment, *see Mandel*, 408 U.S. at 769-70; *Price v. INS*, 962 F.2d 836, 841-44 (9th Cir. 1992), or reflected unconstitutional discrimination, *see Fiallo v. Bell*, 430 U.S. 787, 792-96 (1977); *Barthelemy v. Ashcroft*, 329 F.3d 1062, 1065-67 (9th Cir. 2003). There is no principled basis for exempting the Establishment Clause, which "establishes a norm of conduct which the Federal Government is bound to honor—to no greater or lesser extent than any other inscribed in the Constitution." *Valley Forge*, 454 U.S. at 484. Establishment Clause claims are subject to the same "presumption in favor of the constitutionality of statutes" as other constitutional claims, *Bowen v. Kendrick*, 487 U.S. 589, 617 (1988), and the same justiciability principles generally apply.

Supra pp. 2, 9-10. It also would be illogical to apply different standards to religious-discrimination claims depending on whether they are pleaded under the Establishment Clause or the "inextricably connected" Free Exercise Clause. *Larson v. Valente*, 456 U.S. 228, 245 (1982).

2. *Mandel* precludes invoking extrinsic material to discredit the Order's stated purpose

Plaintiffs argue (Br. 46-47) that *Mandel* requires considering whether the Order's stated purpose was given in "bad faith." *Mandel* makes clear, however, that determining whether a policy decision rests on a "facially legitimate and bona fide reason" does *not* include "look[ing] behind" that reason. 408 U.S. at 769-70. Courts can ensure that the stated rationale is valid and consistent with the government's action, but *Mandel* precludes searching for ulterior motives in extrinsic material. *Id.* *Mandel*'s standard "is equivalent to the rational basis test," under which "it is constitutionally irrelevant whether the justification proffered by the government was in fact the reasoning that generated" its action. *Ablang v. Reno*, 52 F.3d 801, 804-05 (9th Cir. 1995).

Plaintiffs' cases confirm the limited scope of this inquiry. *Wauchope v. United States Department of State*, 985 F.2d 1407, 1415-16 (9th Cir. 1993), held that a statute according citizenship to foreign-born children of U.S.-citizen fathers (but not mothers) failed rational-basis review because the government's stated rationale was illogical on its face and misread foreign citizenship laws. And in *Nadarajah v.*

Gonzales, 443 F.3d 1069, 1082-83 (9th Cir. 2006), the evidence supporting the alien's release was "undisputed."

Plaintiffs cite (Br. 46) Justice Kennedy's concurrence in *Kerry v. Din*, 135 S. Ct. 2128 (2015), which states that an "affirmative showing of bad faith on the part of [a] consular officer" denying a visa, "plausibly alleged with sufficient particularity," can overcome the deference due under *Mandel*. *Id.* at 2141. *Din* is inapposite because refusing visas to aliens abroad does not violate plaintiffs' own Establishment Clause rights. *Supra* pp. 8-10. But even if courts may consider claims of bad faith in individualized decisions by consular officers, that would not warrant second-guessing formal national-security determinations by the President. Plaintiffs never confront the Supreme Court's holding that, when "[t]he Executive * * * deem[s] nationals of a particular country a special threat," "a court would be ill equipped to determine the[] authenticity and utterly unable to assess the[] adequacy" of that determination. *Reno v. Am.-Arab Anti-Discrimination Comm. (AAADC)*, 525 U.S. 471, 491 (1999). Their invitation to disregard the President's formal risk assessment and policy judgment (*e.g.*, Br. 39-40) flouts that rule. Moreover, the President demonstrated *good faith* by revising the Revoked Order in part to address concerns raised by courts. Gov't Br. 38.

3. The Order is valid even apart from *Mandel*

a. Plaintiffs concede that the Order is valid even apart from *Mandel* so long as it does not "single out religious dissents for opprobrium" or "allocate benefits and burdens based on" religious faith. Br. 47 (brackets omitted). Plaintiffs cite nothing in Sections 2 and 6 that does so or shows the Order's stated national-security objective to be "secondary" or a "sham." *McCreary County v. ACLU*, 545 U.S. 844, 865 (2005). They cite (Br. 51) another section (not challenged here) directing federal agencies to collect data regarding "acts of gender-based violence against women, including so-called 'honor killings,' in the United States by foreign nationals." Order § 11(a)(iii). "Honor crimes," however, "are not specific to any religion, nor are they limited to any one region of the world."[3]

Plaintiffs assert (Br. 51-52) that Section 2(c)'s application to Muslim-majority countries demonstrates bias. But those countries were selected because they present heightened terrorism-related risks, which Congress and the previous Administration recognized in excluding dual nationals of and recent visitors to those countries from travel under the Visa Waiver Program. Order § 1(b)(i)-(ii), (d)-(e). Plaintiffs do not question Congress' or the Executive's motives in making that designation.

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[3] Human Rights Watch, *HRW World Report 2001: Women's Rights, Item 12 – Integration of the Human Rights of Women and the Gender Perspective* (Apr. 6, 2001), http://pantheon.hrw.org/legacy/press/2001/04/un_oral12_0405.htm.

Plaintiffs also provide no basis to impute a religious purpose to other portions of Section 2 or any of Section 6—which were also enjoined. Section 6's refugee provisions apply to refugees from all nations. Order § 6(a)-(b). The remaining provisions address only agencies' internal and intergovernmental activities and do not impose burdens on anyone outside the government. *See Bowen v. Roy*, 476 U.S. 693, 699-700 (1986).

b. Plaintiffs argue (Br. 49, 53-56) that the district court properly discredited the Order's stated purpose based on campaign and other statements. But they fail to justify looking beyond the "text, legislative history, and implementation of the statute," or "comparable official act," to infer an unstated improper purpose. *McCreary*, 545 U.S. at 862-63. Plaintiffs assert (Br. 53) that *McCreary* supports a much more wide-ranging inquiry. *McCreary*, however, concerned an explicitly religious display, and the display's religious purpose was expressly confirmed by official pronouncements. Gov't Br. 48-49. Likewise, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535-36 (1993), addressing a free-exercise claim, held that the ordinances' "text" and "operation" showed that they were a "religious gerrymander."

Plaintiffs thus cite no precedent that permits impugning the Order's express national-security purpose based on extrinsic material. They note (Br. 53) that two Justices in *Lukumi* considered more than the ordinances' text and operation.

508 U.S. at 540-42 (opinion of Kennedy, J., joined by Stevens, J.); *but see id.* at 557-59 (Scalia, J., joined by Rehnquist, C.J., concurring in part and concurring in the judgment). The statements there by city officials and residents at city-council meetings are far removed from campaign-trail comments and if anything more closely resemble legislative history. Plaintiffs also cite (Br. 54) Justice Kennedy's separate opinion in *County of Allegheny v. ACLU*, 492 U.S. 573, 671 (1989), discussing Thanksgiving proclamations by President Washington and his successors. Those proclamations were official decrees declaring a "national day of celebration and prayer." *Id.*

Plaintiffs also do not dispute that the presumption of regularity applies with the utmost force to the President, and they fail to refute the practical difficulties that "ill equipped" courts would face in attempting "to determine the authenticity" of Executive national-security judgments. *AAADC*, 525 U.S. at 491; *cf.* Gov't Br. 46-47. Plaintiffs argue (Br. 53-54) that these principles pose no obstacle here because the statements at issue "clearly" reflect an improper purpose. But the statements' supposed clarity is irrelevant because plaintiffs fail to show that they reflect the government's "official objective." *McCreary*, 545 U.S. at 862.

c. Plaintiffs are likewise wrong (Br. 55) that post-election statements by the President and aides show an impermissible purpose. They cite (Br. 8, 56) a statement on the President's campaign website, but it is an archived press release

dated December 7, 2015. S.E.R. 156. Plaintiffs also cite (Br. 50) language in the Revoked Order prioritizing refugee claims of members of religious minorities. As the Order explains, however, that language did not reflect religious bias, Order § 1(b)(iv), and in any event the Order omits it to eliminate any possible misunderstanding. Plaintiffs cite (Br. 50) statements describing the Order as pursuing "the same basic policy outcome," E.R. 156, or constituting a "watered down version" of the Revoked Order, S.E.R. 84. Both Orders further the same national-security objective of facilitating a review of existing screening procedures. Order § 1(b), (d)-(i). The Order, however, pursues that objective through substantially revised provisions; the differences are clear on the Order's face. Gov't Br. 9-13.

Plaintiffs finally argue that two ambiguous remarks by the President (one before he took office) and a spokesperson's statement that the President is keeping "campaign promises" signal an improper motive. Br. 4, 8, 55 (citing E.R. 148 (statement at signing that "[w]e all know what that means"); E.R. 147 (pre-inauguration statement that "[y]ou know my plans")). Attempting to glean official governmental purpose from such cryptic, offhand remarks requires the "judicial psychoanalysis" *McCreary* forecloses. 545 U.S. at 862; *see Sarsour v. Trump*, 2017 WL 1113305, at *12 (E.D. Va. Mar. 24, 2017). Moreover, plaintiffs' belief that those statements reflect an intent to ban Muslim immigration is irrelevant

because Sections 2 and 6 do no such thing. Section 2(c) temporarily suspends entry of certain aliens from six countries previously identified by Congress and the Executive as posing heightened terrorism-related risks. Section 6's refugee provisions apply worldwide. The remaining provisions of Sections 2 and 6 have no plausible connection to religion.

B. Plaintiffs' Alternative Arguments Provide No Basis To Uphold The Injunction

Plaintiffs alternatively urge the Court (Br. 23-42, 57-59) to uphold the injunction on statutory and due-process grounds the district court declined to reach. E.R. 14 n.3, 53 n.11. Plaintiffs' alternative arguments lack merit.

1. The Order is a valid exercise of the President's statutory authority

Plaintiffs incorrectly claim (Br. 26-42) that portions of Sections 2 and 6 exceed the President's statutory authority. The Order is a valid exercise of the President's inherent power and his statutory authority to "suspend the entry of all aliens or any class of aliens" whose entry he finds "would be detrimental to the interests of the United States," 8 U.S.C. § 1182(f), and to prescribe "reasonable rules, regulations, and orders" regarding entry, "subject to such limitations and exceptions as" he adopts, *id.* § 1185(a)(1). Plaintiffs do not dispute that these provisions' plain text encompasses Sections 2 and 6. They erroneously argue instead that both provisions should be read narrowly for other reasons.

a. Plaintiffs assert (Br. 27-28) that Sections 1182(f) and 1185(a)(1) should be construed narrowly to avoid an unconstitutional delegation of legislative power. But as the Supreme Court explained in rejecting a nondelegation challenge to Section 1185(a)(1)'s precursor, statutes addressing "admissibility of aliens * * * implement[] an inherent executive power." *Knauff*, 338 U.S. at 542 (citing *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936)). Moreover, "in its delegations of power in the area of foreign relations, Congress 'must of necessity paint with a brush broader than that it customarily wields in domestic areas.'" *Abourezk v. Reagan*, 785 F.2d 1043, 1063 (D.C. Cir. 1986) (R.B. Ginsburg, J.), *aff'd by equally divided Court*, 484 U.S. 1 (1984).

b. Plaintiffs argue (Br. 30-31) that Section 2(c)'s entry suspension violates 8 U.S.C. § 1152(a)(1)(A), which prohibits nationality-based discrimination in the "issuance of an immigrant visa." That is wrong for four reasons. *See Sarsour*, 2017 WL 1113305, at *8 (rejecting same argument). *First*, Section 1152(a)(1)(A) does not restrict the President's longstanding authority to "suspend the entry" of "any class of aliens" under Section 1182(f) or to prescribe "limitations" and "exceptions" on entry under Section 1185(a)(1). Section 1152(a)(1)(A) was enacted in 1965 to abolish the prior system of nationality-based quotas for immigrant visas, but it did not displace the President's preexisting authority. *See* S. Rep. No. 89-748, at 1, 12-14, 21-22 (1965).

Indeed, Sections 1182(f) and 1185(a)(1) have long been understood to permit the President to draw nationality-based distinctions. *E.g.*, Proclamation No. 5517 (1986) (order "suspend[ing] entry into the United States as immigrants by all Cuban nationals"). The Supreme Court deemed it "perfectly clear that" Section 1182(f) "grants the President ample power to establish a naval blockade that would simply deny illegal Haitian migrants the ability to disembark on our shores." *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187 (1993). Section 1185(a)(1) likewise has long been construed to authorize nationality-based distinctions. *Immigration Laws and Iranian Students*, 4A Op. O.L.C. 133, 140 (1979); *e.g.*, Exec. Order 12,172 (1979) (directing "limitations and exceptions" regarding "entry" of certain "Iranians"), *amended by* Exec. Order 12,206 (1980) (expanding coverage to all Iranians); *Nademi v. INS*, 67 F.2d 811, 814 (10th Cir. 1982).

Plaintiffs do not explain why, given that the President may validly bar entry of the aliens covered by Section 2(c), such aliens cannot be refused visas. Requiring that such aliens be issued visas permitting them to travel to this country, only to be denied entry upon arrival, would create needless difficulties and confusion. Plaintiffs cite (Br. 30) only *Legal Assistance for Vietnamese Asylum Seekers v. Department of State, Bureau of Consular Affairs*, 45 F.3d 469 (D.C. Cir. 1995), *vacated on other grounds*, 519 U.S. 1 (1996) (per curiam), but it did not address Section 1182(f) or 1185(a)(1).

Second, plaintiffs' reading contradicts settled interpretive principles. It requires construing Section 1152(a)(1)(A) as partially "repeal[ing]" Section 1182(f) by "implication," which courts will not do unless Congress's "intention" is "clear" and "manifest." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662, 664 n.8 (2007). Their interpretation also raises serious constitutional concerns that the Court must avoid if possible. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). For instance, it would bar the President from restricting entry of aliens from a country with which this Nation is on the verge of war.

Third, Section 1152(a)(1)(B) contains an exception for "procedures for the processing of immigrant visa[s]." Plaintiffs assert (Br. 31) that the exception does not apply because Section 2(c) does not regulate procedures but imposes "a flat ban." Section 2(c), however, suspends entry of certain aliens temporarily, and it does so to facilitate a review of the Nation's screening and vetting protocols. Order §§ 1(f), 2(c). Both its operation and purpose concern procedures.

Fourth, even if plaintiffs' Section 1152(a)(1)(A) argument were correct, it could not support the injunction the district court entered. Section 1152(a)(1)(A) addresses only the "issuance of an immigrant visa." It has no bearing on *nonimmigrant* visas. And even as to immigrant visas, Section 1152(a)(1)(A) governs only visa issuance; it does not restrict the President's ability to suspend

entry. Section 1152(a)(1)(A) cannot justify enjoining Section 2(c)'s entry suspension at all, let alone with respect to the majority of aliens seeking nonimmigrant visas.

c. Plaintiffs incorrectly argue (Br. 32-37) that the Order's entry and refugee suspensions conflict with 8 U.S.C. § 1182(a)(3)(B), which addresses the admissibility of aliens who have engaged in terrorist activity or have certain ties to terrorist groups. *First*, plaintiffs' own authority refutes that reading. *Abourezk* and *Allende v. Shultz*, 845 F.2d 1111 (1st Cir. 1988), held that the President may use his "sweeping proclamation power" under Section 1182(f) to suspend entry of aliens for reasons that overlap with Section 1182(a)'s grounds of inadmissibility. *Abourezk*, 785 F.2d at 1049 n.2; *Allende*, 845 F.2d at 1118 & n.13.

Second, the Court need not decide the precise scope of the President's Section 1182(f) authority. At a minimum, as plaintiffs conceded below, the President may invoke Section 1182(f) to exclude aliens "who present concerns similar to" one of Section 1182(a)'s categories, so long as he does not exclude one of the exact same categories under a different "burden of proof." ECF No. 191, at 12. The Order complies with plaintiffs' own test. It does not suspend entry of aliens and refugees because the President concluded they are all "potential terrorists." Pltfs. Br. 32. Rather, he determined that conditions in the six countries warrant temporarily suspending entry of certain of those countries' nationals pending a review of this

Nation's screening and vetting procedures. Order § 1(d)-(f). Nothing in Section 1182(a) precludes that judgment.

Third, if plaintiffs were correct that the Order conflicts with Section 1182(a)(3) merely because it concerns terrorism-related risks, that would effectively read Section 1182(f) out of the statute. Section 1182(a) sets forth numerous grounds of inadmissibility, including grounds relating to "[h]ealth[]," "[c]riminal" history, "[s]ecurity," and "[f]oreign policy." 8 U.S.C. § 1182(a)(1), (2), (3), (3)(C). Given the breadth and variety of those grounds, few exercises of the President's Section 1182(f) authority could not be characterized as touching a topic addressed in Section 1182(a). Presidents have suspended entry of aliens under Section 1182(f) for reasons similar to statutory grounds for inadmissibility. ECF No. 145, at 34-35 (collecting examples).

d. Plaintiffs assert (Br. 34-37) that the President could not conclude that entry of covered aliens from the six countries is "detrimental to the interests of the United States" because in 2015 Congress already addressed the risks posed by those countries and restricted nationals of and recent visitors to those countries from visa-free travel under the Visa Waiver Program. 8 U.S.C. § 1187(a)(12). Nothing in Section 1187(a)(12), however, prevents the President, exercising his authority under Sections 1182(f) and 1185(a)(1), from concluding that the terrorism concerns that led to designation of those countries under Section 1187(a)(12) warrant further

review of existing screening and vetting procedures and a temporary suspension until that review is complete.

e. Plaintiffs assert (Br. 36-37) that Section 6(b)'s refugee cap violates 8 U.S.C. § 1157(a), which limits the number of refugees who "may be admitted" annually to the number "the President determines, before the beginning of the fiscal year." Plaintiffs did not make this contention or cite Section 1157(a) below, and it is meritless. Section 1157(a) prohibits entry of refugees in excess of the ceiling the President establishes before each fiscal year. But it does not require that the maximum number be admitted, and Sections 1182(f) and 1185(a)(1) permit the President to allow entry of only a lower number.

2. The Order complies with due process

Plaintiffs' due-process claim (Br. 57-59) similarly lacks merit. The Order applies only to aliens abroad, who have no due-process rights in connection with their entry with this country. *See Angov v. Lynch*, 788 F.3d 893, 898 (9th Cir. 2015); Order §§ 3(a)-(b), 12(e). Plaintiffs assert (Br. 57) that *Washington* concluded that refugees subject to the Revoked Order may have "viable due process claims." 847 F.3d at 1166. The panel was focused on asylum applicants present in the United States. *See id.* at 1165-66. The Order, however, suspends only refugee adjudications and travel under the Refugee Program, which covers only aliens seeking admission from abroad. *See* 8 U.S.C. § 1157; 8 C.F.R. pt. 207.

Plaintiffs assert (Br. 58) that the Order violates the due-process rights of U.S. citizens who have an interest in specific aliens' entry, but "[t]here is no such constitutional right." *Din*, 135 S. Ct. at 2131 (plurality opinion). To be sure, before *Din*, this Court held that a U.S.-citizen spouse had a protected interest in her husband's entry, *Bustamante v. Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008), and *Din* reserved judgment on that issue, 135 S. Ct. at 2139, 2141 (Kennedy, J., concurring in the judgment). The alleged right in *Din* and *Bustamante*, however, was tied to the fundamental right to marry. *Id.* at 2134 (plurality opinion); *Bustamante*, 531 F.3d at 1062; *see Cardenas v. United States*, 826 F.3d 1164, 1169-72 (9th Cir. 2016) (same). None of those cases supports extending due-process rights concerning entry of more distant family members, such as Dr. Elshikh's mother-in-law. Other courts have rejected extending *Din* to such relationships. *See Santos v. Lynch*, 2016 WL 3549366, at *3-4 (E.D. Cal. June 29, 2016) (adult child); *L.H. v. Kerry*, No. 14-06212, slip op. 3-4 (C.D. Cal. Jan. 26, 2017) (daughter, son-in-law, and grandson).[4]

[4] Plaintiffs mention (Br. 58) *Mandel*, but it did not address a due-process claim; it decided "the narrow issue whether the First Amendment" entitled U.S.-citizen professors to "receive information" from an excluded alien. 408 U.S. at 759-62. Plaintiffs alleged no such claim to receive information here. E.R. 167-73. And Hawaii has no due-process rights at all. *See South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966).

Moreover, plaintiffs have not shown how the Order violates due process. They abandoned below any claim to "individualized hearings," ECF No. 191, at 15, and for good reason: due process does not require notice or individualized hearings when the government acts through categorical judgments. *See Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445-46 (1915); *Yassini v. Crosland*, 618 F.2d 1356, 1363 (9th Cir. 1980) (per curiam). Moreover, the Order's waiver provisions "satisf[y] any obligation [the government] might have." *Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring in the judgment); Order §§ 3(c), 6(c). Plaintiffs note (Br. 58-59) that *Washington* deemed the Revoked Order's waiver provisions insufficient. But the Order's provisions are much more extensive and provide concrete guidance the Revoked Order lacked. Order § 3(c). Due process requires no more.

III. The Balance Of Equities Weighs Strongly Against Enjoining Sections 2 and 6

Plaintiffs respond to the balancing-of-equities analysis in the government's brief by cross-referencing sixteen pages of their stay opposition. Gov't Br. 54-56; Pltfs. Br. 59. The government will thus address that response in detail in its stay reply brief, but to summarize: even assuming that plaintiffs have alleged some cognizable injuries, they are not irreparable, let alone so substantial as to outweigh the institutional and national-security harms from enjoining the President's Order, which are harms that plaintiffs and the district court improperly discounted.

IV. The Categorical, Nationwide Injunction Is Improper

Plaintiffs fail to refute the multiple ways in which the injunction is overbroad. *First*, they do not defend the injunction's application to the President. They argue (Br. 60 n.15) that the Court need not address the issue because their alleged "injuries can be redressed" by relief against other officials. Plaintiffs thus concede that they do not need injunctive relief against the President, which is more reason to vacate that unlawful aspect of the injunction. Plaintiffs assert (*id.*) that this argument is forfeited, but the bar on enjoining the President limits federal-court "jurisdiction." *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) (plurality opinion). In any event, this Court can and should correct this error, which goes to the heart of the separation of powers, is "purely one of law," and "does not depend on the factual record." *Ruiz v. Affinity Logistics Corp.*, 667 F.3d 1318, 1322 (9th Cir. 2012).

Second, plaintiffs do not dispute that Sections 2 and 6 can be enjoined as facially invalid only if every application is unlawful. They argue (Br. 59) that the Order's allegedly religious "purpose" invalidates every application. Irrespective of the Order's purpose, many applications of Sections 2 and 6 cannot violate the Establishment Clause because they involve only aliens abroad who lack any rights under the Clause, including its application to non-Muslims in the six countries. Plaintiffs cite (Br. 59) *Santa Fe Independent School District v. Doe*, 530 U.S. 290,

313-15 (2000), but it involved a local school-prayer policy that directly applied only to U.S. persons with First Amendment rights.

Third, plaintiffs fail to justify enjoining the portions of Sections 2 and 6 that are unrelated to any harm plaintiffs allege—including the annual refugee cap and provisions addressing agencies' internal and intergovernmental activities. *Cf.* Gov't Br. 57-58. Plaintiffs cite *Lukumi*, but it did not address the proper scope of injunctive relief. *Lukumi* simply declined to evaluate one of the challenged ordinances in isolation in adjudicating the merits. 508 U.S. at 540. Plaintiffs assert (Br. 60) that the government did not "provide a workable framework for narrowing" the injunction's scope, but they disregard the government's detailed submission explaining why each enjoined subsection beyond Section 2(c) does not harm plaintiffs. ECF No. 251, at 4-7, 25-27.

Fourth, plaintiffs do not show that nationwide relief is necessary to redress any cognizable, irreparable injury to them. Their brief fails to address *Meinhold v. United States Department of Defense*, 34 F.3d 1469, 1480 (9th Cir. 1994), which vacated a nationwide injunction except as to the plaintiff service member. Plaintiffs assert that the Order's application to other persons causes Dr. Elshikh "stigmatic and spiritual harms," but that claimed injury is not cognizable. *Supra* pp. 2-4. They further argue (Br. 61) that nationwide relief is necessary to maintain uniform immigration law. But that proposition concerning the substance of immigration law

does not displace fundamental Article III and equitable limitations on the scope of injunctive *relief*. Uniformity and respect for the political branches' primacy in this area—and the Order's express severability clause—confirm that any relief should be individualized. Gov't Br. 59-60.

CONCLUSION

Accordingly, the district court's preliminary injunction should be vacated. At a minimum, the injunction should be vacated and remanded with instructions to narrow it in accordance with the principles set forth above.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-face requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-volume limitations of Ninth Circuit Rule 32-1(b). The brief contains 6968 words, excluding the parts of the brief excluded by Federal Rule of Appellate Procedure 32(a)(7)(iii) and 32(f) and Ninth Circuit Rule 32-1(c).

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CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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