Nos. 17-2231 (L), 17-2232, 17-2233, 17-2240 (Consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, a project of the Urban Justice Center, Inc., on behalf of itself and its clients; HIAS, INC., on behalf of itself and its clients; JOHN DOES # 1 & 3; JANE DOE #2; MIDDLE EAST STUDIES ASSOCIATION OF NORTH AMERICA, INC., on behalf of itself and its members; MUHAMMED METEAB; PAUL HARRISON; IBRAHIM AHMED MOHOMED; ARAB AMERICAN ASSOCIATION OF NEW YORK, on behalf of itself and its clients,
Plaintiffs-Appellees,

and

ALLAN HAKKY; SAMANEH TAKALOO,
Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; DEPARTMENT OF STATE; OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE; ELAINE DUKE in her official capacity as Acting Secretary of Homeland Security; REX TILLERSON, in his official capacity as Secretary of State; DANIEL R. COATS, in his official capacity as Director of National Intelligence,
Defendants – Appellants.

No. 17-2231 (L)
(8:17-cv-00361-TDC)

[Caption continued on inside cover]

REPLY OF DEFENDANTS-APPELLANTS IN SUPPORT OF MOTION FOR AN EMERGENCY STAY PENDING EXPEDITED APPEAL AND ADMINISTRATIVE STAY

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IRANIAN ALLIANCES ACROSS BORDERS; JANE DOE #1; JANE DOE #2; JANE DOE #3; JANE DOE #4; JANE DOE #5; JANE #6,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; ELAINE C. DUKE, in her official capacity as Acting Secretary of Homeland Security; KEVIN K. MCALEENAN, in his official capacity as Acting Commissioner of U.S. Customs and Border Protection; JAMES MCCAMENT, in his official capacity as Acting Director of U.S. Citizenship and Immigration Services; REX TILLERSON; JEFFERSON B. SESSIONS III, in his official capacity as Attorney General of the United States,

Defendants – Appellants.

No. 17-2232
(8:17-cv-02921-TDC)

EBLAL ZAKZOK; SUMAYA HAMADMAD; FAHED MUQBIL; JOHN DOE #1; JOHN DOE #2; JOHN DOE #3,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; UNITED STATES DEPARTMENT OF STATE; ELAINE C. DUKE, in her official capacity as Acting Secretary of Homeland Security; REX TILLERSON, in his official capacity as Secretary of State,

Defendants – Appellants.

No. 17-2233
(1:17-cv-02969-TDC)

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, a project of the Urban Justice Center, Inc., on behalf of itself and its clients; HIAS, INC., on behalf of itself and its clients; JOHN DOES #1 AND 3; JANE DOE #2; MIDDLE EAST STUDIES ASSOCIATION OF NORTH AMERICA, INC., on behalf of itself and its members; MUHAMMED METEAB; ARAB AMERICAN ASSOCIATION OF NEW YORK, on behalf of itself and its clients,

Plaintiffs – Appellants,

and PAUL HARRISON; IBRAHIM AHMED MOHOMED; ALLAN HAKKY; SAMANEH TAKALOO,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; DEPARTMENT OF STATE; OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE; ELAINE C. DUKE, in her official capacity as Acting Secretary of Homeland Security; REX TILLERSON, in his official capacity as Secretary of State; DANIEL R. COATS, in his official capacity as Director of National Intelligence,

Defendants – Appellees.

No. 17-2240
(8:17-cv-00361-TDC)

The district court's ruling enjoins worldwide a national-security and foreign-relations judgment by the President set forth in a Proclamation issued pursuant to broad congressional authorization. That judgment represents the culmination of a comprehensive, multi-agency review of foreign governments' information-sharing practices and risk factors and individualized findings that certain governments' practices are deficient. Plaintiffs offer no persuasive reason to allow that injunction effectively to nullify the Proclamation before this Court has an opportunity to rule on the injunction's validity and scope.

Both in denying that the injunction will cause the government and the public irreparable harm and in assailing the Proclamation as the product of religious bias, plaintiffs largely ignore the good-faith process that led to the Proclamation and the tailored nature of its substantive restrictions. That review process identified specific, concrete deficiencies in the information supplied by particular foreign countries that directly implicate this Nation's security, and the Proclamation imposes tailored restrictions to encourage greater cooperation and to protect the Nation until sufficient improvements occur. The review and recommendations of multiple Cabinet officials whose motivations have never been questioned refute any suggestion of religious animus, and the Proclamation's findings foreclose any claim that the President exceeded his expansive authority, consistent with similar decisions by past Presidents.

Plaintiffs urge the Court to equate the Proclamation with Executive Order 13,780 (EO-2), which this Court addressed in its now-vacated opinion. In essence, plaintiffs contend that, because the government did not succeed in obtaining a full stay from this Court or the Supreme Court of an injunction against prior travel restrictions imposed by EO-2, the government also cannot do so here. But after granting review of that injunction, the Supreme Court vacated it as moot precisely to wipe the slate clean for fresh consideration. And even on its own terms, this Court's vacated opinion does not justify ignoring the differences between the two directives or the comprehensive process and national-security findings on which the Proclamation is based.

Plaintiffs also fail to identify any cognizable, let alone irreparable, harm that they would suffer if the Proclamation takes effect during the brief duration of an expedited appeal. Plaintiffs' statutory and constitutional claims are not justiciable, and the speculative injuries they forecast will not be ripe unless and until their relatives and members seek and are denied a waiver and visa. At a minimum, the injunction should be stayed to the extent it reaches numerous third parties to whom plaintiffs have no connection at all.

A. The Balance of Harms Supports A Stay

1. As we demonstrated, the district court's injunction overriding the President's national-security and foreign-policy judgment causes irreparable

substantive and institutional injuries. Motion 8-9. Plaintiffs rejoin that the Supreme Court declined to stay the EO-2 injunction for individuals with credible claims of bona fide relationships with U.S. persons or entities, and contend that the government has identified no "new" or "concrete" harms warranting a stay of the injunction against the Proclamation for such individuals. IRAP Opposition ("Opposition") 4-5 (emphasis omitted). That is erroneous. Unlike EO-2, which imposed restrictions pending a worldwide review based on concern that existing information may be inadequate, the Proclamation reflects an exhaustive multi-agency review process that identified actual information-sharing deficiencies and other risk factors for eight countries, and that recommended entry restrictions to induce improvements by those countries and to protect this Nation. Procl. § 1(c)-(i).

Plaintiffs offer no valid reason to discount that process or the resulting determinations. Indeed, the district court *found no fault* with the President's finding under 8 U.S.C. §§ 1182(f) and 1185(a) that entry of the covered aliens would be detrimental to the national interest. Opinion 49-61. Plaintiffs assert that the injunction cannot pose irreparable injury because former national-security officials disagree with the need for the Proclamation's entry restrictions. Opposition 5-6. But none of those former officials participated in the recent review, diplomatic-engagement, and recommendation processes that culminated in the Proclamation. Their private viewpoints, based on outdated information, cannot justify disregarding the

considered judgment of the President and multiple Cabinet officials whose good faith is unquestioned.

Plaintiffs' remaining attempts to undermine the government's showing of irreparable harm are insubstantial. They wrongly suggest that the district court's injunction cannot threaten national security because the Proclamation permits entry by some individuals from the covered countries. Opposition 6. But those exemptions either do not equally implicate the concerns motivating the Proclamation, *see, e.g.*, Procl. § 3(b)(iv) (dual nationals traveling on a non-covered nation's passport), or reflect careful balancing of countervailing considerations, *see, e.g.*, *id.* § 3(c) (waivers in certain circumstances). Plaintiffs also inaccurately accuse the government of acting without "dispatch" in implementing the Proclamation. Opposition 7. The government acted deliberately yet expeditiously by completing, within 90 days of the date the temporary stay suspension went into effect, the following steps: identifying the criteria by which to evaluate countries; collecting data on, and evaluating the information-sharing practices of, nearly 200 countries; engaging with foreign governments to encourage them to improve their performance, which yielded substantial improvements; and crafting the final restrictions after considering recommendations and further advice. Procl. § 1(c)-(i). Nor should the government be faulted for allowing a brief period in the Proclamation for orderly implementation worldwide of its entry restrictions.

2. Plaintiffs also fail to identify any countervailing harm that justifies denying a stay. Setting aside their allegations that the Proclamation denigrates their religion, Opposition 21—which is not a cognizable injury at all, *see* p. 5-6, *infra*—they rely entirely on general assertions about the harms they will supposedly suffer from the Proclamation's "indefinite" entry suspension. Opposition 21-22; IAAB Opposition 6-8. But plaintiffs make no attempt to show that significant harms would occur during *the brief period* of a stay pending expedited appeal, taking into account the widely varying times for visa processing and the uncertainty whether the aliens with whom they have a bona fide relationship would meet otherwise-applicable visa requirements and ultimately be denied a waiver. Motion 9-10. And during the appeal, those aliens can continue to seek visas and perhaps receive the final agency action that would be a prerequisite to review under the Administrative Procedure Act even if such review were not otherwise barred.

B. The Government Is Likely To Prevail On Appeal

1. Plaintiffs' claims are not justiciable

Plaintiffs do not respond to the government's argument that the Proclamation's exclusion of aliens abroad does not violate plaintiffs' own rights under the Establishment Clause or Equal Protection Clause. Motion 12-15. Plaintiffs simply cite this Court's vacated en banc opinion, Opposition 21, while ignoring the government's showing that this Court conflated the question whether

plaintiffs have suffered an Article III injury-in-fact from the exclusion of aliens abroad with the question whether the allegedly discriminatory treatment of those third parties violated plaintiffs' own constitutional rights.

Plaintiffs fare no better on their statutory claims. They do not dispute that "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950). Nor do they identify any express legal authorization to review their statutory challenges to the exclusion of aliens abroad. (*Knauff*, by contrast, involved an alien detained at Ellis Island, as to whom Congress had authorized habeas corpus review. *Id.* at 539-40.)

Instead, plaintiffs reprise the district court's assertion that exclusion orders are non-reviewable without statutory authorization only for the exclusion of "particular" aliens, and that the principle of non-reviewability does not extend to "general" policies. Opposition 19. But plaintiffs provide no response to the government's showing that this distinction is inconsistent with the rationale underlying the principle of non-reviewability and contrary to the constitutional structure. Motion 11-12. Not one of the cases cited by plaintiffs ordered the admission of aliens abroad that the Executive Branch had excluded.

2. The Proclamation does not violate the INA or the Establishment Clause

a. Plaintiffs contend that the Proclamation exceeds the President's broad authority under 8 U.S.C. §§ 1182(f) and 1185(a)(1). Opposition 15-19. Contrary to their suggestion, the district court did not merely "decline[] to enjoin" the Proclamation on this ground, Opposition 15, but rather affirmatively rejected plaintiffs' argument. Opinion 49-61. Under the plain text of these statutory provisions, it is unquestionably permissible to restrict entry of nationals from countries that present information-sharing deficiencies or other risk factors, both to encourage improvement by those countries and to protect this country in the interim. Motion 15-17. Indeed, plaintiffs fail to refute the government's showing that this Proclamation is not materially distinguishable from President Carter's 1979 decision to authorize the exclusion of Iranian nationals during the Iran Hostage Crisis and President Reagan's 1986 exclusion of Cuban nationals during a diplomatic dispute. Motion 16; Opposition 18-19.

Plaintiffs nevertheless contend that the Proclamation "override[s] Congress's enacted policy judgments," particularly with respect to the Visa Waiver Program (VWP). Opposition 15, 16-18. As the district court correctly held, however, "a fair reading of § 1182(f) is that it allows the President to impose * * * additional restrictions outside of previously listed requirements." Opinion 57-58; *see, e.g.*, *Allende v. Shultz*, 845 F.2d 1111, 1118-19 (1st Cir. 1988) (holding that Presidents can

use § 1182(f) to supplement statutory grounds for inadmissibility under § 1182(a)). In particular, here, because the incentive that Congress has provided countries to improve their information-sharing practices (the VWP) has not been adequate for the countries at issue, Congress has recognized the President's authority to impose entry restrictions. *See* Opinion 58.

b. In defending the district court's holding that the Proclamation violates 8 U.S.C. § 1152(a)(1)'s ban on nationality discrimination in the issuance of immigrant visas, plaintiffs do not meaningfully respond to our objections.

First, plaintiffs do not seriously dispute that Section 1152(a)(1)'s restriction on "the issuance of an immigrant visa" does not purport to restrict the *President's* power to *suspend entry* under Sections 1182(f) and 1185(a). Motion 17-18. Although plaintiffs emphasize that the purpose of Section 1152(a)(1) was to end the national-origins quota system for immigrant visas, Opposition 13-14, that history is entirely consistent with the government's showing that Section 1152(a)(1) merely prevents discrimination on the basis of nationality within the set of aliens who are otherwise eligible for immigrant visas, but does not restrict the President's power to limit the set of aliens who are eligible for entry in the first place.

Second, plaintiffs ignore that their position would mean that President Carter's 1979 decision to authorize the exclusion of Iranian immigrants during the Iran Hostage Crisis violated Section 1152(a)(1), as would President Reagan's 1986

exclusion of Cuban immigrants during a diplomatic dispute. Motion 18-19. And more generally, plaintiffs ignore that it is eminently sensible for the President to respond to problems posed by a particular country by restricting the entry of that country's nationals—*e.g.*, when on the brink of war with a country—and equally sensible to implement such an entry suspension by denying visas rather than stopping aliens at the border. Motion 18. The need for nationality-based restrictions in such a situation demonstrates that the district court's reading of Section 1152(a)(1) cannot be correct, and nothing in that statute authorizes plaintiffs to second guess the President on when nationality-based restrictions are warranted. Nor do plaintiffs dispute that Section 1152(a)(1) is unambiguously inapplicable to *non*-immigrant visas.

c. Plaintiffs likewise fail to refute the government's showing that the Proclamation does not violate the Establishment Clause. Plaintiffs cannot reconcile their claim with the Proclamation's religion-neutral text, process, and substance, and they cannot evade that fatal flaw by fixating on the earlier Executive Orders or the President's campaign statements.

Plaintiffs repeat the district court's erroneous assertion that the Proclamation's "underlying architecture" is "fundamentally the same" as the prior Executive Orders. Opposition 9. But plaintiffs concede that, unlike the prior Executive Orders, the Proclamation reflects a months-long worldwide review and recommendation

process by multiple government agencies whose officials have never been accused of, much less shown to have acted based on, anti-Muslim animus or any other bad-faith motive. Motion 20. Plaintiffs reprise the district court's accusation that the agencies' recommendation was "pre-ordained," Opposition 10, but they ignore our showing that this charge is directly contrary to the unambiguous text of the provisions in EO-2 establishing the review and recommendation process, Motion 22. Plaintiffs also emphasize that it was the President, not the agencies, who ultimately adopted the Proclamation's restrictions. Opposition 11. But, as the Proclamation makes clear, the eight countries selected were the same countries recommended by the Acting Secretary of Homeland Security, and the particular tailored restrictions imposed on each country were in accordance with the Acting Secretary's recommendations. Procl. § 1(g)-(i).

Moreover, the substantive restrictions imposed by the President underscore the good-faith, secular basis of the Proclamation. Plaintiffs' animus-based theory does not explain why the President dropped two Muslim-majority nations that had been subject to entry restrictions under prior Executive Orders (Sudan and Iraq). Motion 20-21. Nor do Plaintiffs explain why the President exempted significant categories of non-immigrant visas from five Muslim-majority nations (Somalia, Libya, Yemen, Chad, and Iran). Motion 21-22. Plaintiffs likewise do not explain why only one (barely) Muslim-majority nation was added (Chad), Motion 21, and

plaintiffs' suggestion that the addition of two non-Muslim-majority nations (North Korea and Venezuela) was merely a "litigating position," Opposition 11, is belied by the fact that this addition was recommended by the Acting Secretary of Homeland Security. Finally, plaintiffs allege that the President treated Somalia and Venezuela inconsistently based on religion, Opposition 11, but they ignore the Proclamation's neutral explanation for why those countries were treated differently, Motion 22-23.

Given their inability to undermine the Proclamation's text, process, and substance, plaintiffs repeatedly emphasize the history of the prior Executive Orders and the campaign statements that preceded them. Opposition 8-9, 12. But both Supreme Court precedent and common sense compel the conclusion that this history cannot continue to disable the President from regulating the entry of aliens when applied to Muslim-majority countries—not after a multi-agency review by officials whose motives have never been questioned, and whose recommendation as implemented by the President operates neutrally with respect to religion and in myriad ways that are inconsistent with a purpose or effect of banning Muslims. Motion 24.

C. The Global Injunction Is Improper

Plaintiffs do not dispute that both Article III and equitable principles require that any injunctive relief be limited to redressing plaintiffs' own cognizable, irreparable injuries, regardless of whether the Proclamation may also be invalid as

applied to others. Motion 24-25; Opposition 22-23. Yet, apart from their non-cognizable "message" injury, they identify no reason that could justify relief that extends beyond any particular aliens with whom they have a bona fide relationship. Although they observe that the organizational plaintiffs have "employees, clients, and members located across the country," Opposition 23, that does not make it "impractical" to limit any relief to particular aliens abroad with which a member or client claims a bona fide relationship. Plaintiffs thus fall back on the claim that the Supreme Court's decision staying in part the injunction against EO-2 otherwise "approved" that global injunction, Opposition 22, but they misconstrue that stay decision, as we have already explained, Motion 25.

CONCLUSION

Defendants respectfully request that, pending completion of appellate review (including any Supreme Court proceedings), this Court stay the preliminary injunction, in whole or at least as to all aliens except those identified aliens whose exclusion would impose a cognizable, irreparable injury on plaintiffs. Defendants also respectfully request that, pending a ruling on a stay pending appeal, the Court grant an immediate administrative stay.

Respectfully submitted,

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OCTOBER 2017

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-volume limitations of Fed. R. App. P. 27(d)(2)(A). This motion contains 2,585 words, excluding the parts of the motion excluded by Fed. R. App. P. 27(d)(2) and 32(f).

/s/ Sharon Swingle
Sharon Swingle

CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2017, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Fourth 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.

/s/ Sharon Swingle
Sharon Swingle