No. 16A1191

IN THE SUPREME COURT OF THE UNITED STATES

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., APPLICANTS

v.

STATE OF HAWAII, ET AL.

REPLY IN SUPPORT OF APPLICATION FOR STAY PENDING APPEAL AND PENDING DISPOSITION OF PETITION FOR A WRIT OF CERTIORARI

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To summarize where this case stands: respondents brought an unripe challenge before a single alien abroad had been denied a visa, an act that is itself generally unreviewable. Respondents then obtained a global injunction, including against portions and applications of Executive Order 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) (Order), that do not even arguably affect them. The injunction now rests on a statutory argument that respondents did not raise below and that the Fourth Circuit declined to adopt in ruling on constitutional grounds. And because the Ninth Circuit narrowed the injunction, and the President is proceeding to implement those provisions of the Order that are no longer enjoined while seeking this stay, respondents claim that it is somehow the President's action -- rather than the injunction in their own

case -- that has undermined the Order. None of respondents' arguments adheres to usual legal rules; each is tailor-made for this Order alone. This Court should stay this injunction, grant certiorari here and in Trump v. IRAP, No. 16-1436, and expedite its consideration of these important cases.

I. THERE IS A REASONABLE PROBABILITY THAT THIS COURT WILL GRANT CERTIORARI

This case warrants review. Indeed, respondents previously conceded "the fundamental importance of the underlying legal issues." Opp. 11. And respondents no longer press their earlier claim that certiorari is unnecessary because, although certain provisions of the Order have been enjoined, the government has taken other steps to improve national security. See Opp. 11-12; Gov't Supp. Br. 29. Of respondents' remaining arguments against certiorari (Supp. Br. 35-40), none bears even minimal scrutiny.

A. Respondents contend (Supp. Br. 36-37) that the Ninth Circuit's decision diminishes the need for review. But the Ninth Circuit upheld broader injunctive relief than the Fourth Circuit in IRAP, and it did so based on a novel reading of 8 U.S.C. 1182(f) that respondents themselves never urged and that only two judges of the Fourth Circuit endorsed. See IRAP v. Trump, 857 F.3d 554, 608-611 (2017) (en banc) (Keenan, J., joined by Thacker, J., concurring in part and concurring in the judgment). A majority of the en banc Fourth Circuit necessarily found that statutory argument insufficient to avoid the constitutional issue. Id. at

580-581. Although respondents are correct that 13 federal appellate judges have voted to invalidate the Order (Supp. Br. 6), eight appellate judges have voted to uphold it or the Order it replaced, and they at least agree on the governing rationale.[1]

In any event, the fact that the decision below nullifies a national-security directive of the President warrants review regardless of whether the circuits are divided. This Court has granted review on important questions of immigration law in the absence of any square, developed conflict. See United States v. Texas, 136 S. Ct. 2271 (2016) (per curiam); Arizona v. United States, 567 U.S. 387 (2012). It should do the same here.[2]

B. Respondents reprise (Supp. Br. 37-39) their contention that the government's litigation conduct undercuts the need for review, but it gains no force through repetition. Gov't Supp. Br. 28-29. At every stage, the government has moved quickly and sought a stay. Respondents suggest (Supp. Br. 37) the government could have saved time by stipulating to conversion of the temporary restraining order (TRO) to a preliminary injunction. But as the Ninth Circuit has now recognized, the TRO's scope would have

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[1] See generally, e.g., IRAP, 857 F.3d at 639 (Niemeyer, J., joined by Shedd and Agee, JJ., dissenting); Amended Order, Washington v. Trump, No. 17-35105 (9th Cir. Mar. 17, 2017) (Kozinski, J., joined by Bybee, Callahan, Bea, and Ikuta, JJ., dissenting from denial of reconsideration en banc).

[2] Respondents wrongly suggest (Supp. Br. 36) that the procedural posture here weighs against review. Texas and Arizona also involved preliminary injunctions, and the decision below rests squarely on the court's assessment of the merits.

restrained even provisions addressing internal government reviews of vetting procedures. Supp. Add. 70-72. It was thus essential for the government to seek to narrow the scope of injunctive relief in the district court so that those reviews could proceed.

Respondents also fault the government (Supp. Br. 38) for not short-circuiting the lower courts' review by seeking immediate relief from this Court. They claim, however, that even now this Court's review is premature. See p. 3 n.2, supra. In any event, the government moved to (and did) expedite proceedings in the court of appeals, but in a manner that allowed that court to consider its stay request after full briefing in the hope that relief from this Court would not be necessary -- and to ensure that, if it were, this Court would have the benefit of the Ninth Circuit's considered ruling. The government has moved this case through the courts with urgency and care at every stage.

C. Respondents' primary argument against review (Supp. Br. 1, 7, 35-36) rests on the President's June 14, 2017, memorandum (Memorandum) clarifying that the Order's enjoined provisions will take effect as soon as the injunctions here and in IRAP are stayed or lifted. That Memorandum should not have been necessary, but the IRAP respondents argued to this Court (as a reason why the government's certiorari petition and stay application were moot) that Section 2(c)'s 90-day suspension was set to expire last week, notwithstanding the injunctions here and in IRAP. Br. in Opp. at 13, IRAP, No. 16-1436 (June 12, 2017). The President's Memorandum

confirms what the Order's text and common sense indicate: a stay of these injunctions will provide meaningful relief, by allowing the entry and refugee suspensions to operate in tandem with the parallel reviews, just as the Order envisions.

Respondents here and in IRAP, however, claim that the President is the one who severed the link between the entry and refugee suspensions and the accompanying reviews of those programs. Resps. Supp. Br. 1; Resps. Supp. Br. at 1, 4, IRAP, No. 16-1436 (June 20, 2017). That is simply wrong. It is the injunctions in these cases -- not any actions of the President -- that are preventing the Order's various provisions from operating together. If this Court stays those injunctions, the Order will function precisely as the President intended: the entry and refugee suspensions will take effect during approximately the same period as the reviews, which will free resources to perform those reviews and promote national security by limiting the entry of certain foreign nationals while those reviews are ongoing.

Respondents do not press (Supp. Br. 35) the argument advanced by the IRAP respondents in their supplemental brief filed yesterday -- namely, that the President's ability to take different or additional measures after the reviews are completed means the 90- and 120-day suspensions will eventually be overtaken by events. The question is whether, in the meantime, the President should be able to implement all of the Order's provisions as an integrated whole. And the answer to that question should turn on

whether the government has met this Court's well-established stay standard -- not on whether the temporary suspensions, which are important now, will pass in time. The IRAP respondents' approach would mean that this Court could not stay (and then review) any injunction against a temporary measure of short duration. See Gov't Stay Reply at 13, Trump v. IRAP, No. 16A1190 (June 14, 2017). Neither the IRAP respondents, nor respondents here, offer any response to these points.

II. THERE IS A FAIR PROSPECT THAT THIS COURT WILL SET ASIDE THE DECISION BELOW

Respondents devote the bulk of their submission (Supp. Br. 8-31) to defending the court of appeals' decision on the merits. Respondents' defense is unpersuasive.

A. Respondents' Statutory Claims Are Not Justiciable

Respondents' statutory claims face two threshold difficulties that they barely address. First, respondents do not dispute that aliens abroad generally lack any rights regarding entry, and as a result the denial of entry or a visa to such aliens is ordinarily not subject to judicial review. Gov't Supp. Br. 7-8. Respondents do not even discuss (Supp. Br. 8-10) the doctrine of consular nonreviewability. Although this Court has twice permitted limited review where U.S. citizens plausibly alleged that the refusal of a visa to an alien abroad violated the citizens' own constitutional rights, see Kerry v. Din, 135 S. Ct. 2128 (2015); Kleindienst v.

Mandel, 408 U.S. 753 (1972), respondents cite no decision of this Court extending such review to statutory claims.[3]

Second, the only basis for judicial review would be the Administrative Procedure Act, 5 U.S.C. 704. Even assuming that review is not precluded for the reasons given above, see 5 U.S.C. 701(a), here there is no "final agency action" for a court to review: no alien abroad has been denied a visa pursuant to Section 2(c). Respondents do not dispute that the Order contains a detailed waiver provision, that one of the grounds for a waiver is reuniting with close family members in the United States, and that Dr. Elshikh's mother-in-law may seek a waiver on that basis. Gov't Supp. Br. 9-10. Likewise, none of the students Hawaii wants to enroll has been denied a visa or waiver. For similar reasons, respondents do not have a ripe claim. See Lujan v. National Wildlife Fed'n, 497 U.S. 871, 891-892 (1990). The Court could reverse the injunction on that ground alone without resolving any other issue in this case. After all, in both Mandel and Din, the Court did not consider the constitutional claims at issue until after the visa (and in Mandel, a waiver) had been denied to the alien abroad. There is no reason for a different result here.

[3] In Sale v. Haitian Centers Council, Inc., 509 U.S. 155 (1993), this Court did not address reviewability. See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 91 (1998) ("[D]rive-by jurisdictional rulings * * * have no precedential effect.").

B. Respondents' Statutory Claims Are Meritless

1. The Order is consistent with 8 U.S.C. 1182(f)

a. Respondents do not dispute that the Ninth Circuit adopted a position they never urged and no other court has embraced: the Order violates Section 1182(f) because the President failed to make a sufficient finding that the entry of aliens from the six countries and refugees would be detrimental to the national interest. But as this Court reiterated only days ago, "[n]ational-security policy is the prerogative of the Congress and President," and "[j]udicial inquiry into the national-security realm raises concerns for the separation of powers in trenching on matters committed to the other branches." Ziglar v. Abbasi, No. 15-1358 (June 19, 2017), slip op. 19 (citation and internal quotation marks omitted). Courts thus accord "deference to what the Executive Branch has determined is essential to national security." Ibid. (ellipsis, citation, and internal quotation marks omitted).

Section 1182(f) calls for even greater deference to the Executive because it confirms the President's discretion at every turn: the statute reserves to the President (1) whether and when to suspend entry by proclamation ("[w]henever he finds that the entry" of aliens "would be detrimental" to the national interest); (2) whose entry to suspend ("all aliens or any class of aliens," whether as "immigrants or nonimmigrants"); (3) for how long ("for such period as he shall deem necessary"); (4) and on what terms ("he may * * * impose on the entry of aliens any restrictions he

may deem to be appropriate"). 8 U.S.C. 1182(f). Respondents have no answer for the statutory text, or for the wide latitude that the Executive has historically been afforded in making national-interest determinations. See Gov't Supp. Br. 15 & n.3.

Respondents argue (Supp. Br. 25) that the President must "actually find" that entry of aliens would be detrimental. But the President did make such a finding. See Order §§ 1(b)(iii), 1(h), 2(c), and 6(b). The question here is not whether the President failed to make a finding, but whether the President may rest that finding on a risk assessment regarding the inability or unwillingness of certain foreign governments to provide reliable information about their nationals -- and whether courts are free to second-guess the adequacy of the President's national-interest determination. Respondents offer nothing that would support limiting the grounds on which the President may invoke Section 1182(f), or that would require a reviewing court to agree in its own independent judgment with the President's risk assessment. See Webster v. Doe, 486 U.S. 592, 600 (1988).

Respondents dismiss (Supp. Br. 10) Doe, Franklin v. Massachusetts, 505 U.S. 788 (1992), and Dalton v. Specter, 511 U.S. 462 (1994), because those cases contemplated review in certain circumstances of claims that an Executive official exceeded his authority. But those decisions do not support the proposition that a court may review the President's decision on matters the statute commits to his discretion, see Dalton, 511 U.S. at 474-476,

which Section 1182(f) does. Respondents rely on Mach Mining, LLC v. EEOC, 135 S. Ct. 1645 (2015), but that case -- which involved agency conciliation procedures in employment-discrimination cases -- does not remotely support the Ninth Circuit's invasive review of the President's national-security judgments.

At bottom, respondents resort (Supp. Br. 18-20) to attacking a straw man: that reversing the decision below would mean a "practically limitless immigration power." To be sure, as this Court has held, Section 1182(f) grants the President broad authority: it "clear[ly]" authorizes a naval blockade directed against aliens from an entire nation. Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 187 (1993). Respondents offer no difference in principle between that and the entry and refugee suspensions at issue here. But from the fact that the President may place 90- and 120-day pauses on entry by certain foreign nationals and refugees, it does not follow that the President's powers are boundless. As explained below, see pp. 12-15, infra, the President has not sought to override other immigration provisions (once those provisions are properly understood), and the Order is entirely constitutional under Mandel and Din.

b. In any event, respondents fail to impugn the Order's findings under any standard. Aside from passing, cursory references (Supp. Br. 23, 26), they make no effort to undermine the findings in the Order that support Section 6(a)'s refugee suspension or Section 6(b)'s lowering of the refugee cap. There

is no basis for the injunction against those provisions. The same is true of Section 2(c)'s entry suspension, which rests on two related national-security risks that the Order identifies: the six countries' sponsorship or sheltering of terrorism both "diminishes [their] willingness or ability to share or validate important information about individuals seeking to travel to the United States" and "increases the chance that conditions will be exploited to enable terrorist operatives or sympathizers to travel to the United States." Order § 1(d).

Respondents do not attack those findings on their own terms. Instead, they distort the Order's rationale, arguing that there is "no basis for thinking that all nationals of the six covered countries * * * pose a risk of terrorism." Supp. Br. 23 (emphasis omitted). But the Order does not find that all nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen pose terrorism threats. Rather, the Order finds that the United States may not have complete, reliable information to determine which nationals of those countries pose such a threat. Respondents dismiss (Supp. Br. 24) that concern as "newly minted," but it appears on the Order's face. See Order § 1(d); see also Gov't C.A. Br. 10. The Order is premised on the "unacceptably high" "risk" that would-be terrorists will exploit conditions in their home countries to travel to this Nation undetected. Order § 1(d); see id. § 1(f).

Respondents' argument boils down to a policy disagreement with the President's risk assessment and whether the Order

adequately addresses it. For instance, respondents contend (Supp. Br. 23) that the Order is overinclusive because some of the affected nationals live elsewhere, but that line reflects the need for information from foreign governments about their nationals (indeed, the Order expressly excludes dual nationals traveling on a passport not issued by one of the six countries, Order § 3(b)(iv)). Respondents similarly argue (Supp. Br. 24) that the suspension is overbroad because immigration officials can deny entry to suspected terrorists on a case-by-case basis. But the question is whether the foreign governments specified in the Order are willing and able to provide reliable information, and the President has made a categorical judgment that a temporary pause on entry is warranted while he investigates that situation. Respondents' objections to that judgment belong in the political arena, not the courts.

2. The Order is consistent with 8 U.S.C. 1152(a) and 1157

Respondents press (Supp. Br. 26-28) two other statutory arguments that the Ninth Circuit adopted. Both lack merit, and neither supports the full scope of the current injunction.

a. Respondents argue (Supp. Br. 26-27) that Section 2(c)'s temporary pause on entry violates 8 U.S.C. 1152(a)(1)(A) because its implementation entails denying visas based partly on nationality. Even if that were correct, the claim would not support affirmance for two reasons. First, it has nothing to do

with the refugee suspension and cap, which apply without any regard to nationality. Second, Section 1152(a)(1)(A) deals with the issuance of immigrant visas -- not the issuance of nonimmigrant visas, and not entry into the United States. At most, the claim would require the government to issue immigrant visas to a fraction of the aliens affected by Section 2(c), who could then be barred from entry when they arrived at the Nation's borders.

Sections 1152 and 1182 should be interpreted in harmony not to require that fruitless result. Section 1182(f) provides that the President may suspend the entry of aliens "as immigrants or nonimmigrants," and there is no evident reason why Congress would have wanted the former set (but not the latter) to receive visas but be denied admission. 8 U.S.C. 1182(f). To the contrary, Congress specified that no visa may issue if the applicant "is ineligible * * * under [S]ection 1182." 8 U.S.C. 1201(g). Section 1182 lists many such grounds for ineligibility, among them health, criminal history, and terrorist affiliation. Whatever the relevant underlying ground in any individual case, the alien is denied a visa because he is "ineligible" to enter "under [S]ection 1182." So too here, if an alien is subject to the Order and does not receive a waiver, he is being denied an immigrant visa <u>because he has been validly barred from entering the country under Section 1182(f)</u> -- not because he is suffering the type of nationality-based discrimination prohibited by Section 1152(a)(1)(A).

That reading not only harmonizes Sections 1152(a) and 1182(f), but it has other virtues as well. First, it accords with the settled principle that the later-enacted Section 1152 should not be construed as partially repealing Section 1182(f) by implication. Gov't Supp. Br. 22. Second, it is consistent with longstanding State Department practice, which has treated aliens covered by Section 1182(f) proclamations as ineligible for visas. See 9 U.S. Dep't of State, Foreign Affairs Manual 302.14-3(B) (2016). Third, it avoids the constitutional concerns with limiting the President's authority to suspend the entry of nationals from any particular foreign country. Respondents avoid those concerns only by reading into Section 1152(a)(1)(A) an atextual exception for "a national emergency," Supp. Br. 27 n.6, thereby conceding the fundamental difficulties with their interpretation.

b. Respondents further argue (Supp. Br. 27-28) that Section 6(b)'s refugee cap violates 8 U.S.C. 1157. That claim has no bearing on Sections 2(c) or 6(a), and it lacks merit. Respondents do not grapple at all with the statutory text, purpose, or history. They deny that there is a "textual basis" for permitting fewer refugees than the annually authorized maximum, but the statutory text is undeniably discretionary: Section 1157 speaks of "the number of refugees who may be admitted." 8 U.S.C. 1157(a)(2) (emphasis added). Respondents do not address the legislative history or the fact that the number of admitted refugees often falls far below the maximum. Gov't Supp. Br. 25-26 & nn.4-5.

3. The Order is consistent with 8 U.S.C. 1182(a)

Finally, respondents press (Supp. Br. 20-22) an argument that the court of appeals did not adopt. Contrary to the suggestion created by their spliced quotations (id. at 20), the court declined to decide whether Section 2(c) conflicts with 8 U.S.C. 1182(a)(3)(B). Supp. Add. 60 ("We need not decide the precise scope of § 1182(f) authority in relation to § 1182(a)(3)(B)."). Respondents' own cases show that there is no conflict: both Abourezk v. Reagan, 785 F.2d 1043, 1049 n.2 (D.C. Cir. 1986) (R.B. Ginsburg, J.), aff'd by an equally divided Court, 484 U.S. 1 (1987), and Allende v. Shultz, 845 F.2d 1111, 1118-1119 (1st Cir. 1988), explained that the President may use his "sweeping proclamation power" under Section 1182(f) to suspend entry of aliens for reasons that overlap with Section 1182(a)'s grounds of inadmissibility. That Congress "considered the terrorism risk posed by nationals of these countries" and adopted certain measures (Resps. Supp. Br. 21) is beside the point, because Congress also expressly gave the President power to suspend entry of any alien whose entry he finds detrimental to the Nation's interests.[4]

[4] Respondents vaguely assert (Supp. Br. 21-22) that the Order conflicts with the "structure and policies" of immigration law. Historical practice suspending or restricting entry based partly on nationality under both Sections 1182(f) and 1185(a)(1) forecloses any contention that the immigration laws implicitly preclude such distinctions. Gov't C.A. Br. 22; D. Ct. Doc. 145, at 28 (Mar. 13, 2017). The "power" to "exclude or expel" is "inherent because the very idea of nationhood requires the drawing of thorny lines -- between members and non-members, between admitted and excluded." Ledezma-Cosino v. Sessions, No. 12-73289,

C. Respondents' Establishment Clause Claim Is Meritless

Respondents' reiteration (Supp. Br. 15-16, 28-31) of their Establishment Clause claim adds nothing to the analysis. They insist (id. at 15) that their claims are justiciable, repeating in two sentences the purported harms they suffer. But each of those alleged harms stems from application of the Order to others, i.e., aliens abroad. This Court has made clear -- including in McGowan v. Maryland, 366 U.S. 420, 429-430 (1961) -- that individuals indirectly injured by alleged religious discrimination against others generally may not sue. Gov't C.A. Reply Br. 9-10. Respondents offer no answer to that clear rule. They argue that the Order violates their own religious-freedom rights because it sends them an offensive "message," but the D.C. Circuit rejected that end run around standing limitations in In re Navy Chaplaincy, 534 F.3d 756 (2008), which respondents do not address.

On the merits, respondents misread (Supp. Br. 28) Mandel, 408 U.S. 753, as applicable to policy decisions made by Congress but not the Executive. That approach makes no sense, particularly where, as here, the President acts pursuant to express statutory authority. Gov't C.A. Reply Br. 12. Respondents also argue (Supp. Br. 29) that Mandel invites looking behind facially legitimate objectives, but only the dissent in Mandel considered "the absence of facts supporting the Government's asserted purpose." See

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2017 WL 2324717, at *6 (9th Cir. May 30, 2017) (en banc) (Kozinski, J., joined by Bea and Ikuta, JJ., concurring).

408 U.S. at 778 (Marshall, J., dissenting). The Court expressly declined to do so. Id. at 770. Respondents' further claim (Supp. Br. 30-31) that the President's Memorandum undermines the Order's facially legitimate and bona fide basis is wrong for the reasons explained above. See pp. 4-5, supra.[5]

III. THE BALANCE OF EQUITIES DECISIVELY FAVORS A STAY

The balance of equities strongly supports staying the injunction the Ninth Circuit affirmed. At a minimum, respondents have not demonstrated any cognizable injury from the Order's application to others besides Dr. Elshikh's mother-in-law, much less injury that could conceivably warrant global relief.

A. Respondents minimize (Supp. Br. 31-32) the harms caused by the injunction to the government and the public. They dismiss (ibid.) the interference with the President's national-security judgment on the ground that the Court has declined to stay injunctions against federal policies before. The interference here, however, is direct and indisputable: the President expressly determined that the Order's provisions are needed to promote national security, but the lower courts here (and in IRAP) nullified that judgment. Respondents' observation (id. at 32)

[5] Respondents offer no additional justification for impugning a religion-neutral Executive Order based on campaign statements. They cite only a 22-year-old Second Circuit brief addressing -- in the context of claims under the Fair Housing Act, 42 U.S.C. 3601 et seq. -- material showing that the local campaign to create a new village was undertaken for the purpose of excluding a sect. Resps. Supp. Br. 30-31 (citing Gov't Reply Br., LeBlanc-Sternberg v. Fletcher, 67 F.3d 412 (2d Cir. 1995) (No. 94-7103)).

that the Executive may take other steps to improve information-gathering from other countries misses the point: the President, in consultation with Cabinet officials, determined that a temporary pause was necessary to protect national security while he assessed the willingness and ability of the governments of the six Section 2(c) countries to provide the information necessary to vet nationals from those countries properly.

B. For their own part, respondents repeat (Supp. Br. 31) the harms they previously alleged. Critically, none of these alleged injuries plausibly justifies enjoining Sections 2(c), 6(a), and 6(b) as to all persons worldwide.

First, the only injury Dr. Elshikh asserts for his statutory challenge to Section 2(c) is the possible effect of the Order on his mother-in-law's entry. Resps. Supp. Br. 10-11. Even assuming that claim is ripe, his putative injury would be fully redressed by an injunction limited to her and Section 2(c). Second, the only injury Dr. Elshikh asserts for his constitutional challenge to Section 2(c) is the "message" that the Order allegedly conveys. To the extent respondents contend that injury would justify a global injunction, it only underscores why the injury cannot be cognizable in the first place. See pp. 6-7, supra. A plaintiff cannot reframe government conduct directed at aliens abroad as government speech directed at U.S. citizens in order to obtain a global injunction. Third, the only injury Dr. Elshikh asserts for the refugee provisions in Section 6(a) and (b) is that "[h]e is

the Imam of a mosque in Hawaii that counts refugees as members." Resps. Supp. Br. 12. That injury is plainly not cognizable, let alone irreparable, and he identifies no refugee abroad whose entry could possibly affect his rights. Fourth, Hawaii's putative injuries add nothing. The State identifies no cognizable sovereign interest in the entry of aliens abroad, much less the entry of refugees.

Like the court of appeals (Supp. Add. 75), respondents try to dodge the problem by arguing (Supp. Br. 33) that global relief is appropriate because every application of the Order is "illegal." That argument conflates the nature of respondents' legal theory with what matters to the scope of equitable relief: the irreparable injury to the plaintiffs before the Court based on a violation of their own rights. Wholly apart from whether respondents' legal arguments would apply to every application of Sections 2(c), 6(a), and 6(b), Article III and equitable principles confine injunctive relief to that which is necessary to redress respondents' cognizable injuries. Stay Appl. 37.

Respondents' attempt (Supp. Br. 33-34) to derive a contrary rule from this Court's cases is unavailing. Their lead case, Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000), has no bearing on the scope of injunctive relief and simply held the school district's prayer policy invalid. The relief granted there, moreover, was permissible because the school-prayer policy was directed to the audience of which the plaintiff was a part, and

could realistically be redressed only by ending the practice. That is not true of any of respondents' claims here. Respondents' remaining cases are still further afield.[6]

There is simply no basis for enjoining Sections 2(c), 6(a), and 6(b) wholesale. The Court should hold that the government is likely to succeed on the merits and, as in United States Department of Defense v. Meinhold, 510 U.S. 939 (1993), stay the injunction except as to Dr. Elshikh's mother-in-law (or, at most, also as to specific students that Hawaii identifies who have accepted admission for the upcoming school year, cf. Aziz v. Trump, No. 17-116, 2017 WL 580855, at *10 (E.D. Va. Feb. 13, 2017)).

[6] Most involved direct review in courts of appeals, see National Wildlife Fed'n, 497 U.S. at 891-892, and have nothing to do with the proper scope of injunctive relief in district-court actions. See Gonzales v. Oregon, 546 U.S. 243 (2006), aff'g 368 F.3d 1118, 1120-1121 (9th Cir. 2004) (explaining that case involved petition for direct review); Dole v. United Steelworkers of Am., 494 U.S. 26 (1990); Pittston Coal Grp. v. Sebben, 488 U.S. 105 (1988); INS v. Cardoza-Fonseca, 480 U.S. 421 (1987). Reno v. ACLU, 521 U.S. 844 (1997), involved severability rather than relief to nonparties, and the "vast array" of plaintiffs, the varied nature of their conduct, and the vagueness of the statute made limiting relief not "practicable." Id. at 883-884; see id. at 861 nn.27-28. And Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986), and National League of Cities v. Brennan, 419 U.S. 1321 (1974) (Burger, C.J., in chambers), did not address the scope of injunctive relief for nonparties, and each involved large organizations suing on behalf of their members.

CONCLUSION

The Court should construe the government's stay application as a petition for a writ of certiorari and grant the petition along with the petition for a writ of certiorari in IRAP. In addition, the Court should stay the injunction in its entirety pending disposition of the petition and any further proceedings in this Court. At a minimum, it should stay the injunction as to all persons other than Dr. Elshikh's mother-in-law and any specific students Hawaii identifies who have accepted admission.

Respectfully submitted.

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