No. 17-17168

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF HAWAII, et al.

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, et al.

Defendants-Appellants.

On Appeal from an Order of the United States District Court for the District of Hawaii

United States District Judge Derrick K. Watson
Case No. 1:17-cv-00050-DKW-KSC

BRIEF OF *AMICUS CURIAE* T.A., A U.S. RESIDENT OF YEMENI DESCENT, IN SUPPORT OF APPELLEES

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T.A.[1] is a United States citizen who was raised in Yemen. T.A. is a Muslim. T.A.'s father and many members of T.A.'s extended family hold Yemeni passports, although they reside in countries not designated by Presidential Proclamation No. 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats. 82 Fed. Reg. 45161 (Sept. 24, 2017) ("EO-3"). EO-3 would nonetheless bar them from entering the United States.

SUMMARY OF ARGUMENT

This brief focuses on two issues. Part I demonstrates an additional, narrow basis—drawn from the statutory text—for enjoining EO-3's travel bans. Unlike the previous Executive Order's ("EO-2") bans, EO-3's bans have neither a time limit nor a link to a finite event. The unlimited duration of EO-3's bans, and EO-3's serial bans, contradict the words "suspend," "period," and "necessary" in 8 U.S.C. § 1182(f), would nullify other provisions of the Immigration and Naturalization Act ("INA") that reject country-based travel bans, and contravene fundamental norms of separation of powers. The President must propose EO-3's

[1] This *amicus* brief uses initials, rather than T.A.'s full name, to reduce the risk of potential reprisals to T.A. or his family members. Courts have permitted T.A. and others to use pseudonyms and initials in similar circumstances. *See, e.g.*, *United States v. Doe*, 655 F.2d 920, 922 (9th Cir. 1981). No counsel for any party authored the brief in whole or in part, and no person or entity other than *amicus* made a monetary contribution to its preparation or submission. Counsel for Appellants and Appellees have consented to the filing of this *amicus* brief.

bans of unlimited duration, and EO-3's serial bans, to Congress—not impose them by executive fiat.

Part II demonstrates that, although this Court issued a partial stay *pending* appeal, *after* appellate proceedings are concluded, the preliminary injunction should bar all applications of EO-3's illegal travel bans, regardless of whether aliens have a prior U.S. relationship. The meaning of section 1182 is a question of law that the appellate proceedings, including any Supreme Court review, will definitively resolve. After appellate proceedings establish that, on the merits, section 1182 precludes EO-3's unauthorized travel bans, with no exception for aliens without a prior U.S. relationship, there will be no reason to exclude those persons from subsequent injunctive relief.

BACKGROUND

A. EO-3's Bans Have an Unlimited Duration

Unlike the travel bans in EO-2, the bans in EO-3 are of unlimited duration. Not only do EO-3's bans have no end date, no time period is defined by reference to a finite event (*e.g.*, during a declared war).

EO-3 does *not* even provide that, if future reports show that the often nebulous "required" criteria in Section 1(c)(i)-(iii) have been satisfied, any travel ban will end. Indeed, as Section 1(h) admits, eight nations are included in EO-3's bans even though only seven were determined not to satisfy adequately the

Section 1(c) criteria. In addition, Section 9(c) renders *everything* in EO-3 *unenforceable* against the Government. Section 9(c) provides that EO-3 "does not . . . create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies or entities, its officers, employees, or agents, or any other person."

B. T.A.

T.A. is a Muslim and a United States citizen who grew up in Yemen. When T.A. was eighteen, he returned to the United States to attend college. He lives here and has been a videographer.

T.A.'s father, and some of his aunts, uncles, and cousins—all of whom hold Yemeni passports—fled as refugees from the ongoing Yemeni Civil War and now live in Jordan or other countries not designated by EO-3. Many of T.A.'s extended family members want to travel to the United States to visit T.A. and their extended family. One cousin has a pending visa application. Two others visited the United States during the period when EO-2's travel bans were enjoined and want to return.

ARGUMENT

I. EO-3's Unlimited and Serial Bans Violate the INA and Separation of Powers

A. The INA Precludes Unlimited and Serial Executive Travel Bans Based on Reasons Already Addressed by the INA

EO-3's travel bans indisputably have an unlimited duration. *Supra*, at 2-3. They also contain a second ban on nationals from five designated countries. As demonstrated below, bans of unlimited duration and serial bans are precluded by the words of 8 U.S.C. § 1182(f) and improperly render at least three other provisions of subsection 1182 superfluous.

1. Subsection 1182(f)'s Use of "Suspend," "Period," and "Necessary" Precludes EO-3's Unlimited and Serial Travel Bans

8 U.S.C. § 1182(f) provides that, if the President makes the required findings, the President may "by *proclamation*, and for such *period* as he shall deem *necessary*, *suspend* the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate." (Emphasis added.) The italicized words preclude an entry ban of unlimited duration and serial bans.

To start, "suspend" means "[t]o interrupt; postpone; defer," as in "[t]o temporarily keep (a person) . . . from exercising a right or privilege." *Black's Law Dictionary* 1675 (10th ed. 2014). "The word 'suspend' connotes a *temporary* deferral." *Hoffman ex rel. N.L.R.B. v. Beer Drivers & Salesmen's Local Union No.*

888, 536 F.2d 1268 (9th Cir. 1976) (emphasis added) (citing *Webster's Third New International Dictionary* (1966) and *Bouvier's Law Dictionary*, 3d Rev. (1914)); *see also Carrington Gardens Assocs., I v. Cisneros*, 1 F. App'x 239, 242 (4th Cir. 2001) (suspend means "to interrupt, to cause to cease *for a time*; to postpone; to stay, delay, or hinder, to discontinue *temporarily*, but with an expectation or purpose of resumption") (emphasis added) (quoting *Black's Law Dictionary* 1446 (6th ed. 1990)). EO-3's bans of unlimited duration are not temporary, nor do they merely interrupt, postpone, or defer entry.

The natural meaning of "suspend" is supported by subsection 1182(f)'s additional requirement that the "proclamation" set a "period" for suspension. The singular "period" means a "point, space, or division of time." *Black's Law Dictionary* 893 (2d ed. 1910). As the United States told the Supreme Court in 1930, "the word 'period' connotes a *stated* interval of time commonly thought in terms of years, months, and days." *United States v. Updike*, 281 U.S. 489, 495 (1930) (emphasis added).[2]

This time-limiting meaning of the singular "period" is reinforced by subsection 1182(f)'s requirement that the period be "necessary," rather than "advisable" or the like. Nothing in EO-3 explains how its goals could not have been achieved if its bans were required to end after a specified interval of time, or

[2] *Updike* itself did not decide the meaning of "period."

even when the criteria in Section 1(c) are satisfied. Moreover, because the Trump administration has been in office for ten months, it has had more than the period necessary to seek authorization from Congress for EO-3's travel bans. *See infra*, at 20, 29. It has not even tried.

EO-3 is not saved by subsection 1182(f)'s authority to "impose on the entry of aliens any restrictions [the President] may deem to be appropriate." To start, under subsection 1182(f), like suspension of entry, any restrictions on entry must be limited to a singular "period" that is "necessary." Restrictions on entry for an unlimited duration are not limited to a necessary "period."

Moreover, a "restriction" means a "confinement within bounds or limits; a limitation or qualification." *Black's Law Dictionary* 1508 (10th ed. 2014). A ban on entry does not merely set limitations or qualifications on entry. It bans entry entirely. An example of a "limitation or qualification" on entry would be conditioning entry on the potential entrant's permitting his or her mobile phone to be searched.

In contrast, when the INA authorizes barring entry for an unlimited duration, the INA refers not to a "restriction" or "suspension," but rather to rendering an alien "ineligible," 8 U.S.C. § 1182(a), or "inadmissible," *e.g.*, *id.* §§ 1182(a)(1)(A), 1182(a)(2)(A), 1182(a)(2)(B), or to the alien's "exclusion," *e.g.*, § 1182(a)(4)(B)(ii). Subsection 1182(f) uses none of those words. As the Supreme

Court held concerning the INA: "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) (quotations and citations omitted).

Finally, most of EO-3's travel bans are also invalid because their timing violates the words of subsection 1182(f) in an additional way. Subsection 1182(f) authorizes the President to use one set of concerns as the basis for a singular "proclamation" suspending travel for "any class of aliens" for a singular "period." A President cannot do an end-around that evades subsection 1182(f)'s duration limit by issuing serial bans. Subsection 1182(f)'s use of the singular is very different from other provisions of section 1182 that use plural nouns to authorize multiple actions by the executive branch. *See, e.g.*, 8 U.S.C. §§ 1182(l)(6) (impose "special requirements"), 1182(n)(2)(c)(i)(I) ("impose such other administrative remedies"), and 1182(f)(3)(c)(ii) (same). *Cf. United States v. Hayes*, 555 U.S. 415, 421-22 (2009) (had Congress meant a provision in a comprehensive code to cover multiple items, "it likely would have used the plural . . . , as it has done in other offense-defining provisions"). EO-3 is therefore invalid at least for nationals of five of EO-3's designated countries—Yemen, Somalia, Iran, Libya, and Syria. This is because the EO-2 "proclamation," for the

"period" from June 26, 2017 to September 24, 2017, already had banned nationals from those countries.

2. If Subsection 1182(f) Authorized EO-3, This Would Nullify Other Subsections That Reject Country-Based Bans

"Statutory construction . . . is a holistic endeavor." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest*, 484 U.S. 365, 371 (1988) (Scalia, J., for a unanimous Court). "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme-because . . . only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *Id.* No provision of a statutory scheme should be given an interpretation that "renders [another provision] a practical nullity." *Id.* at 375. Specifically, when a "comprehensive [statutory] scheme" includes "a general authorization and a more limited, specific authorization," the "terms of the specific authorization must be complied with" to avoid "the superfluity of a specific provision that is swallowed by the general one." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (Scalia, J., for a unanimous Court) (citation omitted).

The Government contends that subsection 1182(f) overrides all the specific limits on executive action contained in other provisions of the comprehensive section 1182. *See* Gov't Br. at 28-30. This improperly would turn

more specific statutory provisions into mere items in a suggestion box that a President could disregard for as long as the President wants.

a. Subsection 1182(a)(3)(B)

This subsection addresses when to ban an alien for an unlimited duration based on whether an alien "is likely to engage after entry in any terrorist activity." 8 U.S.C. § 1182(a)(3)(B)(i)(II). Under subsection 1182(a)(3)(B), a ban based on an association with others who have committed terrorism requires far more than birth in a nation that has some terrorists. Only two associations qualify. First is being "a member of a terrorist organization . . . , unless the alien can demonstrate . . . that *the alien* did not know, and should not reasonably have known, that the organization was a terrorist organization." *Id.* § 1182(a)(3)(B)(i)(VI) (emphasis added). The second is being "the spouse or child of an alien who is inadmissible under [§ 1182(a)(3)(B)]," unless activity causing the inadmissibility occurred more than five years ago, the "spouse or child . . . did not know or should not reasonably have known of the activity causing the alien to be found inadmissible under [§ 1182(a)(3)(B)]," *or* "the spouse or child . . . has renounced the activity causing the alien to be found inadmissible." *Id.* §§ 1182(a)(3)(B)(i)(IX), 1182(a)(3)(B)(ii).

EO-3 nullifies three specific limits contained in subsection 1182(a)(3)(B) on a ban of unlimited duration based on association with terrorists.

First, birth in a designated country is not a basis to deny entry as such birth neither makes one a member of a terrorist organization nor a spouse or child of an inadmissible alien. Second, EO-3 has no exception based on the potential entrant's personal knowledge or renunciation. Third, as the legislative history confirms, because subsection 1182(a)(3)(B) refers to "the alien" and "an alien," it requires that a denial of entry based on potential association with terrorism "must be applied on a case by case basis." H.R. Rep. No. 100-182, at 30 (1988); *c.f., e.g.*, *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 902 (1991) ("[t]he definite article 'the' obviously narrows . . .").

b. Subsection 1182(a)(3)(C)

This subsection provides a narrow authority to exclude "an alien" for an unlimited duration based on "potentially serious adverse foreign policy consequences." EO-3 nullifies three of subsection 1182(a)(3)(C)'s specific limits on foreign policy exclusion. First, subsection 1182(a)(3)(C)(iii) prohibits an exclusion based on "the alien's . . . associations" when such "associations would be lawful within the United States, unless the Secretary of State personally determines that *the* alien's admission would compromise a compelling United States foreign policy interest." (Emphasis added.) Being born in one of the designated countries is not an association that "would be [un]lawful within the United States." Nor does EO-3 even assert that admitting any particular alien

"would compromise a compelling United States foreign policy interest." Second, EO-3 contains no determination by the Secretary of State. EO-3 states that the President made the determination, EO-3 § 1(h)(ii) ("I have determined"), § 1(i) (same), adopting in part "recommend[ations]" from the "Secretary of Homeland Security." *Id.* § 1(h). The Secretary of State's role was merely "consultation." *Id.* Preamble, § 1(h)(i). Third, § 1182(a)(3)(C)(iv) requires notice from the Secretary of State to four congressional committee chairmen "of the identity of *the* alien and the reasons for the determination." (Emphasis added.) EO-3 contains no notice of "the identity of the alien" or "the reasons" specific to any alien.

c. Subsection 1182(l)(5)

This subsection is incompatible with the Government's interpretation that subsection 1182(f) implicitly allows an entry ban because of a country's security risks. Subsection 1182(l)(5) is important because its official statutory purpose was to bring Guam and the Northern Mariana Islands within the "*uniform* adherence to long-standing fundamental immigration policies *of the United States*" on a number of subjects, including "national security and homeland security issues." Pub. L. No. 110-229, § 701(a), 122 Stat. 853 (2008) (emphasis added). Subsection 1182(l)(1) authorizes the Secretary of DHS to admit nonimmigrant visitors to enter and stay in Guam and the Northern Mariana Islands *without* meeting the standard visa and passport requirements. *See also* 8 U.S.C.

§ 1182(a)(7)(B)(i) and (iii). Subsection 1182(l)(5) provides that when the Secretary of DHS determines "that visitors from a country pose a risk to . . . security interests . . . of the United States," the Secretary of DHS may "suspend the admission of *nationals of such country* ***under this subsection***." (Emphasis added.)

Subsection 1182(l)(5)'s text is incompatible with the Government's interpretation of subsection 1182(f) for two reasons. First, the limiting words "under this subsection [1182(l)]" reflect the understanding of Congress that the executive branch has authority to require visas because of security risks, but not to suspend entry of the nationals of a country altogether. Second, subsection 1182(l)(5) uses the critical words "nationals" and "a country." Those are the express, specific words that Congress uses when a provision of section 1182 authorizes any executive action based on nationality. Subsection 1182(f) does *not* use those words.

B. Norms of Separation of Powers Are Incompatible with EO-3's Nationality-Based Bans of Unlimited Duration and Serial Bans

1. Subsection 1182(f) Should Not Be Interpreted to Raise Serious Separation of Powers Issues

Under Justice Jackson's formative opinion on separation of powers, in an area within Congress's legislative powers, a President may not use his "inherent" powers to take "measures incompatible with the *expressed or implied* will of Congress." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637

(1952) (Jackson, J., concurring) (emphasis added). The Constitution's norms of separation of powers, including the Presentment Clause, Art. I, § 7, provide two reasons to interpret 8 U.S.C. § 1182 to preclude an executive decree that sets immigration bans of unlimited duration, or serial bans, based on nationality grounds that Congress has rejected.

First, particularly because separation of powers protects "liberty," THE FEDERALIST NO. 47 ("Federalist") (James Madison), there is every reason to apply to subsection 1182 the usual rule[3] of construing a statute to avoid a serious constitutional issue. Second, it is the more natural reading that a statute comports with, rather than contravenes, the normal functioning of separation of powers.

2. Not Even Congress May Authorize the President to Exercise Legislative Power Over Immigration

The Constitution deliberately made the immigration power a legislative power to prevent unilateral executive action. As Justice Jackson wrote in *Youngstown Sheet*, 343 U.S. at 641: "The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and *the description of its evils in the Declaration of Independence* leads me to doubt that they were creating the new Executive in his image."

[3] *See, e.g., I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300 (2001).

(emphasis added).[4] The Declaration of Independence lists "obstructing the laws for Naturalization of Foreigners" and "refusing to pass [persons] to encourage their migrations hither" as among the acts of "absolute Tyranny" of "the present King of Great Britain." The Declaration of Independence (U.S. 1776). Accordingly, Article I, section 8, clause 4 of the Constitution gives the legislative power over immigration "exclusively to Congress." *Galvan v. Press*, 347 U.S. 522, 531 (1954).

The President may not exercise a legislative power over immigration. As Justice Jackson wrote: "The tendency is strong to emphasize transient results upon policies . . . and lose sight of enduring consequences upon the balanced power structure of our Republic." *Youngstown Sheet*, 343 U.S. at 643. The framers "knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation." *Id.* at 650. As the chief Nuremburg prosecutor, Justice Jackson knew better than most that history was littered with republics that gave way to executive autocracy in response to assertions of national security. *See id.* at 651 (citing, *inter alia*, the Weimar Republic). The lesson is that "emergency powers are consistent with free

[4] *See also Zivotsky ex rel. Zivotsky v. Kerry*, 135 S. Ct. 2076, 2126 (2015) (Scalia, J., joined by Roberts, C.J., and Alito, J. dissenting) ("a presidency more reminiscent of George III than George Washington" is "not the chief magistrate under which the American people agreed to live when they adopted the national charter").

government only when their control is lodged elsewhere than in the Executive who exercises them." *Id.* at 652. Thus, the "law" made to address emergencies must "be made by parliamentary deliberations"—that is, by Congress. *Id.* at 655.

"Separation of powers was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). This fundamental anti-concentration rule of separation of powers applies to both foreign and domestic policy. *See Zivotsky*, 135 S. Ct. at 2090 ("The Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue.").[5] In particular, as Federalist No. 63 stated, in "critical moments" when major changes in domestic *or* foreign policy are proposed, the need for legislation to pass "a well-constructed Senate" serves as a bulwark against lamentable measures proposed by demagogues:

> [T]here are particular moments in public affairs when the people, stimulated by some irregular passion, or some illicit advantage, *or misled by the artful misrepresentations of interested men*, may call for

[5] *Accord Zivotsky,* 135 S. Ct. at 2125 (Scalia, J., joined by Roberts, C.J., and Alito, J. dissenting):

> It turns the Constitution upside-down to suggest that in areas of shared authority, it is the executive policy that preempts the law, rather than the other way around . . . [T]he President *must* "take Care" that Congress's legislation "be faithfully executed," Art. II, § 3. And Acts of Congress made in pursuance of the Constitution are the "supreme Law of the Land"; acts of the President (apart from treaties) are not. Art. VI, cl. 2. (Emphasis in original.)

> measures which they themselves will afterwards be the most ready to lament and condemn. In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens, in order to check the misguided career, and to suspend the blow meditated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind?

Under the Presentment Clause, not even Congress may authorize "unilateral Presidential action that either repeals or amends *parts* of duly enacted statutes." *Clinton*, 524 U.S. at 439 (emphasis added). Instead, Article II, Section 3 provides that in an area of legislative power, such as immigration, the President "*shall . . . recommend* to *their* [*Congress's*] *consideration* such measures as he shall judge necessary or expedient." (Emphasis added.) These limits on unilateral Presidential action apply even *if* the President raises a concern of "first importance" that, if unaddressed by statutory changes, might put the "Constitution and its survival in peril." *Id.* at 449 (Kennedy, J., concurring).

3. The Government's Limitless Interpretation of Subsection 1182(f) Raises Serious Separation of Powers Issues

The Government reads subsection 1182(f) to authorize the President to suspend entry even when that suspension contradicts policy choices embodied in other provisions of the INA. This raises serious constitutional issues, and contravenes the normal functioning of separation of powers, because it would authorize the President to reject a "policy judgment made by Congress" in other

provisions of the INA. *Clinton*, 524 U.S. at 444 & n.35; *see id.* at 452 (Kennedy, J., concurring) ("one Congress cannot yield up its own powers, much less those of other Congresses to follow").

The Government argues that subsection 1182(f) grants the President authority to make "the *decisions* (1) whether, when, and *on what basis* to suspend entry . . . (2) *whose* entry to suspend . . . , [and] (3) *for how long*." Gov't Br. at 28-29 (emphasis added). Under this view, subsection 1182(f) contains "no meaningful" limit, *id.* at 30, on the President's ability to reject the policy choices Congress made in other provisions of the INA.

The Government's limitless reading of subsection 1182(f) is the antithesis of what separation of powers permits, even when a President would act in response to "conditions which prevail in foreign countries." *Clinton*, 524 U.S. at 445 (quotations and citations omitted). For these conditions, the Presentment Clause permits a statutory provision in which "*Congress itself made the decision to suspend* or repeal the *particular* [*other*] *provisions* at issue upon the occurrence of *particular events* subsequent to enactment, and it left *only* the determination of whether such events occurred up to the President." *Id.* (emphasis added). In contrast, the Government's limitless construction of subsection 1182(f) has the President make "the decisions . . . on what basis to suspend" and "for how long." Gov't Br. at 28-29. That would "enhance[] the President's powers beyond what

the Framers would have endorsed." *Clinton*, 524 U.S. at 451 (Kennedy, J., concurring).

EO-3's unlimited travel bans adopt policy choices that specific provisions of 8 U.S.C. § 1182 reject. *See supra*, at 8-12. Additionally, in 2015, Congress rejected travel bans on nationals of countries designated by EO-3. *See, e.g.,* H.R. 3314, 114th Cong., introduced July 29, 2015; S. 2302, 114th Cong., introduced Nov. 18, 2015 (ban on refugees from Libya, Somalia, Syria, and Yemen). Instead, Congress enacted the Visa Waiver Program Improvement And Terrorist Travel Prevention Act ("VWPA"), Pub. L. No. 114-113, div. O, tit. II, § 203, 129 Stat. 2242, 2989-91, codified in 8 U.S.C. § 1187(a)(12).

The House had initially passed the American Security Against Foreign Enemies Act of 2015 ("SAFE Act"). H.R. 4038, 114th Cong. (2015). It would have banned any refugees from Syria or Iraq absent personal certifications by the Secretary of DHS, the FBI Director, and the Director of National Intelligence that the specific refugee was not a security threat. *Id.* § 2(a). In practice, the SAFE Act would have operated as a ban. *See* Evan Perez, *First on CNN: FBI Director James Comey balks at refugee legislation*, CNN (Nov. 19, 2015), http://cnn.it/1Ngw5ik.

The Senate did not pass the SAFE Act, as a cloture vote failed. *See* H.R. 4038, 114th Cong. (2015): American Security Against Foreign Enemies Act

of 2015, http://bit.ly/2w3XhK7. This illustrates how Justice Kennedy has said separation of powers works: "The Framers of the Constitution could not command statesmanship. They could simply provide structures from which it might emerge." *Clinton*, 524 U.S. at 452-53 (Kennedy, J., concurring).

Having rejected country-based travel bans, Congress enacted the VWPA as its policy choice for additional "Terrorist Travel Prevention." Like 8 U.S.C. § 1182(l)(5), *supra*, at 11-12, the VWPA requires visas for nationals of designated countries but does *not* ban travel altogether. Under the VWPA, nationals of designated countries "go through the full vetting of the *regular* visa process, which includes an in-person interview *at a U.S. embassy or consulate*." Karoun Demirjian & Jerry Markon, *Obama administration rolls out new visa waiver program rules in wake of terror attacks*, Wash. Post (Jan. 21, 2016), http://wapo.st/2sERVn1 (emphasis added); U.S. Customs and Border Protection, *Visa Waiver Program Improvement and Terrorist Travel Prevention Act Frequently Asked Questions* (June 19, 2017, 10:55), http://bit.ly/1Tz4wRn. As this Court held, even EO-2's temporary bans operated to nullify the VWPA. *See Hawaii v. Trump*, 859 F.3d at 741, 773-74 (9th Cir. 2017), vacated as moot, *Trump v. Hawaii*, No. 16-1540, 2017 WL 4782860 (Oct. 24, 2017).

EO-3's bans of unlimited duration and serial bans constitute a more fundamental assault on separation of powers than did EO-2's temporary bans.

EO-2's bans might have been defended as giving the President a single, temporary period under subsection 1182(f) to persuade Congress to change the INA to authorize country-based travel bans. But EO-3 cuts Congress out of the picture. President Trump has been in office nearly *ten months*, which constitutes more than ample opportunity to propose a travel ban to Congress. By comparison, President Bush persuaded Congress to enact the Patriot Act, including amending 8 U.S.C. § 1182, within 45 *days* of September 11, 2001. Pub. L. No. 107-56, § 411(a), 115 Stat. 272, 345-48 (Oct. 26, 2001). President Trump has not yet proposed any travel ban to Congress.

In sum, the norms of separation of powers oppose construing 8 U.S.C. § 1182(f) to authorize executive edicts that ban travel for an unlimited duration, or serially, based on grounds previously addressed much more narrowly—*without* country-based travel bans—by more specific subsections in 8 U.S.C. § 1182 and by the VWPA. *Supra, at* 9-12, 18-19. EO-3's unilateral executive action, in Justice Jackson's words, would not "plunge us straightaway into dictatorship, but it is at least a step in that wrong direction." *Youngstown Sheet*, 343 U.S. at 653 (Jackson, J., concurring). Our separated powers "may be destined to pass away. But it is the duty of the Court to be the last, not first, to give them up." *Id.* at 655.[6]

[6] For similar reasons, as in the EO-2 cases, 8 U.S.C. § 1185(a)(1) does not provide "an independent basis for the [unlimited] suspension of entry." *Hawaii v. Trump*, 859 F.3d at 770 n.10. Moreover, unlike subsection 1182(f), subsection 1185(a)(1)

II. After Appellate Rulings, the Injunction Should Not Exclude Potential Entrants Who Lack a Prior U.S. Relationship

The Government argues, Gov't Br. at 53, that injunctive relief against EO-3's bans should exclude foreign nationals who lack a prior bona fide relationship with a person or entity in the United States (hereinafter, "a Prior U.S. Relationship"). But whether to stay that portion of the preliminary injunction *pending* review by this Court and the Supreme Court is a very different question from the scope of the injunction *after* appellate proceedings resolve the dispositive legal issues. *After* dispositive appellate rulings, there will be no reason for the District Court's injunction to exclude potential entrants who lack a Prior U.S. Relationship. Those appellate rulings should establish on the merits the lack of statutory authority for EO-3's travel bans, whether or not the banned aliens have a Prior U.S. Relationship. The post-appeal injunction should be as broad as the appellate invalidation of EO-3's travel bans.

A. On the Merits, the President Lacks Statutory Authority to Apply EO-3's Bans to Aliens with or Without a Prior U.S. Relationship

First, as the District Court correctly held, the Plaintiffs-Appellees have standing to obtain a judicial ruling that the President lacked statutory authority for the bans in EO-3. A post-appeal injunction based on lack of authority for an executive rule would enjoin the unauthorized rule, not merely some

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does not authorize imposing any restrictions on entry by a "class of aliens" or use the word "suspend."

applications of the unauthorized rule. *See Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2449 (2014).

Second, when considering the merits at the preliminary injunction stage, a court projects what the District Court's final judgment likely will provide. *See Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 546 n.12 (1987) ("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.") (citations omitted). An appellate invalidation of EO-3's bans in a final merits decision should apply the same to aliens with and without a Prior U.S. Relationship.

The plain meaning of the limits in the pertinent INA subsections precludes reading into them exceptions for aliens without a Prior U.S. Relationship. 8 U.S.C. § 1182(f) prescribes conditions that limit the President's authority to ban "the entry of *any* aliens or *any* class of aliens . . . ." 8 U.S.C. § 1182(a)(3)(C) sets limitations that apply to every exclusion of "an alien" on "foreign policy" grounds. 8 U.S.C. § 1182(a)(3)(B) likewise sets conditions for excluding "*[a]ny* alien" based on potential terrorism. (Emphasis added.) 8 U.S.C. § 1182(a)(1)(A) prescribes that "*no person* shall . . . be discriminated against" based on nationality with four express, and here-inapplicable, statutory exceptions. *Id.* (Emphasis added.) The lack of a Prior

U.S. Relationship is *not* an exception to any subsection of section 1182 that EO-3 transgresses.

Moreover, reading such an exception into section 1182 would contravene the rule of constitutional avoidance, *supra*, at 13, by forcing the Court to address the Establishment Clause challenge to EO-3. The express limits imposed by the Establishment Clause apply to a government-wide order issued in the United States to deny entry to foreigners, including those without a Prior U.S. Relationship. The Constitution gives the power to make all *laws* on immigration to Congress. *Supra*, at 13-16. The Establishment Clause provides: "Congress shall make *no law* respecting *an* establishment of religion . . . ." U.S. CONST. Amend. I (emphasis added). That Clause therefore applies to an immigration law impacting those who lack a Prior U.S. Relationship.

The reasoning of *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), supports this conclusion. *Verdugo-Urquidez* held that the reach of the Fourth Amendment was circumscribed by its use of the term "the right of the people." *Id.* at 265. The Court emphasized, however, that "in some cases, provisions [without that term] extend beyond the citizenry." *Id.* at 269.

Justice Kennedy's concurrence, which was necessary for the majority, is even more supportive. Justice Kennedy emphasized that in general "the

Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic." *Id.* at 277.

Unlike the Fourth Amendment, the First Amendment's Establishment Clause is not circumscribed by the term "the right of the people." This omission is particularly meaningful as, in sharp contrast to the Establishment Clause, the First Amendment's protection of peaceful assembly extends only to "the right of the people." Because the Establishment Clause uses the universal term "no law" without any limitation, the Establishment Clause applies to the entry suspensions in EO-3 for persons without a Prior U.S. Relationship.

Finally, were this Court to create an exception for aliens without a Prior U.S. Relationship from the limits in the INA and the Establishment Clause, the cure would be worse than the disease. For example, any President could permit entry only by foreigners who were Christians, unless a non-Christian had a Prior U.S. Relationship.

B. The Post-Appeal Injunction Should Be As Broad As the Appellate Invalidation of EO-3's Travel Bans

When the Supreme Court stayed *pending* its review the portions of preliminary injunctions against EO-2's bans that applied to aliens without a Prior U.S. Relationship, the Court relied on the national security rationale asserted by the Government. The Government represented to the Supreme Court in its stay application that the reason for the "short" and "temporary" travel ban in EO-2 was

to allow this Administration to establish its own "current screening and vetting procedures [that] are *adequate* to detect terrorists seeking to infiltrate this Nation." Application for a Stay at 8, 30, *Trump v. Int'l Refugee Assistance Project*, No. 16-1436 (June 1, 2017) (emphasis added). Based on this rationale, the Supreme Court allowed EO-2's temporary pause to be applied to aliens without a Prior U.S. Relationship pending Supreme Court review. *Trump v. Int'l Refugee Assistance Project,* 137 S. Ct. 2080, 2088 (2017).

For four reasons, that "adequate" vetting rationale will not apply after the appellate rulings on EO-3. *First*, that rationale was fulfilled even *before* EO-3 was promulgated. Before EO-3, this Administration had implemented its own not merely adequate but *extreme* vetting for all potential entrants, including nationals of the countries designated in EO-2 or EO-3.

For example, on March 17, 2017, the State Department adopted enhanced visa screening by requiring longer interviews, more detailed questions by consular officials, and a "mandatory social media review" by the "Fraud Prevention Unit" if an "applicant may have ties to ISIS or other terrorist organizations or has ever been present in an ISIS-controlled territory . . . ." State Dep't Cable 25814 ¶¶ 8, 10, 13, *available at* http://bit.ly/2o0wBqt. On April 27, 2017, the Administration added a question to the Electronic Visa Update System, asking for information associated with an applicant's "online presence," meaning

information related to his or her "Provider/Platform," "social media identifier," and "contact information." 82 Fed. Reg. 19380 (Apr. 27, 2017). On June 1, 2017, the State Department promulgated a new supplemental questionnaire for visa applicants that asks applicants to list (1) every place they have lived, worked, and traveled internationally—including how such travel was funded—for the past fifteen years; (2) every passport they have ever held; (3) names and birth dates of all siblings, children, spouses, and partners; and (4) every social media handle, phone number, and e-mail address used in the past five years. U.S. Dep't of State, Supplemental Questions for Visa Applicants (2017), http://bit.ly/2wzoatR. In addition, during the first six months of the 2017 fiscal year, searches of electronic devices of international travelers arriving at U.S. airports increased 36.5%. U.S. Customs and Border Prot., CBP Releases Statistics on Electronic Device Searches (Apr. 11, 2017), http://bit.ly/2oyyLAu.

As a result, before EO-3, President Trump himself established that his Administration had substantially improved vetting and screening *while all* EO-2 travel bans were *fully* enjoined from March 16, 2017, to June 24, 2017. On April 29, 2017, President Trump wrote that his Administration was "substantially improv[ing] vetting and screening." *See* Donald J. Trump, *President Trump: In my first 100 days, I kept my promise to Americans*, Wash. Post (Apr. 29, 2017), http://wapo.st/2s7BmUg. On June 5, 2017, while decrying the full injunctions

against the EO-2 "Travel Ban," President Trump admitted: "*In any event we are* EXTREME VETTING people coming into the U.S. in order to help keep our country safe." Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017, 3:37 a.m. and 3:44 a.m.), http://bit.ly/2hGHz2Z and http://bit.ly/2rtbEIK (emphasis added; capitalization in original).

State Department data shows the impact—without a travel ban—of this Administration's extreme vetting of nationals of the countries designated by EO-2. Comparing April 2017—when *all EO-2 bans were entirely enjoined*—to the 2016 monthly averages, non-immigrant visa issuances by State Department officials were *down* 55% *among the six countries designated by EO-2*. Nahal Toosi and Ted Hesson, *Visas to Muslim-majority countries down 20 percent*, Politico (May 25, 2017, 10:28 p.m. EDT), http://politi.co/2r0XBHQ. The decrease caused by this Administration's "extreme vetting" is especially compelling as, before this Administration, the State Department's visa refusal rate was already 79 percent higher for nationals of the EO-2 designated countries than for other nationals. Brief of the Cato Institute as *Amicus Curiae* at 9, Nos. 16-1436 and 16-1540 (U.S. Sept. 9, 2017) (citing State Department data).

And the Trump Administration continues to strengthen its extreme vetting. For example, on October 31, 2017, the President "order[ed]" his Administration "to *step up* our already Extreme Vetting Program." Donald J.

Trump (@realDonaldTrump), Twitter (Oct. 31, 2017, 6:26 p.m. EDT) (emphasis added), http://bit.ly/2A6exkS.

Faced with the success of the Trump Administration's own "extreme vetting"—*without a travel ban*—in decreasing admissions of nationals from the designated countries, EO-3's rationale moved the goalposts. EO-3 does *not* seek more time to improve U.S. vetting procedures. Instead, the stated rationale for EO-3 is that, regardless of the extreme vetting by U.S. officials, the designated countries could and should provide better information. *See* EO-3 §§ 1(b)-(e).

Second, this new rationale for EO-3 weakens the equities invoked by the Government. Tellingly, the Government *does not claim that, during the 100-day injunction of all of EO-2's bans*, this Administration was forced to admit ***with inadequate information*** *even one person with no Prior U.S. Relationship from the designated countries*.[7] The record thus shows that this Administration's "extreme vetting," without any ban, has substantially reduced any potential information risks concerning those without a Prior U.S. Relationship. This is confirmed by EO-3's waiver provision. Under that provision, the Secretaries of State and DHS with *current* information are able to determine when, for any national of a designated country, "entry would not pose a threat to the national security or public safety of the United States." EO-3 § 3(c)(i)(B).

[7] The same is true for the 26 days from October 18, 2017, to November 12, 2017, when the District Court enjoined all of EO-3's travel bans.

Third, President Trump has had ten months and counting to propose to Congress travel bans for those of a designated country's nationals who lack a Prior U.S. Relationship. The President has proposed other INA amendments to Congress. David Nakamura, *Trump, GOP senators introduce bill to slash legal immigration levels*, Wash. Post (Aug. 3, 2017), http://wapo.st/2z4lc1h. But the President has not done so for any travel ban. Because President Trump continues to impose "extreme vetting" and has not yet chosen to propose any travel ban to Congress, the President can no longer argue, as he did on February 5, 2017: "*If* something happens, blame [the judge] and court system." Donald J. Trump (@realDonaldTrump), Twitter (Feb. 5, 2017, 12:39 p.m. EST), http://bit.ly/2ojCwta (emphasis added).

Fourth, contrary to the Supremacy Clause, *see supra,* at 21-22, statutory constraints on travel bans by executive decree would be pointless if dispositive judicial rulings discarded those constraints on equitable grounds because the executive views the proper scope and duration of travel bans differently than does the statute. For example, a different President could ban entry by foreigners who have owned guns, or who have had or are seeking firearms training, because the San Bernardino and Orlando terrorists (who were not nationals of a designated country) used guns.

Federal judges must enforce the rule of law regardless of a President's preferences, rhetoric, or intimidation. As Hamilton wrote in Federalist No. 78:

> This *independence of the judges* is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of *designing men*, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government.

(Emphasis added.)

The rule of law rejects using national security as "a ready pretext," *Youngstown Sheet*, 343 U.S. at 650 (Jackson, J., concurring), for discarding legal constraints on executive decrees. Rather, the Supreme Court addressed risks of "terrorism" in *Boumediene v. Bush* and held: "*The laws and Constitution are designed to survive, and remain in force, in extraordinary times*. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law." 553 U.S. 723, 798 (2008) (emphasis added).

The Supreme Court's "precedents, old and new, make clear that concerns of national security and foreign relations do not warrant abdication of the judicial role." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010). "Security subsists, too, in fidelity to freedom's first principles." *Boumediene*, 553 U.S. at 797. There is thus no reason, equitable or otherwise, for a post-appeal

injunction to be narrower than the appellate invalidation of EO-3's travel bans on the merits.

CONCLUSION

This Court should affirm the decision of the district court.

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Respectfully submitted,

/s/ Richard D. Bernstein

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