No. 17-15589

In the United States Court of Appeals for the Ninth Circuit

STATE OF HAWAI'I AND ISMAIL ELSHIKH,
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HOMELAND SECURITY; U.S. DEPARTMENT OF STATE; REX W. TILLERSON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE; AND THE UNITED STATES OF AMERICA,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Hawai'i

BRIEF FOR THE STATES OF TEXAS, ALABAMA, ARIZONA, ARKANSAS, FLORIDA, KANSAS, LOUISIANA, MONTANA, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, AND WEST VIRGINIA, AND GOVERNOR PHIL BRYANT OF THE STATE OF MISSISSIPPI AS AMICI CURIAE IN SUPPORT OF APPELLANTS AND A STAY PENDING APPEAL

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Interest of Amici Curiae

Amici curiae are the States of Texas, Alabama, Arizona, Arkansas, Florida, Kansas, Louisiana, Montana, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, and West Virginia, and Governor Phil Bryant of the State of Mississippi.[1] Amici have a significant interest in protecting their residents' safety. But the States possess no authority to restrict or set the terms of aliens' entry into the United States for public-safety and national-security reasons. Instead, the States and their elected officials rely on the federal Executive Branch to carry out that function pursuant to the laws of Congress. *See Arizona v. United States*, 132 S. Ct. 2492, 2507 (2012). Congress delegated to the Executive Branch significant authority to prohibit aliens' entry into the country, and the challenged Executive Order is a lawful exercise of that authority. Plaintiffs' lawsuit presents no basis to enjoin the Order.

[1] By separate motion, amici request leave to file this brief, to which the parties consent.

SUMMARY OF THE ARGUMENT

After multiple federal officials drew public attention to serious flaws in the preexisting vetting scheme for aliens residing abroad who wish to enter this country with visas or as refugees, the Executive Branch made a policy decision entrusted to it expressly by Congress: the Executive temporarily suspended the admission of specified classes of aliens pursuant to its broad authority under 8 U.S.C. § 1182(f). This Executive Order expressly identified a heightened national-security risk attendant to six countries that Congress and the Obama Administration had previously identified as "countries of concern" under national-security-risk criteria.

The district court's injunction of the Executive Order is remarkable. The Order falls within the Executive Branch's strongest area of authority—*Youngstown*'s first zone of executive action—because it draws support not only from the President's own foreign-affairs and national-security powers, but also from Congress's delegated authorization pursuant to its Article I powers over the admission of aliens into the country. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-36 (1952) (Jackson, J., concurring). The Executive Order, especially given its national-security context, thus enjoys "the strongest of presumptions and the widest latitude of judicial interpretation." *Id.* at 637. After all, "[u]nlike the President and some designated Members of Congress, neither the Members of [the Supreme] Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people." *Boumediene v. Bush*, 553 U.S. 723, 797 (2008). Furthermore, there is a "heavy presumption of constitutionality to which a carefully considered decision of a coequal and representative branch of

our Government is entitled." *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 721 (1990) (citation and quotation marks omitted).

Plaintiffs cannot satisfy the heavy burden necessary to overcome that strongest presumption of validity. Their argument would extend the Constitution's application to policies regarding *nonresident aliens* who are *outside this country* and attempting to enter the country. The Constitution does not apply extraterritorially to nonresident aliens who are in foreign territory clearly not under the sovereign control of the United States and who are attempting to enter this country. Indeed, the Supreme Court has recognized that there is no "judicial remedy" to override the Executive's use of the delegated § 1182(f) power to deny classes of nonresident aliens entry into the country. *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 188 (1993).

Yet even if plaintiffs were correct that constitutional protections apply extraterritorially to nonresident aliens abroad, no constitutional violation exists here. A discriminatory-purpose pretext analysis of governmental action is exceedingly limited under the Supreme Court's precedents. Under those precedents, the Executive Order is nothing close to a pretext for religious discrimination: it is grounded in national-security concerns and classifies aliens according to nationality—not religion. The six countries covered by the Order were previously identified by Congress and the Obama Administration, under the visa-waiver program, as national-security "countries of concern." In fact, before the current presidential Administration took office, multiple federal officials—including the FBI Director, the former Assistant Director of the FBI's Counterterrorism Division, and the former

Director of National Intelligence—expressed concerns with deficiencies in the country's ability to vet the entry of aliens. *See infra* pp. 17-18.

The court below relied (D.E.270 at 15) on the three-judge panel's suggestion in *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (per curiam), that the Executive was unlikely to prevail against an Establishment Clause challenge to the prior Executive Order. *See id.* at 1167-68. That reliance was mistaken; the panel's suggestion is dicta and is unpersuasive. The *Washington* panel opinion's due-process reasoning is also incorrect and should be overruled in an appropriate case. *See* Amended Order, *Washington v. Trump*, No. 17-35105, slip op. 7 (9th Cir. Mar. 17, 2017) (Kozinski, J., dissenting from denial of rehearing en banc); *id.*, slip op. 24-26 (Bybee, J., dissenting from denial of rehearing en banc).

The district court's ruling is an intrusion into the national-security, foreign-affairs, and immigration powers possessed by the Executive and delegated by Congress in the Immigration and Nationality Act (INA). The injunction is contrary to law, and it threatens amici's interests by denying the federal government—under a statutory regime crafted by the States' elected representatives in Congress—the latitude necessary to make policy judgments inherent in this country's nature as a sovereign. This Court should grant defendants' motion to stay and ultimately reverse.

ARGUMENT

I. The Strongest Presumption of Validity Applies to the Executive Order Because It Falls Within *Youngstown*'s First Category of Executive Action Pursuant to Power Expressly Delegated by Congress.

This lawsuit seeks a remarkable use of the judicial power to interfere with the President's national-security decisions in an area of strongest executive authority. Because the Executive Order implements power expressly delegated by Congress, the President's authority is at its maximum and "includes all that he possesses in his own right plus all that Congress can delegate." *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring), *quoted in Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 375 (2000), *and Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083-84 (2015). Executive action in this first *Youngstown* zone is "supported by the strongest of presumptions" of validity. *Id.* at 637, *quoted in Dames & Moore v. Regan*, 453 U.S. 654, 674 (1981).

A. The Order's suspension of entry is an exercise of authority expressly delegated by Congress in the INA.

The President has temporarily suspended the entry into the United States of two classes of aliens:

- nationals of six listed countries, if they are not lawful permanent residents (LPRs) of the United States, were outside this country ten days after the Executive Order issued, and do not qualify for other exceptions (such as holding a valid visa ten days after the Executive Order issued); and
- aliens seeking entry under the U.S. Refugee Admissions Program.

Executive Order 13,780 §§ 2, 3, 6, 82 Fed. Reg. 13,209, 13,212-16 (Mar. 9, 2017) (EO). That suspension is an exercise of broad, discretionary authority delegated to the President by Congress to suspend the entry of aliens. 8 U.S.C. § 1182(f).

1. "Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953). Congress has recognized this too, as it gave the President broad discretion to suspend the entry of any class of aliens:

> *Whenever* the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, *he 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.

8 U.S.C. § 1182(f) (emphases added). It is unlawful for an alien to enter the country in violation of "such limitations and exceptions as the President may prescribe." *Id.* § 1185(a)(1).

In addition to the President's § 1182(f) power to suspend the entry of aliens, Congress also provided that the Executive Branch "may at any time, in [its] discretion," revoke a visa. *Id.* § 1201(i). Such a discretionary visa revocation is judicially unreviewable except in one narrow circumstance: in a removal proceeding, if the "revocation provides the sole ground for removal." *Id.*

The President's power to limit refugee admission is authorized not only by § 1182(f) but also by the INA's separate delegation to the President of the power to

control the number of refugee admissions. *Id.* § 1157(a)(2) (refugee admissions capped at "such number *as the President determines*," after certain congressional consultation, "is justified by humanitarian concerns *or is otherwise in the national interest*" (emphases added)).

2. As an initial matter, any challenge to an exercise of the President's § 1182(f) power founders on *Sale*, 509 U.S. at 187-88. At issue there was a challenge on behalf of Haitian migrants to an executive order requiring that certain aliens interdicted at sea be immediately returned to their home country without an opportunity to present asylum claims. *Id.* at 164-66. *Sale* held it "perfectly clear that 8 U.S.C. § 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." *Id.* at 187. The Court rejected the argument that a later-enacted statutory provision limits the President's power under § 1182(f) to suspend aliens' entry into the United States, reasoning that it "would have been extraordinary for Congress to make such an important change in the law without any mention of that possible effect." *Id.* at 176.

ty intereste Court in *Sale* ultimately concluded that there is no "judicial remedy" remedy" to override the Executive's use of the § 1182(f) power to deny classes of nonresident aliens entry. The Court found itself "in agreement with the conclusion expressed in Judge Edwards' concurring opinion in" *Haitian Refugee Center v. Gracey*, 809 F.2d 794 (D.C. Cir. 1987): "'*there is no solution to be found in a judicial*

remedy'" that overrides the Executive's exercise of § 1182(f) authority.[2] *Sale*, 509 U.S. at 188 (quoting *Gracey*, 809 F.2d at 841 (Edwards, J., concurring)) (emphasis added). *Sale* is thus fatal to plaintiffs' claims.

3. The sweeping delegation of authority in § 1182(f) is not undermined by 8 U.S.C. § 1152(a)(1)(A). Section 1152(a)(1)(A) does not address the *entry* of aliens into the country. Instead, it is part of a set of restrictions on the *issuance* of *immigrant visas*: visas for aliens to seek admission for permanent residence.[3] *See* 8 U.S.C. §§ 1101(a)(15)-(16), 1151(a)-(b), 1181(a). Added in the Immigration and Nationality Act of 1965, which abolished an earlier national-origins-formula quota system, § 1152(a)(1)(A) states:

> Except as specifically provided [elsewhere in the INA], no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence.

Section 1152(a)(1)(A) does not conflict with § 1182(f) or impliedly restrict nationality-based denials of entry under § 1182(f). *See Sale*, 509 U.S. at 176; *see also Posadas v. Nat'l City Bank of N.Y.*, 296 U.S. 497, 503 (1936) (describing conflict re-

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[2] Notably, Judge Edwards' persuasive conclusion in *Gracey* addressed both statutory and constitutional challenges. *See* 809 F.2d at 837-38.

[3] Section 1152(a)(1)(A) addresses only the issuance of an "immigrant visa." Because § 1152(a)(1)(A) does not apply to nonimmigrant visas, it could not possibly show that § 2 of the Order is unauthorized by the INA as applied to aliens seeking entry as nonimmigrants. Similarly, refugee admission does not require an immigrant visa. *See* 8 U.S.C. § 1181(c). So § 1152(a)(1)(A) cannot show that the INA somehow withholds any authority for § 6 of the Order.

quirement for repeal by implication). An alien's *entry* into this country is a different and much more consequential event than the preliminary step of receiving a *visa*, which merely entitles the alien to apply for admission.[4] Visa possession does not control or guarantee entry into the country; the INA provides several ways in which visa-holding aliens can be denied entry. *See, e.g.*, 8 U.S.C. §§ 1101(a)(13)(A), 1182(a), (f), 1201(h), (i); 22 C.F.R. §§ 41.122, 42.82. One of them is the President's express authority under § 1182(f) to suspend the entry of classes of aliens.

This design of the INA has been repeatedly recognized in past practice. For example, over 30 years ago, the Executive suspended the entry of Cuban nationals into the United States as immigrants, subject to certain exceptions. Presidential Proclamation No. 5517, 51 Fed. Reg. 30,470 (Aug. 26, 1986). Plaintiffs point to no instance in which the Executive has treated § 1152(a)(1)(A) as prohibiting nationality-based suspensions of entry under § 1182(f). It does not.

4. Nor does 8 U.S.C. § 1182(a) limit the President's § 1182(f) authority to suspend aliens' entry. In § 1182(a), Congress enumerated no fewer than seventy grounds that make an alien automatically inadmissible to the United States, unless an exception applies. And Congress did not provide that these are the only grounds

[4] A visa does not entitle an alien to enter the country. Entry can be denied, for example, if the alien is found inadmissible upon arrival at a port of entry. *Id.* § 1201(h). "Admission" of an alien means "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." *Id.* § 1101(a)(13)(A). Mere presence on U.S. soil is not enough: "an alien present in the United States who has not been admitted or who arrives in the United States" is only an "applicant for admission." *Id.* § 1225(a)(1).

on which the Executive can deny aliens entry. Instead, Congress in § 1182(f) separately enabled the President to impose additional entry restrictions, including the power to "suspend the entry" of "any class of aliens" for "such period as he shall deem necessary." As the D.C. Circuit correctly recognized in *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986), § 1182(f) permits the Executive to deny aliens entry even if the aliens are not covered by one of the enumerated § 1182(a) categories that automatically render an alien inadmissible: "The President's sweeping proclamation power [in § 1182(f)] thus provides a safeguard against the danger posed by any particular case or class of cases that is not covered by one of the categories in section 1182(a)." *Id.* at 1049 n.2. The *Abourezk* court even noted an example of this understanding in a nationality-based § 1182(f) proclamation issued by President Reagan, which suspended entry for "officers or employees of the Cuban government or the Cuban Communist Party." *Id.* (citing Presidential Proclamation No. 5377, 50 Fed. Reg. 41,329 (Oct. 10, 1985)).

B. Because the Order's directives are in *Youngstown*'s first zone, they receive the strongest presumption of validity.

Executive action in the first *Youngstown* zone—exercising power assigned by Congress—is "supported by the strongest of presumptions and the widest latitude of judicial interpretation." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring), *quoted in Dames & Moore*, 453 U.S. at 674.

That respect attaches here because of not only the explicit congressional grant of authority to deny entry, 8 U.S.C. § 1182(f), but also the INA's complementary approach to allowing entry. Specifically, Congress enacted "extensive and com-

plex" provisions detailing how over forty different classes of nonimmigrants, refugees, and other aliens can attain lawful presence in the country. *Arizona*, 132 S. Ct. at 2499; *see Texas v. United States*, 809 F.3d 134, 179 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (per curiam). But while Congress provided these detailed criteria to significantly restrict the Executive's ability to unilaterally *allow* aliens to be lawfully present in the country, Congress simultaneously delegated the Executive broad discretionary authority to *exclude* aliens from the country, under § 1182(f).

The exclusion of aliens is also a core federal prerogative: a power "inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of government." *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972) (quotation marks omitted); *accord United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950). The burden of persuasion must "rest heavily upon" any party who might attack the Executive's congressionally authorized action on such a fundamental aspect of sovereignty. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

II. Plaintiffs' Arguments that the Executive Order Violates the Constitution Are Meritless.

Plaintiffs' constitutional challenges rest on the flawed premise that the United States Constitution applies to policies regarding nonresident foreign citizens, located abroad, who seek admission into this country. That premise is incorrect and represents a remarkable expansion of constitutional rights. It is "clear" that "an unadmitted and nonresident alien" "ha[s] no constitutional right of entry to this country as a nonimmigrant or otherwise." *Mandel*, 408 U.S. at 762. The "power to admit or exclude aliens is a sovereign prerogative," and aliens seeking admission to the United States request a "privilege." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982).

Moreover, even on plaintiffs' incorrect view of these constitutional rights' territorial scope, a discriminatory-purpose pretext analysis of governmental action is exceedingly limited under the Supreme Court's precedents—and is far from being satisfied here.

A. Neither the Establishment Clause nor the Fifth Amendment apply extraterritorially to policies regarding nonresident aliens abroad seeking entry into the United States.

The Establishment Clause does not apply to nonresident aliens abroad, for the same reasons that due-process and equal-protection rights do not apply to such aliens. *See, e.g.*, *Sale*, 509 U.S. at 188 (observing that no "judicial remedy" exists to challenge the Executive's exercise of § 1182(f) authority to deny nonresident aliens entry). The Supreme Court has long "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States."

United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990) (citing *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950)). And it has held that the Due Process Clause applies only "within the territorial jurisdiction." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

The Supreme Court thus recognizes a key distinction between aliens inside versus outside the United States. *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *see also Rodriguez-Silva v. INS*, 242 F.3d 243, 248 (5th Cir. 2001) (determining that Congress was not required to establish a rational basis for nationality-based classifications because its power to regulate immigration is plenary); *cf. Boumediene*, 553 U.S. at 754 (involving (1) lengthy detention, rather than entry denial, at (2) Guantanamo Bay, where the United States had "plenary control, or practical sovereignty"). The Constitution does not override immigration policies regarding foreign citizens not residing or present in United States territory.

Plaintiffs cannot make an end-run around that principle by resorting to the alleged "stigmatizing" effect on individuals within the United States of a challenged decision regarding whether nonresident aliens outside this country are admitted. To hold otherwise would allow bootstrapping an Establishment Clause claim based on a government action regulating only aliens beyond any application of the Clause. Amici are aware of no instance, outside the present context, in which a U.S. citizen or alien resident in this country prevailed on an Establishment Clause claim based on the stigma allegedly perceived by how the government treated other nonresident aliens abroad. *Cf. Lamont v. Woods*, 948 F.2d 825, 827, 843 (2d Cir. 1991) (allowing an Establishment Clause claim to proceed based on the unique taxpayer-standing

doctrine in a challenge to the expenditure of government funds in foreign countries). And, consistent with the Establishment Clause's inapplicability in this context, Congress has long designated members of certain religious groups, such as Soviet Jews, Evangelical Christians, and Ukrainian Orthodox Church members, as presenting "special humanitarian concern to the United States" for immigration purposes. 8 U.S.C. § 1157(a)(3) & note; *see* Department of State, Foreign Operations, and Related Programs Appropriations Act, 2016, Pub. L. No. 114-113, div. K, § 7034(k)(8)(A), 129 Stat. 2705, 2765 (2015) (reauthorizing this designation).

B. The Executive Order, which reflects national-security concerns and classifies aliens by nationality, cannot be deemed a pretext for religious discrimination.

Even assuming for the sake of analysis that the Order implicates some form of Establishment Clause or equal-protection guarantee, the Order would still be constitutional. The Order is a valid use of the Executive's foreign-affairs and national-security powers. It is not mere pretext for religious discrimination, and the district court's analysis reaching that conclusion contravenes Supreme Court precedent significantly limiting efforts to discern a hidden discriminatory purpose behind facially neutral governmental action.

1. The Supreme Court "has recognized, ever since *Fletcher v. Peck*, 6 Cranch 87, 130-31[] (1810), that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977). The Court has therefore permitted a discriminatory-purpose analysis "only

in the 'very limited and well-defined class of cases where the very nature of the constitutional question requires [this] inquiry.'" *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 377 n.6 (1991) (quoting *United States v. O'Brien*, 391 U.S. 367, 383 n.30 (1968)).

In the "very limited and well-defined class of cases" where the Supreme Court has engaged in a discriminatory-purpose analysis of governmental actions, *id.*, the Court has concomitantly stated that any such analysis is exceedingly limited, such that only clear and obvious proof of pretext can allow courts to override governmental actions, which are presumed valid:

- Judicial scrutiny of governmental purpose is inappropriate unless "an understanding of official objective emerges from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts." *McCreary County v. ACLU*, 545 U.S. 844, 862 (2005).
- When there are "legitimate reasons" for governmental action, courts "will not infer a discriminatory purpose." *McCleskey v. Kemp*, 481 U.S. 279, 298-99 (1987) (rejecting equal-protection claim).
- Governmental discriminatory purpose can be shown for a neutral classification only if it "is an obvious pretext for . . . discrimination"—that is, the law "can plausibly be explained only as a [suspect class]-based classification." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272, 275 (1979) (rejecting equal-protection claim).
- Governmental pretextual purpose can only be established where there is the "'clearest proof'" to override legitimate governmental objectives. *Smith v. Doe*, 538 U.S. 84, 92 (2003) (rejecting ex-post-facto claim).

All of this follows from the Court's longstanding admonition that government officials' actions are presumed valid. *E.g.*, *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 353 (1918).

2. The Executive Order classifies aliens by nationality—not religion.[5] The Order's temporary pause in entry by nationals from six countries and in the refugee program neither mentions any religion nor depends on whether affected aliens are Muslim. *See* EO §§ 2, 3, 6. These provisions distinguish among aliens only by nationality. *Id.* Thus, the Executive Order is emphatically not a "Muslim ban." Numerous Muslim-majority countries in the world were not covered by the seven-country list used in the prior Executive Order and cabined even further here,[6] and

[5] Because the Executive Order classifies aliens by nationality, and not religion, any equal-protection analysis applicable under the Constitution, *but see supra* Part II.A, subjects the Order to no more than rational-basis review. *See, e.g.*, *Mathews v. Diaz*, 426 U.S. 67, 83 (1976). In fact, decades-old nationality-based classifications are found throughout the INA. For example, Congress has authorized Temporary Protected Status for an "alien who is a national of a foreign state" specified by the Executive. 8 U.S.C. § 1254a(a)(1). Congress has also conferred certain benefits on aliens from particular countries who are applying for LPR status. *See, e.g.*, *id.* § 1255 note (listing immigration provisions under the Haitian Refugee Immigration Fairness Act of 1998 and the Nicaraguan Adjustment and Central American Relief Act, among others). And Congress created a "diversity immigrant" program to issue immigrant visas to aliens from countries with historically low rates of immigration to the United States. *See id.* § 1153(c).

[6] Jack Moore & Conor Gaffey, *What's Behind Donald Trump's Decision to Include Some Muslim-Majority Countries in the Travel Ban—and Not Others?*, Newsweek, Jan. 31, 2017, http://www.newsweek.com/muslim-majority-countries-not-included-trump-travel-ban-550141 (listing Muslim-majority countries not covered by the prior Order's entry restrictions).

the Pew Research Center estimates that even the country list from the prior Executive Order "would affect only about 12% of the world's Muslims."[7]

The Executive Order's nationality-based restrictions have a manifest legitimate basis: to "ensure the proper review and maximum utilization of available resources for the screening and vetting of foreign nationals, [and] to ensure that adequate standards are established to prevent infiltration by foreign terrorists." EO § 2(c). The Order finds detriment to national interests from permitting "unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen," *id.*—similar to the prior Executive Order's restriction on entry of aliens from seven "countries referred to in, or designated under, section 217(a)(12) of the INA, 8 U.S.C. [§] 1187(a)(12)," EO § 1(b)(i), (f). That set of seven countries under § 1187(a)(12) was created by Congress and the Obama Administration, in administering the visa-waiver program, upon finding each to be a national-security "country or area of concern." 8 U.S.C. § 1187(a)(12)(A)(i)(III).

The Executive Order itself explains at length the President's rationale for the entry restrictions. *See* EO §§ 1-2. And before the current Administration took office, numerous federal government officials—including the FBI director,[8] the for-

[7] Pew Research Ctr., *World's Muslim Population More Widespread than You Might Think* (Jan. 31, 2017), http://www.pewresearch.org/fact-tank/2017/01/31/worlds-muslim-population-more-widespread-than-you-might-think/.

[8] H. Comm. on Homeland Sec., 114th Cong., *Nation's Top Security Officials' Concerns on Refugee Vetting* (Nov. 19, 2015), https://homeland.house.gov/press/nations-top-security-officials-concerns-on-refugee-vetting/.

mer Director of National Intelligence,[9] and the former Assistant Director of the FBI's Counterterrorism Division[10]—expressed concerns about the country's current capacity for vetting alien entry. According to the House Homeland Security Committee, ISIS and other terrorists "*are determined*" to abuse refugee programs,[11] and "groups like ISIS may seek to exploit the current refugee flows."[12] The national-security interests implicated by the ongoing War on Terror against radical Islamic terrorists were further recognized in the 2001 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (codified at 50 U.S.C. § 1541 note). *See, e.g.*, *Boumediene*, 553 U.S. at 733; *see also, e.g.*, National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 1035(a), 129 Stat. 726, 971 (2015) (codified at 10 U.S.C. § 801 note); The White House, *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations* 4-7 (Dec. 2016), https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf.

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[9] *Id.*

[10] Letter of Bob Goodlatte, Chairman, H. Comm. on the Judiciary, to Barack Obama, President of the United States of America (Oct. 27, 2015), http://judiciary.house.gov/_cache/files/20315137-5e84-4948-9f90-344db69d318d/102715-letter-to-president-obama.pdf.

[11] H. Comm. on Homeland Sec., 114th Cong., *Syrian Refugee Flows: Security Risks and Counterterrorism Challenges* 2-3 (Nov. 2015), https://homeland.house.gov/wp-content/uploads/2015/11/HomelandSecurityCommittee_Syrian_Refugee_Report.pdf.

[12] H. Comm. on Homeland Sec., 114th Cong., *Terror Threat Snapshot: The Islamist Terrorist Threat* (Nov. 2015), https://homeland.house.gov/wp-content/uploads/2015/11/November-Terror-Threat-Snapshot.pdf.

Given this national-security grounding, a challenge to the Executive Order as a pretext for religious discrimination must fail. Ample reason exists for courts to leave undisturbed the "delicate policy judgments" inherent in the Executive Order about when a factor indicating a heightened national-security risk warrants a particular course of action regarding the Nation's borders. *Plyler v. Doe*, 457 U.S. 202, 225 (1982). Courts are not well situated to evaluate competing experts' views about particular national-security-risk-management measures. *See Boumediene*, 553 U.S. at 797. When it comes to deciding the best way to use a sovereign's power over its borders to manage risk, courts have long recognized that the political branches are uniquely well situated. *E.g.*, *Mathews*, 426 U.S. at 81; *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89, 591 (1952).

Comments the President made during his campaign for office cannot overcome the combination of (1) the Order's detailed explanation of its national-security rationale, (2) the legitimate basis for that reasoning in conclusions of numerous federal officials, *see supra* pp. 17-18, (3) the presumption of validity of government conduct, and (4) the concomitantly cabined nature of discriminatory-purpose pretext review of facially neutral governmental action, *see supra* pp. 14-16. The Supreme Court has recognized the limited significance of campaign statements before candidates assume the responsibilities of office. *See Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002); *see also* Amended Order, *Washington v. Trump*, slip. op. 4-7 (Kozinski, J., dissenting from denial of rehearing en banc). And comments made by nongovernmental officials are irrelevant for determining whether

the Executive Branch took action only as a pretext for a prohibited, discriminatory purpose. *See Feeney*, 442 U.S. at 279.

Plaintiffs' claim that the Order is pretext for religious discrimination thus fails. The Order is religion-neutral, enjoying the strongest presumption of validity not only as *Youngstown* zone-one action, *see supra* Part I, but also because of the Executive's "facially legitimate and bona fide reason" for exercising national-security and foreign-affairs powers to restrict entry, *see infra* pp. 24-25. Courts must "neither look behind the exercise of that discretion, nor test it by balancing its justification against" plaintiffs' asserted constitutional rights. *Mandel*, 408 U.S. at 770.

3. In *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (per curiam), a panel of this Court concluded that the Executive was unlikely to succeed in appealing a district court order enjoining the prior Executive Order on the basis that it violated the Due Process Clause. *Id.* at 1164-65. The panel also stated in unresolved dicta that an Establishment Clause claim raised "serious allegations" and presented "significant constitutional questions," but the panel did not deny a stay pending appeal on that basis. *Id.* at 1168.

The panel's Establishment Clause dicta did not resolve the issue and does not control here. *See Miller v. Gammie*, 335 F.3d 889, 892-93, 899-900 (9th Cir. 2003) (en banc); *id.* at 901 (Kozinski, J., concurring) (question must be "expressly resolved" by a three-judge panel to constitute binding "law of the circuit"). That dicta is not persuasive for the reasons just explained. *See supra* pp. 15-19. Nor does the panel's due-process holding present a sound alternative basis for upholding or

refusing to stay the district court's injunction. That holding was wrong and should be vacated in an appropriate case.

As the Supreme Court has recognized, no process is due if one is not deprived of a constitutionally protected interest in life, liberty, or property. *E.g.*, *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011) (per curiam); *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999). Nonresident aliens abroad have no constitutionally protected interest in entering the United States.[13] Even apart from the issue of entry into the United States, "[t]here is no constitutionally protected interest in either obtaining or continuing to possess a visa." *Louhghalam v. Trump*, No. 1:17-cv-10154, 2017 WL 479779, at *5 (D. Mass. Feb. 3, 2017) (slip op. 13). Similarly, multiple courts of appeals have rejected due-process claims regarding visa issuance or processing. *See, e.g.*, *Azizi v. Thornburgh*, 908 F.2d 1130, 1134 (2d Cir. 1990); *De Avilia v. Civiletti*, 643 F.2d 471, 477 (7th Cir. 1981).

Regardless, whatever process could possibly be due was satisfied here by the Executive Order's public proclamation prospectively announcing an exercise of the

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[13] The analysis could be different for certain lawful permanent residents who are returning to the country from abroad, *see Landon*, 459 U.S. at 33-34, but the Executive Order's suspension of entry for certain foreign nationals does not apply to those who are lawful permanent residents of the United States. EO § 3(b)(i).

The analysis could also be different where *removal proceedings*—which involve the distinct situation of potential detention and forcible removal—were instituted against an alien who is in this country and whose visa was revoked, as that alien would have certain due-process protections under the Fifth Amendment. *See Demore v. Kim*, 538 U.S. 510, 523 (2003); *Zadvydas*, 533 U.S. at 693; *see also* 8 U.S.C. § 1201(i) (judicial review of visa revocations only regarding certain deportation proceedings).

Executive's § 1182(f) authority. In fact, the Executive Order goes beyond the INA's requirements for process by giving ten days' advance notice to potentially affected aliens. And § 1182(f) cannot be subverted by arguing that a class-wide proclamation under that authority is constitutionally insufficient procedure. *See Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915).

The *Washington v. Trump* panel incorrectly posited that four categories of aliens, other than LPRs, may have "potential" claims to due-process protections. 847 F.3d at 1166 (listing the following categories: (1) "persons who are in the United States, even if unlawfully"; (2) "non-immigrant visaholders who have been in the United States but temporarily departed or wish to temporarily depart"; (3) "refugees"; and (4) "applicants who have a relationship with a U.S. resident or an institution that might have rights of its own to assert"). That theory, however, leads to absurd consequences: it could effectively extend constitutional rights to every person on the planet. Regardless, none of those potential claims has merit.

First, there are no viable claims as to aliens in the United States unlawfully. Even if unlawfully present aliens have due-process rights in *removal proceedings*, *see id.* (citing *Zadvydas*, 533 U.S. at 693), that does not mean that an unlawfully present alien who leaves the country somehow has a right to process for admission to the country upon return. Moreover, such aliens would generally be inadmissible based on their prior unlawful presence. *See* 8 U.S.C. § 1182(a)(9)(B), (f).

The second category—nonimmigrant visaholders—is expressly exempted from the current Executive Order. EO § 3(a)(i)-(iii). In all events, *Landon* does not establish that nonimmigrant visa-holders have due-process rights when seeking

to enter this country from abroad. *Cf. Washington*, 847 F.3d at 1166 (raising this suggestion). *Landon* involved a *resident* alien, and suggested that any process due must account for the circumstances of an alien's ties to this country. *See* 459 U.S. at 32-34 ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional [due-process] status changes accordingly. . . . The constitutional sufficiency of procedures provided in any situation, of course, varies with the circumstances."). Those ties are significantly less in the case of a *nonresident* alien who was temporarily admitted on a nonimmigrant visa. In any event, *Landon* was decided before Congress changed the nature of an alien's interest in visa possession by amending the INA, in 2004, to provide that "[t]here shall be no means of judicial review . . . of a revocation" of a visa, "except in the context of a removal proceeding if such revocation provides the sole ground for removal under" the INA. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 5304(a), 118 Stat. 3638, 3736 (codified at 8 U.S.C. § 1201(i)).

Third, any due-process argument based on the purported denial of refugees' rights to apply for relief also fails. *Cf. Washington*, 847 F.3d at 1166. Aliens seeking "refugee" status are nonresident aliens located abroad, so they have no constitutionally protected liberty interest in admission into the United States. *See supra* p. 21. Any claim regarding the refugee program cannot rest on provisions regarding asylum. *See* 8 U.S.C. § 1158. Asylum and refugee admission are not the same thing. The INA's asylum protection can be sought by individuals who are already "physically present in the United States or who arrive[] in the United States." *Id.*

§ 1158(a)(1). Only an alien *outside* the United States may apply to be admitted as a refugee. *See id.* §§ 1101(a)(42), 1157(a), 1158(a), (c)(1), 1181(c). And, again, there is no baseline norm that constitutional rights—including the right to petition the United States government—apply to citizens of other countries neither residing nor present in the United States. *See supra* Part II.A.

Fourth, there are no viable due-process arguments based on visa "applicants who have a relationship with a U.S. resident or an institution that might have rights of its own to assert." *Washington*, 847 F.3d at 1166 (citing *Kerry v. Din*, 135 S. Ct. 2128, 2139 (2015) (Kennedy, J., concurring in judgment); *id.* at 2142 (Breyer, J., dissenting); *Mandel*, 408 U.S. at 762-65)). As an initial matter, *Din* involved only a visa application, and it did not address the President's separate § 1182(f) power to deny classes of aliens entry. *Sale*, though, did just that and held there was no "judicial remedy" to challenge an exercise of § 1182(f) authority as applied to nonresident aliens. 509 U.S. at 188.

In any event, the narrowest opinion concurring in the judgment in *Din* expressly did not decide whether a U.S. citizen has a protected liberty interest in the visa application of her alien spouse, such that she was entitled to notice of the reason for the application's denial. *See* 135 S. Ct. at 2139-41 (Kennedy, J., concurring in the judgment). In fact, the concurrence reasoned that, even if due process applied in this context, the only process possibly required was that the Executive give a "facially legitimate and bona fide reason" for denying a visa to an alien abroad—a standard met here as to the suspension of entry by the explanation given in the Executive Order. *Id.* at 2141; *see also id.* at 2131 (plurality op.) ("[A]n unadmitted and

nonresident alien . . . has no right of entry into the United States, and no cause of action to press in furtherance of his claim for admission."). Regardless, the existence of occasional scenarios like that in *Din* could not support a facial injunction.

Conclusion

The Court should grant defendants' motion for a stay pending appeal and ultimately reverse the district court's order enjoining the Executive Order.

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