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CHAPTER 1

Nationality, Citizenship, and Immigration

A. NATIONALITY, CITIZENSHIP, AND PASSPORTS

1. *Hinojosa and Villafranca*

As discussed in *Digest 2017* at 4-7, the district court in two separate cases (*Hinojosa* and *Villafranca*) dismissed plaintiffs' Administrative Procedure Act ("APA") challenges to their passport denials, reasoning that an administrative remedy is provided in 8 U.S.C. § 1503(b)-(c). The U.S. Court of Appeals for the Fifth Circuit consolidated the cases for review and issued its decision on appeal on May 8, 2018. The Fifth Circuit affirmed. The majority opinion is excerpted below.*

* * * *

The Plaintiffs sought similar relief under the APA: *Hinojosa* challenged the denial of her application for a U.S. passport because she was a non-citizen. *Villafranca* challenged the revocation of her passport because its issuance was based on the misrepresentation that she was a U.S. citizen. The district court rejected *Villafranca*'s petition because it concluded she was not appealing a final agency action. By contrast, it rejected *Hinojosa*'s petition because it concluded there was an adequate alternative means of receiving judicial review under 8 U.S.C. § 1503. Both grounds provide independent bases to reject an APA claim. *See Am. Airlines, Inc. v. Herman*, 176 F.3d 283, 287 (5th Cir. 1999) (finality requirement); *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988) (no other adequate remedy requirement).

* Editor's note: In February 2019, the United States filed a brief in opposition to the plaintiffs' petition for certiorari. The Supreme Court denied the petition on March 18, 2019. *Hinojosa v. Horn*, No. 18-461.

Section 1503 outlines the process by which individuals can receive judicial review of the denial of “a right or privilege as a national of the United States” by a government official, department or independent agency “upon the ground that he is not a national of the United States.” 8 U.S.C. §§ 1503(a), (b). On appeal, both Villafranca and Hinojosa challenge the dismissal of their APA claims by arguing that the procedures under 8 U.S.C. § 1503 are inadequate. We disagree. After reviewing the adequacy requirement under the APA and the procedures afforded under § 1503, we conclude that the district court’s denial on this basis was proper.

A. The Adequate Alternative Remedy Requirement

The APA provides judicial review for “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.” 5 U.S.C. § 702. Notwithstanding this broad definition, the APA limits the sort of “agency action[s]” to which it applies. Specifically, the statute requires that the challenged act be an “[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court.” *Id.* § 704. ...

At a minimum, the alternative remedy must provide the petitioner “specific procedures” by which the agency action can receive judicial review or some equivalent. *Id.* The adequacy of the relief available need not provide an identical review that the APA would provide, so long as the alternative remedy offers the “same genre” of relief. *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep’t of Justice*, 846 F.3d 1235, 1245 (D.C. Cir. 2017) ...

* * * *

B. Section 1503 Procedures

With these principles in mind, we now turn to the procedures set forth in the statute in question. 8 U.S.C. § 1503 outlines specific procedures to appeal the denial of “a right or privilege as a national of the United States” by a government official, department or independent agency “upon the ground that he is not a national of the United States.” 8 U.S.C. §§ 1503(a), (b). The statute provides two separate procedures for individuals to vindicate such claims, depending on whether they are within the United States. When the individuals are already within the United States, judicial review is immediately available: They are authorized to “institute an action under [the Declaratory Judgment Act] against the head of such department or independent agency for a judgment declaring him to be a national of the United States.” *Id.* § 1503(a).

When they are not already within the United States, however, the path to judicial review is longer because such individuals must first gain admission into the country by the procedures set forth in §§ 1503(b)–(c). These provisions first require an application to “a diplomatic or consular officer of the United States” for a certificate of identity, which allows petitioners to “travel[] to a port of entry in the United States and apply[] for admission.” *Id.* § 1503(b). To receive the certificate, petitioners must demonstrate good faith and a “substantial basis” for the claim that they are, in fact, American citizens. *Id.* If their applications are denied, petitioners are “entitled to an appeal to the Secretary of State, who, if he approves the denial, must provide a written statement of reasons.” *Id.* The statute does not itself provide a means of reviewing the Secretary of State’s decision if he confirms the denial.

If the certificate of identity is issued—either by the diplomatic or consular officer or by the Secretary of State—the individual may apply for admission to the United States at a port of entry, subject “to all the provisions ...relating to the conduct of proceedings involving aliens

seeking admission to the United States.” *Id.* § 1503(c). If admission is denied, petitioners are entitled to “[a] final determination by the Attorney General” that is “subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise.” *Id.* Conversely, if admission is granted, thereby permitting them to travel within the United States, they can file a declaratory judgment action under § 1503(a).

C. The Plaintiffs’ Remedy Under § 1503 is an Adequate Alternative to APA Relief.

We now apply this procedural framework to the present cases, looking specifically to the wrong the Plaintiffs assert as well as the procedures currently available to remedy that wrong. First, the wrong to be remedied is the deprivation of U.S. passports on the allegedly erroneous conclusion that they are not citizens. They have, in other words, been denied “a right or privilege . . . upon the ground that [they are] not . . . national[s] of the United States.” As noted, § 1503 is specifically designed to review such denials.

Second, we look to the procedures currently available to these Plaintiffs, who have not taken any of the procedural steps required by § 1503. As noted, the statute articulates two bases for reaching the courts to remedy their claims: They are permitted to file a habeas petition if denied admission at the port of entry, or, if granted admission, they are permitted to file a declaratory judgment action. Notably, both forums permit the Plaintiffs to prove their citizenship. If their petition is successful, the hearings will overturn the basis for the deprivation of their U.S. passports.

The only instance in which the Plaintiffs might not receive judicial review under the statute is if their petitions for certificates of identity are denied by the Secretary State. At that moment, they would be entitled to relief under the APA—a point which the Government concedes. But the mere chance that the Plaintiffs might be left without a remedy in court does not mean that the § 1503 is inadequate as a whole. In other words, the Plaintiffs are not entitled to relief under the APA on the basis that a certificate of identity *might* be denied. Otherwise, all persons living abroad claiming United States citizenship would be able to skip §§ 1503(b)–(c) procedures by initiating a suit under the APA. In light of the foregoing, we are satisfied that 8 U.S.C. § 1503 establishes an adequate alternative remedy in court for these Plaintiffs. As noted, the statute provides a direct and guaranteed path to judicial review. Moreover, the provision comprises “both agency obligations and a mechanism for judicial enforcement.” *Citizens for Responsibility*, 846 F.3d at 1245. In sum, § 1503 expresses a clear congressional intent to provide a specific procedure to review the Plaintiffs’ claims. Permitting a cause of action under the APA would provide a duplicative remedy, authorizing an end-run around that process. We therefore affirm the district court’s determination that it lacked jurisdiction.

* * * *

III.

We next consider Plaintiffs’ claims that they should have been allowed to pursue their habeas petitions. “In an appeal from the denial of habeas relief, this court reviews a district court’s findings of fact for clear error and issues of law *de novo*.” *Jeffers v. Chandler*, 253 F.3d 827, 830 (5th Cir. 2001) (per curiam). A district court’s dismissal of a habeas corpus claim for failure to exhaust administrative remedies is reviewed for abuse of discretion. *Gallegos-Hernandez v. United States*, 688 F.3d 190, 194 (5th Cir. 2012).

A person seeking habeas relief must first exhaust available administrative remedies. *United States v. Cleto*, 956 F.2d 83, 84 (5th Cir. 1992) (per curiam). Exhaustion has long been a prerequisite for habeas relief, even where petitioners claim to be United States citizens. *See United States v. Low Hong*, 261 F. 73, 74 (5th Cir. 1919) (“A mere claim of citizenship, made in a petition for the writ of habeas corpus by one held under such process, cannot be given the effect of arresting the progress of the administrative proceeding provided for.”). “The exhaustion of administrative remedies doctrine requires not that only administrative remedies selected by the complainant be first exhausted, but instead that all those prescribed administrative remedies which might provide appropriate relief be pursued prior to seeking relief in the federal courts.” *Hessbrook v. Lennon*, 777 F.2d 999, 1003 (5th Cir. 1985), *abrogated on other grounds by McCarthy v. Madigan*, 503 U.S. 140 (1992), *superseded by statute on other grounds*, *Woodford v. Ngo*, 548 U.S. 81 (2006); *see also Lee v. Gonzales*, 410 F.3d 778, 786 (5th Cir. 2005) (“[A] petitioner must exhaust available avenues of relief and turn to habeas only when no other means of judicial review exists.”).

Conversely, “[e]xceptions to the exhaustion requirement are appropriate where the available administrative remedies either are unavailable or wholly inappropriate to the relief sought, or where the attempt to exhaust such remedies would itself be a patently futile course of action.” *Fuller v. Rich*, 11 F.3d 61, 62 (5th Cir. 1994) (per curiam) (quoting *Hessbrook*, 777 F.2d at 1003). The petitioner bears the burden to demonstrate an exception is warranted. *Id.* (citing *DCP Farms v. Yeutter*, 957 F.2d 1183, 1189 (5th Cir. 1992); *Gardner v. Sch. Bd. Caddo Par.*, 958 F.2d 108, 112 (5th Cir. 1992)).

This court has already applied these principles to §§ 1503(b)–(c), finding the procedures they outline must be exhausted before receiving habeas relief. Specifically, in *Samaniego v. Brownell*, 212 F.2d 891, 894 (5th Cir. 1954), this court noted that,

[w]here, as here, Congress has provided a method, administrative or judicial, by which appellant may challenge the legality of his detention, or exclusion, and such method or procedure is not tantamount to a suspension of the writ of habeas corpus, this remedy must be exhausted before resort may be had to the extraordinary writ.

Like the petitioner in *Samaniego*, Villafranca and Hinojosa have not pursued the remedies available to them under §1503(b)–(c). Nor have they demonstrated that such pursuit would be futile. They argue that they are not provided an effective remedy because the procedures do not specifically address the deprivation of their passports. But the denials were based on a finding that they were not citizens, which—as noted—is precisely the sort of claim that § 1503 is designed to address. In other words, these procedures provide a basis for the Plaintiffs to rectify the wrongful determination that they are not citizens, which, if they are successful, will afford the Plaintiffs an effective remedy to the wrong they suffered.

We also reject the Plaintiffs’ assertions that the position of a § 1503(b) petitioner who appears at a port of authority with a certificate of identity is the same as any other alien seeking admission to the United States. To the contrary, the very fact that the petitioner has that certificate puts her in a different position. Section 1503(b) calls on the U.S. diplomatic or consular officer of the United States to issue the certificate of identity “upon proof...that the application is made in good faith and has a substantial basis.” Thus, when individuals are issued a certificate of identity for purposes of applying for admission to the United States, a U.S. official has found some merit in their claims. Obtaining a certificate of identity signals to U.S.

officials charged with evaluating applications for admission to the United States at a port of entry that an individual's claim may be legitimate. Accordingly, persons who have gone through the process set forth in § 1503(b) assume a legal posture that is distinct from persons who merely proceed to the inspection station and request entry.

Thus, the Plaintiffs have not demonstrated that they are entitled to an exception to the exhaustion requirement.

* * * *

2. *Zzyym v. Pompeo*: Indication of Sex on U.S. Passports

Plaintiff Dana Zzyym ("Zzyym") is an intersex individual who filed suit after the State Department denied Zzyym's request for a passport with an "X" in the sex field, contrary to its policy of requiring either "M" or "F." Zzyym's complaint alleges violations of the APA and equal protection under the Fifth Amendment. On September 19, 2018, the U.S. District Court for the District of Colorado decided that the State Department's policy and denial of the requested passport violate the APA and enjoined the Department from relying on the policy to deny the requested passport. The court did not reach the constitutional claims. The court had previously remanded the case to the Department for reconsideration of its policy after finding the Department failed to show its policy was rational. The 2018 decision was based on the Department reaffirming the policy and seeking dismissal based on the administrative record. Excerpts follow from the opinion of the district court. The opinion is available in full at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>.

* * * *

The APA empowers the Court to "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C. § 706(2)(A). Agency action is arbitrary and capricious if it is not the product of reasoned decision making. This means, among other things, that an agency must provide an adequate evidentiary basis for its action and consider all important aspects of the problem before it.

* * * *

... In the Department's memorandum, the Department first notes that it is aware that some countries and the International Civil Aviation Organization (the UN agency that sets forth passport specifications) provide for the issuance of travel documents bearing an "X" in addition to "M" or "F". R. 82. The Department then provides five reasons for the gender policy:

- **Sex Data Point Ensures Accuracy and Verifiability of Passport Holder's Identity:**
The policy is necessary to ensure that the information contained in US passports is accurate and verifiable, thus ensuring the integrity of the US passport as proof of identity

and citizenship. Because the Department relies on third-party documentation issued by state, municipal, and/or foreign authorities who largely do not allow gender identifiers other than male or female to determine an applicant's identity, the Department would have a more difficult job verifying the identity of a passport holder if a gender aside from male or female was used.

- **Sex Data Point is Used to Determine Applicant's Eligibility to Receive Passport:** The policy is necessary because the sex of a passport applicant (male or female) is a vital data point in determining whether someone is entitled to a passport. In order to determine whether an applicant is eligible to receive a passport, the Department must data-match with other law enforcement systems. Because "all such agencies recognize only two sexes," the Department's continued use of a binary option for the sex data point is the most reliable means to determine eligibility.
- **Consistency of Sex Data Point Ensures Easy Verification of Passport Holder's Identity in Domestic Contexts:** The policy is necessary to ensure that a passport can be used as a reliable proof of identity within the United States. The introduction of a "new, third sex option in US passport applications and Passport data systems could introduce verification difficulties in name checks and complicate automated data sharing among these other agencies." The Department believes that this would "cause operational complications."
- **There is No Generally Accepted Medical Consensus on How to Define a Third Sex:** The policy is necessary because there is no generally accepted medical consensus as to how to define a third sex, making it unreliable as a component of identity verification. "Although the Department acknowledges that there are individuals whose gender identity is neither male nor female, the Department lacks a sound basis on which to make a reliable determination that such an individual has changed their sex to match that gender identity."
- **Altering Department System Would Be Expensive and Time-Consuming:** The policy is necessary because changing it would be inconvenient.

Looking at the proffered reasons and cited evidence provided by the Department, I find that the Department's decision is arbitrary and capricious. I will address each of the Department's proffered reasons and explain why in my judgment they do not show that the gender policy is the product of a rational decision-making process.

i. Reasons One through Three Fail to Show Rational Decision Making Reasons one through three essentially boil down to the same argument—the Department needs to maintain the binary gender classification system for passports because this will ensure accuracy and reliability in cross-checking gender data with other identity systems. R. 82–86. The Department notes that the binary system is important at two points: (1) when determining if an applicant is eligible to receive a passport, and (2) when a passport holder seeks to use their passport as proof of identity. *Id.* After reviewing the memorandum and administrative record, I find that the Department failed to add any substantive arguments or evidence that wasn't previously before the Court when I rejected this argument in my November 2016 Order.

In that order, I noted that the Department's argument that the binary gender policy helped to ensure the accurate identification of passport applicants/holders failed when one looked deeper at the evidence in the administrative record. For example, I noted that the Department undermined its purported rationale when it informed Dana that Dana could receive a male passport if Dana provided a physician's letter attesting to that gender, even though Dana's

Colorado driver's license listed Dana's gender as female. ECF No 55 at 10. The Department has established policies in place that passport specialists and consular officers must follow "when an applicant indicates a gender on the 'sex' line on the passport application with information different from some or all of the submitted citizenship and/or identity evidence[.]" R. 178; 7 FAM § 1310 App. M. By allowing this means of gender designation on the passport, the Department made it apparent that it did not actually rely on other jurisdictions' gender data to verify passport applicants' identities to the extent it argued.

Further, I noted that the administrative record included evidence that "not every law enforcement record from which data is input to this system designates an individual's sex," and "a field left blank in the system is assumed to reflect that the particular datum is unknown or unrecorded." ECF No. 55 at 10 (citing declaration of Bennet Fellows, Division Chief at the Department). Therefore—in addition to the Department's admission that gender is just one of many fields used to crosscheck a passport applicant/holder's identity with other systems (other fields include one's social security number, date of birth, name, etc.)—the Department also admitted that in some systems the gender field isn't even used or reliable. As such, I held the Department's insistence that a binary gender data option is necessary to ensure accuracy and reliability simply was not the case under the evidence provided and therefore was insufficient to show that the policy was the product of rational decision making.

Since that decision, the only "new" evidence in the record on this point cuts against the Department. Joining multiple countries and the International Civil Aviation Organization's recognition of a non-binary gender classification system, at least four U.S. states and territories now issue identification cards with a third gender option. The Department was on notice of this when it reconsidered its policy. As such, the Department's insistence that a binary gender system is necessary to accurately and reliably crosscheck a passport applicant/holder's identity ignores the reality that some American passport applicants will have gender verification documents that exclusively list a gender that is neither female nor male.

As support to its May 2017 letter, the Department offers a "History of the Designation of Sex in U.S. Passports," to explain the basis for its 1976 decision to add a requirement that applicant's designate either "male" or "female" in passport applications. R. 87–90. This brief history explained that the decision to add a sex marker to passport applications was made under the direction of the International Civil Aviation Organization (ICAO), which commissioned a panel of passport experts to address border security concerns resulting from the increase in international air travel. Apparently, the data field of "SEX (M-F)" was recommended because experts thought "[that with] the rise in the early 1970s of unisex attire and hairstyles, photographs had become a less reliable means for ascertaining a traveler's sex." R. 88. In a 1974 report "an ICAO panel confirmed that a holder's sex should be included on passports because names did not always provide a ready indication, and appearances from the passport photograph could be misleading." *Id.* Though this still doesn't answer the question of why a traveler's sex needed to be ascertained, the Department notes that at the time there was no consideration of a third sex marker as the passport book was based on the technical specifications of the ICAO, and the ICAO specified only male and female. *Id.*

But as noted already, the ICAO standards for machine-readable travel documents now specify that sex should be designated by "the capital F for female, M for male, or X for unspecified." ECF 1 ¶ 35; ICAO Document 9303, Machine Readable Travel Documents, at IV-14 (7th ed. 2015) at 14. The Department does not explain its departure from adherence to this standard.

Overall, in these three rationales, the Department argues that the purpose of the sex designation on the passport is to ensure the accuracy and integrity of the document. The Department has maintained that the male and female markers “help identify the bearer of the document, and ensure that the passport remains reliable proof of identification.” ECF 35 at 24. Dana submitted multiple medical certifications from licensed physicians attesting that she is neither male nor female, but intersex. Dana’s Complaint describes invasive and unnecessary medical procedures that doctors subjected Dana to as a child that attempted but failed to change Dana’s intersex nature. ECF 1 ¶ 15. I find that requiring an intersex person to misrepresent their sex on this identity document is a perplexing way to serve the Department’s goal of accuracy and integrity. In sum, taking the Department’s proffered rationales that I previously determined were inadequate with the new evidence in the administrative record regarding the growing body of jurisdictions that allow for a non-binary gender marker, I find that the Department failed to show that its decision-making process regarding the policy was rationale.

ii. Reason Four Fails to Show Rational Decision Making

The Department’s fourth asserted reason for maintaining the binary gender policy also fails. The Department argues that the policy is necessary because there is no generally accepted medical consensus as to how to define a third sex, making it unreliable as a component of identity. R. 85. However, by its own regulations, the Department relies upon a medical authority which plainly recognizes a third sex. *See* 7 FAM §1310(b). The Department defers to the medical “standards and recommendations for the World Professional Association for Transgender Health (WPATH), recognized as the authority in this field by the American Medical Association (AMA),” 7 FAM §1310(b) App. M. WPATH recognizes a third sex. R. 646–763. In addition, the administrative record includes the opinions of three former U.S. Surgeons General and the American Medical Association Board of Trustees that describe non-binary sex categories. ECF No. 65 at 13–14. The Department recognizes that it is medically established that an intersex person is born with mixed or ambiguous markers of sex that do not fit into the typical notions of either male or female bodies. 7 FAM §1360 App. M; R. 185, 605, 765. The Department’s uncertainty about how it would evaluate persons “transitioning” to a third sex misses the ball—intersex people are born as they are.

In the May 2017 letter, the Department highlights that it is unable to recognize a third gender “partly due to the lack of consensus of what it means, biologically, for an individual to have a sex other than male or female.” R 86. However, the information relied upon in the administrative record also reflect a lack of consensus as to how individuals born intersex could be classified as either “male” or “female,” R. 947–65. This has not prevented the Department from requiring intersex people to elect, perhaps at random, as it doesn’t seem to matter to the Department which one of those two categories Dana chooses. Even if the Court ignored the Department’s deference to the WPATH, the justification that there is a lack of medical consensus, whereby “there are a number of genetic, hormonal and physiological conditions in which an individual is not easily classified as male or female,” R. 86, still fails to account for why the binary sex designation is preferable.

Taking this evidence together, the Department's argument that the gender policy is necessary because there is no medically accepted consensus regarding a third sex is not rational and fails.

iii. Reason Five is not Sufficient

Finally, the Department arrives at what this Court suspects is the real reason that the Department has been so resistant to adding a third gender option to passports: money and time. The Department argues that switching the existing data systems—which are currently incapable of printing a passport that reflects a gender option other than “M” or “F”—would be considerably costly and timely. R. 86. However, the Department admits that it has not undertaken a level of effort (LOE) estimation on the time and cost that it would take to add the third sex designation option to the U.S. passport biodata page. *Id.* This does not ring of a rational decision. Without record evidence of or even an attempt at determining the time, cost, or coordination necessary, the Court cannot defer to the Department's claims of administrative convenience. *See, e.g., Plyer v. Doe*, 457 U.S. 202, 227–28 (1982) (“There is no evidence in the record suggesting...any significant burden on the State's economy.”). True, common sense would tell anyone that altering a system will necessary[ly] involve some effort and money. However, the Department's rational here is the product of guesswork rather than actual analysis, and it does not rise to the level of reliable evidence that is needed to show that the Department's policymaking was rational.

In sum, the Department added very little to the evidence and explanations that were before this Court in November 2016 when I determined that the Department's policymaking was not the product of rational decision making. Even with the new memorandum and proffered reasons, I again find that the gender policy is arbitrary and capricious and not the product of rational decision making.

2. The Denial of Dana's Passport Application Exceeds the Authority Delegated to the Department by Congress, 5 U.S.C. § 706(2)(C)).

Dana challenges the policy under a second provision of the APA, section 706(2)(C), which empowers the Court to “hold unlawful and set aside agency action, findings, and conclusions” that are “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C. § 706(2)(C). Dana argues that the Department is acting beyond its authority in denying the option for a non-binary gender option on the passport application. ...

The Department has the power to issue passports under the Passport Act of 1926 “under such rules as the President shall designate and prescribe for and on behalf of the United States.” 22 U.S.C. § 211a; *see* Exec. Order 11295. While this grant of authority does not expressly authorize the denial of passport applications nor specify particular reasons that passports may be denied, the Supreme Court has construed this power broadly. Defendant and plaintiff refer to the Supreme Court cases of *Kent v. Dulles* and *Haig v. Agee* to resolve the question of whether the Department is acting outside of its authority in withholding a passport from Dana.

Haig held that the Secretary has the power to deny passports for reasons not specified in the Passport Act. *Haig v. Agee*, 453 U.S. 280, 290 (1981). ... There, the Supreme Court examined historical practices to conclude that the Executive did have “authority to withhold passports on the basis of substantial reasons of national security and foreign policy,” and that legislative history confirmed congressional recognition and of this power. *Id.* at 293. In *Kent v. Dulles*, the Supreme Court examined whether the Secretary of State had the authority to deny a passport based on suspicions that the passport applicant was a communist. Though the

Court concluded that the Secretary of State did not have authority to promulgate regulations denying passports to persons suspected of being communist, it also emphasized that the Department had a long history of exercising the power to deny passport applications based on grounds related to “citizenship or allegiance on the one hand or to criminal or unlawful conduct on the other.” *Id.* at 127–28. Here, we don’t have a case where the passport applicant is being denied on grounds related to national security, foreign policy, citizenship, allegiance, or criminal or unlawful conduct. Indeed, 22 C.F.R. § 51.60 identifies a number of discretionary and mandatory reasons that a passport can be denied, and these provisions relate to such grounds. None of the provisions setting forth reasons for mandatory and discretionary restrictions of passports in 22 C.F.R. § 51.60 apply to Dana. ECF No. 61 at 23. “It is beyond dispute that the Secretary has the power to deny a passport for reasons not specified in the statutes,” *Haig* at 281; however a reason must be given, and *Kent* and *Haig* both hold that it must also be a good one.

The authority to issue passports and prescribe rules for the issuance of passports under 22 U.S.C. § 211a does not include the authority to deny an applicant on grounds pertinent to basic identity, unrelated to any good cause as described in *Kent* and *Haig*. The Department contends that it was acting within its authority in requiring every applicant to fully complete the passport, *see* 2 C.F.R. §51.20(a). ECF No. 41 at 5. I agree, but Dana does not take issue with the regulation that requires fully completing a passport application. Dana’s issue is that there is not an option on the passport application that does not require Dana to untruthfully claim to be either male or female. ECF No. 61 ¶ 26. I have already held that the Department has acted arbitrarily and capriciously in maintaining a gender policy that requires Dana to inaccurately select M or F, when the administrative record does not provide a rational basis for this requirement. Because neither the Passport Act nor any other law authorizes the denial of a passport application without good reason, and adherence to a series of internal policies that do not contemplate the existence of intersex people is not good reason, the Department has acted in excess of its statutory jurisdiction.

* * * *

On December 3, 2018, the Department filed a motion for a stay, pending appeal, of the district court’s injunction prohibiting the Department from relying on its policy to deny the passport as requested with the “X” gender marker. Excerpts follow from the U.S. brief in support of the motion. The brief and the Declaration of Assistant Secretary of State Carl C. Risch in support of the motion are available at

<https://www.state.gov/digest-of-united-states-practice-in-international-law/>.**

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** Editor’s note: On February 4, 2019, the Department filed a reply brief in support of the motion for stay pending appeal. On February 21, 2019, the district court denied the motion for stay. On February 28, 2019, the Department filed a motion for stay in the U.S. Court of Appeals for the Tenth Circuit. The reply brief in support of the motion was filed on March 18, 2019. The Court of Appeals denied the motion for stay on April 3, 2019, reasoning that the Department was not required to do anything under the district court’s order if there was no pending renewed application for a passport from Zzyym. The case will be discussed further in *Digest 2019*.

In sum, at present, DOS's information technology systems are incapable of producing a passport bearing an "X" sex designation while also properly recording that information in DOS's databases. In order to ensure that even a single passport issued to Plaintiff with an "X" sex designation functions properly like a passport with an "M" or "F" designation, a host of modifications would be required to the entire system for issuing passports and recording their information. The Department estimates these modifications would take approximately 24 months and cost roughly \$11 million. And although it is possible to create a passport bearing an "X" designation outside of the Department's normal processes, such a passport would not function properly. In particular, the sex field information would not be reflected in all of the pertinent databases of DOS or other federal agencies, including U.S. Customs and Border Protection. As a result, use of the passport would likely lead to significant delays and inconvenience when entering the U.S. and create difficulties for the bearer if the passport were to be lost or stolen overseas. Nor would such a passport comply with DOS's published policies, likely leading to delay, inconvenience, or denial of entry at foreign borders. More generally, the production of any passport out of compliance with DOS's published policies would undermine the Government's efforts to fight fraud, detect illegal entry, and prevent terrorism, and would undermine the credibility of all U.S. passports, causing harm to U.S. travelers.

In contrast to the harms to the Government and public described above, a stay pending appeal will not substantially injure Plaintiff. During the pendency of the appeal, Plaintiff may still receive an interim passport with an "M" or "F" marker. Such a passport would permit Plaintiff to travel abroad without impediment, alleviating any irreparable harm Plaintiff could otherwise incur.

Finally, Defendants have made a strong showing that they are likely to succeed on the merits. In this regard, for the reasons set forth below, this Court need not find that its decision was in error in order to stay its injunction, given the balance of harms at stake and the serious questions of law at issue. In any event, Defendants respectfully submit that the Court misapplied the ... arbitrary and capricious standard, which requires the agency to do nothing more than examine the relevant data and articulate a rational connection between the facts found and the decision made. ... DOS did just that: it identified five reasons in support of its decision to retain the sex-designation policy. A.R. 83–86. Although the Court identified what it saw as shortcomings in these reasons, the key inquiry is whether a rational decision maker could arrive at the challenged policy based on those reasons.

* * * *

Under the Constitution, "the President ha[s] primary responsibility—along with the necessary power—to protect the national security and to conduct the Nation's foreign relations." *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2097 (2015). In furtherance of its sovereign interests, the federal government has dedicated significant effort and resources to establishing the U.S. Passport as the "gold standard" international travel document. Risch Decl. ¶ 6. This status is grounded both in the quality of the document itself and in the document's credibility—that it reflects information that is accurate and is backed up by a robust set of publicized DOS regulations and policies. *Id.* ¶¶ 6, 9. For these reasons, whenever DOS implements a change to its passport standards (even a minor one), it undertakes "substantial effort to notify all countries about the impending change and send exemplars of the document so that foreign authorities can

recognize the valid document.” *Id.* ¶ 6. This helps ensure that U.S. passports are recognized as a valid travel document wherever they are presented...

The production of even a single standard or emergency passport with an “X” sex marker, in contravention of DOS’s published policies, would likely undermine the U.S. Passport’s status as the gold standard identity and travel document, for several reasons. *Id.* ¶ 7. First, the use of such a passport could “undermine the confidence that other countries rightfully have in our process for ensuring the validity of our passports, and thus give rise to doubts about the credibility of all U.S. passports.” *Id.* ¶ 10. In turn, this may cause foreign officials to give increased scrutiny to U.S. passports and U.S. travelers generally. *Id.* This would prove to the detriment of the Government and the public, as travelers would experience increased disruption, inconvenience, and delay. *Id.* ¶ 10.

Similarly, a foreign government’s willingness to accept such a passport could undermine the United States’ interest in promoting a reliable and secure system of international travel. As Assistant Secretary Risch explains, foreign governments “could be more inclined to accept, or less able to refuse, similarly nonconforming passports issued by other countries in the future.” *Id.* ¶ 12. This complication raises security concerns for the United States and other countries, as bad actors could exploit this vulnerability to cross borders. *See id.*

Finally, the U.S. Government relies on the information and exemplars provided by other countries in order to police the use of fraudulent or altered passports at our own borders. *Id.* ¶ 11. The more reliable those foreign standards and exemplars are, the better the U.S. Government can defend against fraud, illegal entry, and terrorism. *Id.* By issuing a passport not in compliance with DOS’s *own* standards, the Government undermines its ability to insist that other countries abide by their own standards. *Id.* To protect all of these interests, the United States simply does not issue “one-off” passports. *Id.* ¶ 7.

In sum, DOS is unable at this time to produce by its standard processes a fully functioning U.S. passport bearing an “X” in the sex field. A “one-off” passport with an “X” sex marker would not function properly without systematic changes, and the changes necessary to achieve that capability would cost roughly \$11 million and take approximately 24 months. Specifically, a “one off” passport with an “X” designation would likely lead to delays, inconvenience, and denials of entry for the bearer. The Government, in turn, could face harms to its abilities to detect unlawful conduct, as well as to its sovereign interests in the U.S. passport system generally.

* * * *

3. U.S. Passports Invalid for Travel to North Korea

As discussed in *Digest 2017* at 7, U.S. passports were declared invalid for travel to the Democratic People’s Republic of Korea (“DPRK”), pursuant to 22 CFR 51.63(a)(3), for a period of one year beginning September 1, 2017. Effective September 1, 2018, the Department of State extended the restriction until August 31, 2019. 83 Fed. Reg. 44,688 (Aug. 31, 2018). The State Department “determined that there continues to be serious risk to United States nationals of arrest and long-term detention representing imminent danger to the physical safety of United States nationals traveling to and within the DPRK.” *Id.*

B. IMMIGRATION AND VISAS**1. Consular Nonreviewability****a. Allen v. Milas**

As discussed in *Digest 2017* at 13-16, the United States brief on appeal in *Allen v. Milas* argued that the decision to deny plaintiff's wife's application for a visa was not reviewable. The U.S. Court of Appeals for the Ninth Circuit issued its decision in the case on July 24, 2018. While the Court of Appeals rejected the assertion that the doctrine of consular nonreviewability was jurisdictional and found that the district court had jurisdiction to review the denial, it held that the scope of that review is limited by the doctrine and the consular officer in the case had cited facially legitimate and bona fide reasons for refusing the visa application. The Court also affirmed that the doctrine of consular nonreviewability precludes APA review of a consular officer's adjudication of a visa application. The decision is excerpted below. 896 F.3d. 1094 (9th Cir. 2018). See *Digest 2015* at 15-20 for discussion of the Supreme Court's decision in *Kerry v. Din*, which is discussed in the decision.

* * * *

Section 1201(g)(3) of Title 8 provides that no visa shall be issued if “the consular officer knows or has reason to believe that such alien is ineligible to receive a visa or such other documentation under section 1182 of this title, or any other provision of law.” In accord with this provision, the consular officer here advised Mrs. Allen of the two grounds on which he believed she was not eligible for a visa under § 1182. First, because she had been convicted of a theft offense, the consular officer determined that she was ineligible for a visa because theft is a crime involving moral turpitude. 8 U.S.C. § 1182(a) (2)(A)(i)(I). Second, the officer determined that because Mrs. Allen had been convicted of “illicit acquisition of narcotics” under German law, she was ineligible for a visa because she had been convicted of “a violation of ... any law or regulation of ... a foreign country relating to a controlled substance.” *Id.* § 1182(a)(2)(A)(i)(II).

* * * *

We conclude that the district court had subject matter jurisdiction in this case under 28 U.S.C. § 1331 and the doctrine of consular nonreviewability did not strip the district court of that jurisdiction. Subject matter jurisdiction over this class of claims, otherwise amply provided here by the federal question statute, is constrained only if we identify and apply some “prescripti[ve] delineati[on]” on our “adjudicatory authority.” *Id.* at 160–61, 130 S.Ct. 1237 (quoting *Kontrick*, 540 U.S. at 455, 124 S.Ct. 906); see *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153, 133 S.Ct. 817, 184 L.Ed.2d 627 (2013) (requiring a “clear statement” from Congress that “the rule is jurisdictional”). We know of no such “prescriptive delineation,” and the government has not pointed to any. The rule at issue here, that is, the rule of consular nonreviewability, supplies a rule of decision, not a constraint on the subject matter jurisdiction of the federal courts. See *Fiallo v. Bell*, 430 U.S. 787, 795–96 n.6, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977) (denying that “the

Government's power in this area [of immigration] is never subject to judicial review," but "only to limited judicial review"); *Mathews v. Diaz*, 426 U.S. 67, 81–82, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976) ("The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization."); *Matushkina v. Nielsen*, 877 F.3d 289, 294 n.2 (7th Cir. 2017) ("We treat the doctrine of consular nonreviewability as a matter of a case's merits rather than the federal courts' subject matter jurisdiction."). We discuss consular nonreviewability and *Mandel* in greater detail below, but it suffices at present to observe that the Court's "facially legitimate and bona fide" standard is not the language of subject matter jurisdiction, but the language of the discretion courts afford consular officers. It is a scope of review, the contours of which we turn to now. The district court was correct to treat the government's Rule 12(b)(1) motion as a motion under Rule 12(b)(6).

B

The core of Allen's petition is that he was entitled to judicial review of the non-issuance of his wife's visa under the "scope of review" provisions of the APA found in § 706. More particularly, Allen contends that the consular officer failed to apply the appropriate legal standards to Mrs. Allen's German convictions, and that this legal error renders the consular officer's decision "arbitrary, capricious, and otherwise not in accordance with law."

* * * *

We recognize that the APA's judicial review provisions supply a "strong presumption that Congress intends judicial review of administrative action." *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670, 106 S.Ct. 2133, 90 L.Ed.2d 623 (1986). Sections 701–06 of the APA supply a "default rule ... that agency actions are reviewable under federal question jurisdiction ... even if no statute specifically authorizes judicial review." *ANA Int'l, Inc. v. Way*, 393 F.3d 886, 890 (9th Cir. 2004). ...

* * * *

Nevertheless, the APA itself anticipates that, on occasion, Congress might itself abrogate the presumption of judicial review. First, the APA recognizes that a statute may preclude judicial review. 5 U.S.C. § 701(a)(1). Second, the APA provides that its judicial review provisions do not apply where "agency action is committed to agency discretion by law," *id.* § 701(a)(2), a "rare instance[] where statutes are drawn in such broad terms that in a given case there is no law to apply." *Webster v. Doe*, 486 U.S. 592, 599, 108 S.Ct. 2047, 100 L.Ed.2d 632 (1988) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971)); *see also, e.g., Ekimian v. INS*, 303 F.3d 1153, 1157–58 (9th Cir. 2002) (finding no judicially reviewable standard to examine BIA decision's not to reopen a case). The government does not contend that either of these exceptions to judicial review applies.

The APA recognizes two other instances in which at least some provisions of §§ 701–06 might not apply. Section 702 confers the broad right to judicial review and sets out the cause of action, but then concludes in limiting fashion:

Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

This narrows our focus: Is the doctrine of consular nonreviewability either (1) a “limitation[] on judicial review” or (2) based on statutes that “impliedly forbid[] the relief which is sought”? In other words, is Allen entitled to APA review of the consular official's decision not to issue his wife a visa, or is the standard set forth in *Mandel* his only avenue for judicial relief? The D.C. Circuit has addressed this precise question, and it concluded that *Mandel* supplies the only standard by which the federal courts can review a consular officer's decision on the merits. *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1162–63 (D.C. Cir. 1999). We start with *Mandel* and the rule of consular nonreviewability, and we then turn to *Saavedra Bruno*.

* * * *

In *Mandel*, the Court reaffirmed that where Congress entrusts discretionary visa-processing and ineligibility-waiver authority in a consular officer or the Attorney General, the courts cannot substitute their judgments for those of the Executive. 408 U.S. at 769–70, 92 S.Ct. 2576. But the Court also recognized a narrow exception for review of constitutional claims. Belgian Marxist Ernest Mandel was denied a visa to visit the United States for academic activities. *Id.* at 756–57. ...[T]he Supreme Court began with the proposition that Mandel had no right of entry and thus no personal right to judicial review. 408 U.S. at 762, 92 S.Ct. 2576. The Court assumed the professor plaintiffs had First Amendment rights to hear Mandel speak, and sought a means to balance their rights against Congress's grant of discretionary waiver authority to the Attorney General. It did so against the presumption of consular nonreviewability that had embedded itself as a rule of decision, the provenance of which the Court was “not inclined in the present context to reconsider.” *Id.* at 767, 92 S.Ct. 2576. Rejecting Mandel's request for an “arbitrary and capricious” standard of review, *id.* at 760, 92 S.Ct. 2576, the Court recognized an exception to the rule of consular nonreviewability for review of constitutional claims. The exception itself is quite narrow, requiring deference to the consular officer's decision so long as “that reason was facially legitimate and bona fide.” *Id.* at 769, 92 S.Ct. 2576. The Court concluded:

We hold that when the Executive exercises this power [of exclusion] negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, not test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant.

Id. at 770, 92 S.Ct. 2576.

The Court returned to *Mandel* in *Fiallo v. Bell*, 430 U.S. 787, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977). There, three sets of fathers and sons challenged immigration laws giving preference to natural mothers of “illegitimate” children, thereby alleging constitutional injury through “‘double-barreled’ discrimination based on sex and illegitimacy.” *Id.* at 788, 794, 97 S.Ct. 1473. The government argued that these claims were not subject to judicial review at all, a claim the Court rejected. But the Court also rejected any review beyond that set out in *Mandel*: “We can

see no reason to review the broad congressional policy choice at issue here under a more exacting standard than was applied in *Kleindienst v. Mandel*.” *Id.* at 795, 97 S.Ct. 1473.

The *Mandel* rule was again upheld in *Din*. 135 S.Ct. at 2141. Din, a U.S. citizen, challenged a consular officer’s decision to deny an entry visa to her husband, and sought a writ of mandamus and a declaratory judgment to remedy her alleged constitutional injury arising out of the visa denial. *Id.* at 2131–32 (plurality opinion of Scalia, J.). Justice Scalia, joined by Chief Justice Roberts and Justice Thomas, found in a plurality opinion that Din had no such constitutional right and so received the process due. *Id.* at 2138–40. But Justice Kennedy, joined by Justice Alito, concurred in the judgment alone, in the narrowest and thus controlling opinion in that case. See *Cardenas v. United States*, 826 F.3d 1164, 1171 (9th Cir. 2016). Justice Kennedy found it unnecessary to answer whether Din had a protected constitutional interest, because even assuming she did “[t]he reasoning and the holding in *Mandel* control here.” *Din*, 135 S.Ct. at 2139, 2140 (Kennedy, J., concurring in the judgment). Moreover, *Mandel* “extends to determinations of how much information the Government is obliged to disclose about a consular officer’s denial of a visa to an alien abroad.” *Id.* at 2141. In *Din*, the consular officer offered no explanation other than a citation to 8 U.S.C. § 1182(a)(3)(B), prohibiting visas to persons engaged in or otherwise related to statutorily defined “terrorist activity.” See 8 U.S.C. § 1182(a)(3)(B)(iii). For Justice Kennedy, “the Government satisfied any obligation it might have had to provide Din with a facially legitimate and bona fide reason for its action.” *Din*, 135 S.Ct. at 2141 (Kennedy, J., concurring in the judgment).

Mandel, *Fiallo*, and *Din* all involved constitutional claims. We have applied the *Mandel* rule in a variety of circumstances involving visa denials and claimed violations of constitutional rights. *E.g.*, *Cardenas*, 826 F.3d at 1171; *Bustamante*, 531 F.3d at 1061 (describing *Mandel* as “a limited exception to the doctrine [of consular nonreviewability] where the denial of a visa implicates the constitutional rights of American citizens”). Most recently, in *Trump v. Hawaii*, the Court observed that its “opinions have reaffirmed and applied [*Mandel*’s] deferential standard of review across different contexts and constitutional claims.” — U.S. —, —, 138 S.Ct. 2392, — L.Ed.2d — (2018). Allen concedes *Mandel*’s limited scope of review as to constitutional challenges to visa denials. He argues nonetheless that he is entitled to APA review of his claims, which he characterizes as a nonconstitutional statutory challenge to the consular Officer’s allegedly nondiscretionary duty.

The D.C. Circuit rejected this argument in *Saavedra Bruno*. When a consular officer in Bolivia refused to issue a visa to Saavedra Bruno, he brought suit under the APA, arguing that he was entitled to review for the purpose of challenging factual errors on which the official ostensibly made his decision. 197 F.3d at 1155–56. After a careful review of the historical origins of the consular nonreviewability rule, the court wrote:

[W]e may infer that the immigration laws preclude judicial review of consular visa decisions. There was no reason for Congress to say as much expressly. Given the historical background against which it has legislated over the years, ... Congress could safely assume that aliens residing abroad were barred from challenging consular visa decisions in federal court unless legislation specifically permitted such actions. The presumption, in other words, is the opposite of what the APA normally supposes.

Id. at 1162. From this the court deduced that “[i]n terms of APA § 702(1), the doctrine of consular nonreviewability —the origin of which predates passage of the APA,” constitutes precisely such a “limitation[] on judicial review” unaffected by § 702’s otherwise glad-handing statutory cause of action and right of review to those suffering “ ‘legal wrong’ from agency action.” *Id.* at 1160 (quoting 5 U.S.C. § 702). In sum, “the immigration laws preclude judicial review of consular visa decisions.” *Id.* at 1162; *see also Morfin v. Tillerson*, 851 F.3d 710, 714 (7th Cir. 2017) (rejecting a claim brought under the APA that a consular decision was arbitrary and capricious and not supported by substantial evidence, and concluding that “the denial of a visa application is not a question open to review by the judiciary”).

We agree with the D.C. Circuit’s analysis and conclusion in *Saavedra Bruno*. If Allen were correct, then constitutional claims would be reviewable under the limited *Mandel* standard, and nonconstitutional claims would be reviewable under the APA; in other words, all claims would be reviewable under some standard. Allen’s theory converts consular nonreviewability into consular reviewability. The conclusion flies in the face of more than a century of decisions limiting our review of consular visa decisions. Allen attempts to narrow our focus to *legal* error, which he argues is within the province of the judiciary. We reject his argument for several reasons. First, the burden the INA places on consular officers— who may or may not have any formal legal training— is not to make *legal* determinations in a way that an administrative agency (such as the BIA) or a court might do. Rather the officer is charged with adjudicating visas under rules prescribed by law, and the officer is instructed not to issue a visa if the officer “knows or has reason to believe that such alien is ineligible to receive a visa” under any provision of law. 8 U.S.C. § 1201(g)(3).

Second, the distinction Allen presses for would eclipse the *Mandel* exception itself. The claims in *Mandel*, *Fiallo*, and *Din* were all legal claims. To be sure, they were legal claims based on the law of the Constitution, as opposed to statutory law, but we fail to see why legal claims based on statute should receive greater protection than legal claims based on the Constitution. Indeed, we think the Court has already rejected such an argument in *Webster*, 486 U.S. at 594, 108 S.Ct. 2047. There the Court addressed whether a statute giving the Director of the CIA blanket authority to terminate any officer or employee when deemed “necessary or advisable in the interests of the United States,” rendered the Director’s decisions unreviewable under § 701(a)(2). *Id.* at 594, 601, 108 S.Ct. 2047 (quoting 50 U.S.C. § 403(c)). Although the Court found that Doe’s claims could not be reviewed under the APA, it did find that Doe could nonetheless otherwise raise constitutional claims arising out of his termination, namely that his termination deprived him of liberty and property interests, denied him equal protection under the law, and impaired his right to privacy. *Webster*, 486 U.S. at 601–05, 108 S.Ct. 2047. After *Webster*, we have assumed that the courts will be open to review of constitutional claims, even if they are closed to other claims. *See, e.g., Am. Fed’n of Gov’t Employees Local 1 v. Stone*, 502 F.3d 1027, 1034–39 (9th Cir. 2007). Allen’s argument would flip *Webster* on its head: Statutory arguments would be subject to full APA review even if constitutional arguments, per *Mandel*, are not. We find no support for Allen’s position.

* * * *

We join the D.C. Circuit in holding that the APA provides no avenue for review of a consular officer's adjudication of a visa on the merits. Whether considered under § 702(1) or (2), the doctrine of consular nonreviewability is a limitation on the scope of our judicial review and thus precludes our review under § 706. Allen raises no claim to review under *Mandel*, and regardless, we agree with the district court that the consular officer's citations to the INA and identification of Mrs. Allen's criminal history constituted facially legitimate and bona fide reasons for rejecting her visa application.

* * * *

b. Zeng

On October 18, 2018, the U.S. Court of Appeals for the Second Circuit issued its decision in *Zeng v. Pompeo*, No. 17-2902 (2018). The Second Circuit affirmed the decision of the district court dismissing the case. Excerpts follow from the decision.

* * * *

Zeng contends that the District Court erred in denying his motion to amend his complaint to bring a due process claim challenging the Consulate's denial of his wife's visa. ...

We conclude that the District Court did not err in denying Zeng's motion to amend, although we reach this conclusion on slightly different grounds than the District Court. Zeng sought to amend his complaint to state a due process claim based on the U.S. Consulate's decision to deny his wife a visa due to a finding that she had misrepresented her employment history in a prior visa application.

The doctrine of consular nonreviewability generally bars courts from reviewing a consular officer's denial of a visa. *Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 123 (2d Cir. 2009). But we have concluded that there is a narrow exception where a plaintiff alleges that the denial of a visa to a visa applicant violated the plaintiff's First Amendment right to have the applicant present his views in this Country. *Id.* at 125 (relying on *Kleindienst v. Mandel*, 408 U.S. 753 (1972)). Under such circumstances, a court will review the consular officer's denial of a visa to determine whether the officer acted "on the basis of a facially legitimate and bona fide reason." *Id.* (quoting *Mandel*, 408 U.S. at 769–70). This standard will be satisfied where a consular officer relies on a statutory ground of inadmissibility, unless the plaintiff affirmatively proffers "a well supported allegation of bad faith." *Id.* at 137.

Zeng urges that the District Court erred in failing to apply this limited review and in failing to conclude that the consular officer denied the visa without any bona fide reason to do so. We have not decided whether this narrow exception to the consular nonreviewability doctrine applies to constitutional challenges other than First Amendment challenges, such as due process challenges. *Cf. Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring) (construing *Mandel* to apply where a plaintiff alleges that the visa denial "burdens a citizen's own constitutional rights" and applying *Mandel* to a due process claim). Nor have we ever decided whether a citizen has a due process right to live in this country with their spouse. *See id.* at 2133–36 (Scalia, J., plurality opinion) (holding that wife had no protectible liberty interest in living in

the United States with her husband and could not bring a due process claim based on denial of his visa application). But even if we were to conclude that the limited “bona fide reason” review does apply to due process claims and that Zeng has a due process right to live in the United States with his wife, we would affirm the ruling of the District Court.

Here, the Consulate provided a bona fide and facially legitimate reason for denying Zeng’s wife a visa—namely, that she had made a material misrepresentation about her employment when applying for a visa. Such a misrepresentation rendered her inadmissible. *See* 8 U.S.C. § 1201(g) (“No visa...shall be issued to an alien if ...it appears to the consular officer ... that such alien is ineligible to receive a visa... under section 1182 of this title”); *id.* § 1182(a)(6)(C)(i) (“Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this chapter is inadmissible.”). Moreover, Zeng’s allegation that the Consulate relied on sixteen-year-old information does not constitute a well-supported allegation of bad faith. Neither 8 U.S.C. § 1201(g) nor § 1182(a)(6)(C)(i) contain a limitation on considering such information. Accordingly, the Consulate has satisfied its minimal burden of providing a bona fide reason for denying the visa, and we will not “look behind the exercise of [the consulate’s] discretion.” *Am. Acad. of Religion*, 573 F.3d at 125 (quoting *Mandel*, 408 U.S. at 769–70). As such, Zeng’s proposed amendment was futile, and the District Court did not err by denying Zeng’s motion to amend.

* * * *

2. Visa Regulations and Restrictions

a. Visa sanctions

On November 27, 2018, the State Department issued the determination, dated October 15, 2018, that visa sanctions should be imposed pursuant to section 604 of the Foreign Relations Authorization Act, Fiscal Year 2003 (Pub. L. 107–228) (the “Act”). 83 Fed. Reg. 60,937 (Nov. 27, 2018). Specifically, the determination was that the sanction set out in section 604(a)(1), “Denial of Visas to PLO and Palestinian Authority Officials,” should be imposed for a period of 180 days due to the extent of noncompliance by the Palestine Liberation Organization (“PLO”) or the Palestinian Authority with certain commitments. *Id.* The State Department also determined at the same time that the sanction should be waived pursuant to section 604(c) of the Act for a period of 180 days. *Id.*

b. Visas for same-sex partners of foreign government personnel

On October 2, 2018, senior State Department officials provided a briefing on the eligibility for diplomatic visas for same-sex domestic partners of foreign government officials and international organization personnel traveling to and/or serving in foreign missions or at international organizations in the United States. Excerpts follow from the briefing transcript, which is available at <https://www.state.gov/senior-administration-officials-on-visas-for-same-sex-domestic-partners-of-g-4-and-diplomatic-visa-holders/>.

* * * *

...[T]he purpose of the policy is to promote the equal treatment of all family members and couples, and this decision is in light of the 2015 Supreme Court decision legalizing same-sex marriage. So since 2015, the department announced that it would change its policies to accommodate that Supreme Court decision, and this is part of that policy.

...[R]oughly there are 105 families that would be impacted total in the U.S., and of those only about 55 are with international organizations. ... [W]e understand that a lot of other countries don't necessarily view that the same way, so we are proud of the fact that we're forward-leaning in this policy and are glad that we can implement a policy in furtherance of that. And the department has also been working with foreign governments where same-sex marriage isn't legal to – and like, for example, Israel, where our foreign diplomats – our diplomats serving abroad in Israel are treated the same as opposite-sex spouses. So in the U.S., we would then do the same for those spouses.

And then with respect to IOs, ...international organizations, we expect that there will be lots of questions from that since our policy is slightly different, and we are happy to review any such cases specifically and certainly look forward to doing that and working with them to find a solution.

* * * *

...Just wanted to tell you a little bit about the timeline of our communications with the UN and the foreign missions up here in New York. We've had a dialogue since July on this change to our policy. From the beginning, we've stressed that we'd work closely with the UN and the foreign missions to help people meet these new requirements. I also communicated that if the requirements couldn't be met, that we'd work with individuals on a case-by-case basis to help them to try to legally adjust their status to remain in the United States after the deadline. I'd be happy to answer questions about the process of informing the UN and the foreign missions.

* * * *

U.S. diplomats as of yesterday have to be legally married in order to get ...derivative diplomatic status when they go overseas, so these changes are to mirror what U.S. policy now is.

... if same-sex marriage is legal in that host country, then they would have to be married to get the diplomatic visa derivative status for their partner. If they're from a country that does not recognize same-sex marriage, then we will put processes in place to create a process so that ... the partner could still get derivative status in the United States. So the policy recognizes that not all countries have the same policy as we do, that they don't all recognize same-sex marriage legal as we do, as long as those countries act in a reciprocal fashion towards us and our diplomats.

* * * *

c. *Executive Actions on Foreign Terrorist Entry into the United States*

As discussed in *Digest 2017* at 17-28, the President issued several orders in 2017 on protecting the United States from foreign terrorist entry. These actions were the subject of litigation in multiple courts. On January 19, 2018, the U.S. Supreme Court granted a petition for certiorari in a case challenging Proclamation No. 9645 of September 24, 2017. *Trump v. Hawaii*, No. 17-965.

On April 10, 2018, the President lifted travel restrictions for Chadian nationals imposed under Proclamation 9654. See State Department press statement, available at <https://www.state.gov/presidential-proclamation-lifts-travel-restrictions-for-chad/>. The press statement explains that the Government of Chad had improved its identity-management and information sharing practices. The statement explains further that:

Chad is a critical and vital partner to the U.S. counterterrorism mission. Chad has made significant strides and now meets the baseline criteria established in the Presidential Proclamation. For this reason, the travel restrictions placed on Chad are terminated effective April 13. Its citizens will again be able to receive visas for travel to the United States.

In *Trump v. Hawaii*, the Supreme Court issued its decision on June 26, 2018, holding that the President’s issuance of Proclamation 9645 was a lawful exercise of the broad discretion granted to him to suspend the entry of aliens into the United States. Excerpts follow from the majority opinion (with footnotes omitted). The two concurring opinions and two dissenting opinions are not excerpted herein.

* * * *

Under the Immigration and Nationality Act, foreign nationals seeking entry into the United States undergo a vetting process to ensure that they satisfy the numerous requirements for admission. The Act also vests the President with authority to restrict the entry of aliens whenever he finds that their entry “would be detrimental to the interests of the United States.” 8 U. S. C. §1182(f). Relying on that delegation, the President concluded that it was necessary to impose entry restrictions on nationals of countries that do not share adequate information for an informed entry determination, or that otherwise present national security risks. Presidential Proclamation No. 9645, 82 Fed. Reg. 45161 (2017) (Proclamation). The plaintiffs in this litigation, respondents here, challenged the application of those entry restrictions to certain aliens abroad. We now decide whether the President had authority under the Act to issue the Proclamation, and whether the entry policy violates the Establishment Clause of the First Amendment.

I A

Shortly after taking office, President Trump signed Executive Order No. 13769, Protecting the Nation From Foreign Terrorist Entry Into the United States. 82 Fed. Reg. 8977 (2017) (EO–1). EO–1 directed the Secretary of Homeland Security to conduct a review to examine the adequacy of information provided by foreign governments about their nationals seeking to enter the United States. §3(a). Pending that review, the order suspended for 90 days the entry of foreign nationals from seven countries— Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen— that had been previously identified by Congress or prior administrations as posing heightened terrorism risks. §3(c). The District Court for the Western District of Washington entered a temporary restraining order blocking the entry restrictions, and the Court of Appeals for the Ninth Circuit denied the Government’s request to stay that order. *Washington v. Trump*, 847 F. 3d 1151 (2017) (*per curiam*).

In response, the President revoked EO–1, replacing it with Executive Order No. 13780, which again directed a worldwide review. 82 Fed. Reg. 13209 (2017) (EO–2). Citing investigative burdens on agencies and the need to diminish the risk that dangerous individuals would enter without adequate vetting, EO–2 also temporarily restricted the entry (with case-by-case waivers) of foreign nationals from six of the countries covered by EO–1: Iran, Libya, Somalia, Sudan, Syria, and Yemen. §§2(c), 3(a). The order explained that those countries had been selected because each “is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones.” §1(d). The entry restriction was to stay in effect for 90 days, pending completion of the worldwide review.

These interim measures were immediately challenged in court. The District Courts for the Districts of Maryland and Hawaii entered nationwide preliminary injunctions barring enforcement of the entry suspension, and the respective Courts of Appeals upheld those injunctions, albeit on different grounds. *International Refugee Assistance Project (IRAP) v. Trump*, 857 F. 3d 554 (CA4 2017); *Hawaii v. Trump*, 859 F. 3d 741 (CA9 2017) (*per curiam*). This Court granted certiorari and stayed the injunctions— allowing the entry suspension to go into effect—with respect to foreign nationals who lacked a “credible claim of a bona fide relationship” with a person or entity in the United States. *Trump v. IRAP*, 582 U. S. ___, ___ (2017) (*per curiam*) (slip op., at 12). The temporary restrictions in EO–2 expired before this Court took any action, and we vacated the lower court decisions as moot. *Trump v. IRAP*, 583 U. S. ___ (2017); *Trump v. Hawaii*, 583 U. S. ___ (2017).

On September 24, 2017, after completion of the worldwide review, the President issued the Proclamation before us—Proclamation No. 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats. 82 Fed. Reg. 45161. The Proclamation (as its title indicates) sought to improve vetting procedures by identifying ongoing deficiencies in the information needed to assess whether nationals of particular countries present “public safety threats.” §1(a). To further that purpose, the Proclamation placed entry restrictions on the nationals of eight foreign states whose systems for managing and sharing information about their nationals the President deemed inadequate.

The Proclamation described how foreign states were selected for inclusion based on the review undertaken pursuant to EO–2. As part of that review, the Department of Homeland Security (DHS), in consultation with the State Department and several intelligence agencies, developed a “baseline” for the information required from foreign governments to confirm the identity of individuals seeking entry into the United States, and to determine whether those

individuals pose a security threat. §1(c). The baseline included three components. The first, “identity-management information,” focused on whether a foreign government ensures the integrity of travel documents by issuing electronic passports, reporting lost or stolen passports, and making available additional identity-related information. Second, the agencies considered the extent to which the country discloses information on criminal history and suspected terrorist links, provides travel document exemplars, and facilitates the U. S. Government’s receipt of information about airline passengers and crews traveling to the United States. Finally, the agencies weighed various indicators of national security risk, including whether the foreign state is a known or potential terrorist safe haven and whether it regularly declines to receive returning nationals following final orders of removal from the United States. *Ibid.*

DHS collected and evaluated data regarding all foreign governments. §1(d). It identified 16 countries as having deficient information-sharing practices and presenting national security concerns, and another 31 countries as “at risk” of similarly failing to meet the baseline. §1(e). The State Department then undertook diplomatic efforts over a 50-day period to encourage all foreign governments to improve their practices. §1(f). As a result of that effort, numerous countries provided DHS with travel document exemplars and agreed to share information on known or suspected terrorists. *Ibid.*

Following the 50-day period, the Acting Secretary of Homeland Security concluded that eight countries—Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen—remained deficient in terms of their risk profile and willingness to provide requested information. The Acting Secretary recommended that the President impose entry restrictions on certain nationals from all of those countries except Iraq. §§1(g), (h). She also concluded that although Somalia generally satisfied the information-sharing component of the baseline standards, its “identity-management deficiencies” and “significant terrorist presence” presented special circumstances justifying additional limitations. She therefore recommended entry limitations for certain nationals of that country. §1(i). As for Iraq, the Acting Secretary found that entry limitations on its nationals were not warranted given the close cooperative relationship between the U.S. and Iraqi Governments and Iraq’s commitment to combating ISIS. §1(g).

After consulting with multiple Cabinet members and other officials, the President adopted the Acting Secretary’s recommendations and issued the Proclamation. Invoking his authority under 8 U. S. C. §§1182(f) and 1185(a), the President determined that certain entry restrictions were necessary to “prevent the entry of those foreign nationals about whom the United States Government lacks sufficient information”; “elicit improved identity-management and information-sharing protocols and practices from foreign governments”; and otherwise “advance [the] foreign policy, national security, and counter-terrorism objectives” of the United States. Proclamation §1(h). The President explained that these restrictions would be the “most likely to encourage cooperation” while “protect[ing] the United States until such time as improvements occur.” *Ibid.*

The Proclamation imposed a range of restrictions that vary based on the “distinct circumstances” in each of the eight countries. *Ibid.* For countries that do not cooperate with the United States in identifying security risks (Iran, North Korea, and Syria), the Proclamation suspends entry of all nationals, except for Iranians seeking nonimmigrant student and exchange-visitor visas. §§2(b)(ii), (d)(ii), (e)(ii). For countries that have information-sharing deficiencies but are nonetheless “valuable counterterrorism partner[s]” (Chad, Libya, and Yemen), it restricts entry of nationals seeking immigrant visas and nonimmigrant business or tourist visas. §§2(a)(i), (c)(i), (g)(i). Because Somalia generally satisfies the baseline standards but was found to present

special risk factors, the Proclamation suspends entry of nationals seeking immigrant visas and requires additional scrutiny of nationals seeking nonimmigrant visas. §2(h)(ii). And for Venezuela, which refuses to cooperate in information sharing but for which alternative means are available to identify its nationals, the Proclamation limits entry only of certain government officials and their family members on nonimmigrant business or tourist visas. §2(f)(ii).

The Proclamation exempts lawful permanent residents and foreign nationals who have been granted asylum. §3(b). It also provides for case-by-case waivers when a foreign national demonstrates undue hardship, and that his entry is in the national interest and would not pose a threat to public safety. §3(c)(i); see also §3(c)(iv) (listing examples of when a waiver might be appropriate, such as if the foreign national seeks to reside with a close family member, obtain urgent medical care, or pursue significant business obligations). The Proclamation further directs DHS to assess on a continuing basis whether entry restrictions should be modified or continued, and to report to the President every 180 days. §4. Upon completion of the first such review period, the President, on the recommendation of the Secretary of Homeland Security, determined that Chad had sufficiently improved its practices, and he accordingly lifted restrictions on its nationals. Presidential Proclamation No. 9723, 83 Fed. Reg. 15937 (2018).

B

Plaintiffs in this case are the State of Hawaii, three individuals (Dr. Ismail Elshikh, John Doe #1, and John Doe #2), and the Muslim Association of Hawaii. The State operates the University of Hawaii system, which recruits students and faculty from the designated countries. The three individual plaintiffs are U.S. citizens or lawful permanent residents who have relatives from Iran, Syria, and Yemen applying for immigrant or nonimmigrant visas. The Association is a nonprofit organization that operates a mosque in Hawaii.

Plaintiffs challenged the Proclamation—except as applied to North Korea and Venezuela—on several grounds. As relevant here, they argued that the Proclamation contravenes provisions in the Immigration and Nationality Act (INA), 66 Stat. 187, as amended. Plaintiffs further claimed that the Proclamation violates the Establishment Clause of the First Amendment, because it was motivated not by concerns pertaining to national security but by animus toward Islam.

The District Court granted a nationwide preliminary injunction barring enforcement of the entry restrictions. The court concluded that the Proclamation violated two provisions of the INA: §1182(f), because the President did not make sufficient findings that the entry of the covered foreign nationals would be detrimental to the national interest, and §1152(a)(1)(A), because the policy discriminates against immigrant visa applicants on the basis of nationality. 265 F.Supp. 3d 1140, 1155–1159 (Haw. 2017). The Government requested expedited briefing and sought a stay pending appeal. The Court of Appeals for the Ninth Circuit granted a partial stay, permitting enforcement of the Proclamation with respect to foreign nationals who lack a bona fide relationship with the United States. This Court then stayed the injunction in full pending disposition of the Government’s appeal. 583 U. S. ____ (2017).

The Court of Appeals affirmed. The court first held that the Proclamation exceeds the President’s authority under §1182(f). In its view, that provision authorizes only a “temporary” suspension of entry in response to “exigencies” that “Congress would be ill-equipped to address.” 878 F. 3d 662, 684, 688 (2017). The court further reasoned that the Proclamation “conflicts with the INA’s finely reticulated regulatory scheme” by addressing “matters of immigration already passed upon by Congress.” *Id.*, at 685, 690. The Ninth Circuit then turned to §1152(a)(1)(A) and determined that the entry restrictions also contravene the prohibition on

nationality-based discrimination in the issuance of immigrant visas. The court did not reach plaintiffs' Establishment Clause claim.

We granted certiorari. 583 U. S. ____ (2018).

II

Before addressing the merits of plaintiffs' statutory claims, we consider whether we have authority to do so. The Government argues that plaintiffs' challenge to the Proclamation under the INA is not justiciable. Relying on the doctrine of consular nonreviewability, the Government contends that because aliens have no "claim of right" to enter the United States, and because exclusion of aliens is "a fundamental act of sovereignty" by the political branches, review of an exclusion decision "is not within the province of any court, unless expressly authorized by law." *United States ex rel. Knauff v. Shaughnessy*, 338 U. S. 537, 542–543 (1950). According to the Government, that principle barring review is reflected in the INA, which sets forth a comprehensive framework for review of orders of removal, but authorizes judicial review only for aliens physically present in the United States. See Brief for Petitioners 19–20 (citing 8 U.S.C. §1252).

The justiciability of plaintiffs' challenge under the INA presents a difficult question. The Government made similar arguments that no judicial review was available in *Sale v. Haitian Centers Council, Inc.*, 509 U. S. 155 (1993). The Court in that case, however, went on to consider on the merits a statutory claim like the one before us without addressing the issue of reviewability. The Government does not argue that the doctrine of consular nonreviewability goes to the Court's jurisdiction, see Tr. of Oral Arg. 13, nor does it point to any provision of the INA that expressly strips the Court of jurisdiction over plaintiffs' claims, see *Sebelius v. Auburn Regional Medical Center*, 568 U. S. 145, 153 (2013) (requiring Congress to "clearly state[]" that a statutory provision is jurisdictional). As a result, we may assume without deciding that plaintiffs' statutory claims are reviewable, notwithstanding consular nonreviewability or any other statutory nonreviewability issue, and we proceed on that basis.

III

The INA establishes numerous grounds on which an alien abroad may be inadmissible to the United States and ineligible for a visa. See, e.g., 8 U. S. C. §§1182(a)(1) (health-related grounds), (a)(2) (criminal history), (a)(3)(B) (terrorist activities), (a)(3)(C) (foreign policy grounds). Congress has also delegated to the President authority to suspend or restrict the entry of aliens in certain circumstances. The principal source of that authority, §1182(f), enables the President to "suspend the entry of all aliens or any class of aliens" whenever he "finds" that their entry "would be detrimental to the interests of the United States."

Plaintiffs argue that the Proclamation is not a valid exercise of the President's authority under the INA. In their view, §1182(f) confers only a residual power to temporarily halt the entry of a discrete group of aliens engaged in harmful conduct. They also assert that the Proclamation violates another provision of the INA—8 U. S. C. §1152(a)(1)(A)—because it discriminates on the basis of nationality in the issuance of immigrant visas.

By its plain language, §1182(f) grants the President broad discretion to suspend the entry of aliens into the United States. The President lawfully exercised that discretion based on his findings—following a worldwide, multi-agency review—that entry of the covered aliens would be detrimental to the national interest. And plaintiffs' attempts to identify a conflict with other provisions in the INA, and their appeal to the statute's purposes and legislative history, fail to overcome the clear statutory language.

A The text of §1182(f) states:

“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.”

By its terms, §1182(f) exudes deference to the President in every clause. It entrusts to the President the decisions whether and when to suspend entry (“[w]henever [he] finds that the entry” of aliens “would be detrimental” to the national interest); whose entry to suspend (“all aliens or any class of aliens”); for how long (“for such period as he shall deem necessary”); and on what conditions (“any restrictions he may deem to be appropriate”). It is therefore unsurprising that we have previously observed that §1182(f) vests the President with “ample power” to impose entry restrictions in addition to those elsewhere enumerated in the INA. *Sale*, 509 U. S., at 187 (finding it “perfectly clear” that the President could “establish a naval blockade” to prevent illegal migrants from entering the United States); see also *Abourezk v. Reagan*, 785 F. 2d 1043, 1049, n. 2 (CA DC 1986) (describing the “sweeping proclamation power” in §1182(f) as enabling the President to supplement the other grounds of inadmissibility in the INA).

The Proclamation falls well within this comprehensive delegation. The sole prerequisite set forth in §1182(f) is that the President “find[]” that the entry of the covered aliens “would be detrimental to the interests of the United States.” The President has undoubtedly fulfilled that requirement here. He first ordered DHS and other agencies to conduct a comprehensive evaluation of every single country’s compliance with the information and risk assessment baseline. The President then issued a Proclamation setting forth extensive findings describing how deficiencies in the practices of select foreign governments—several of which are state sponsors of terrorism—deprive the Government of “sufficient information to assess the risks [those countries’ nationals] pose to the United States.” Proclamation §1(h)(i). Based on that review, the President found that it was in the national interest to restrict entry of aliens who could not be vetted with adequate information—both to protect national security and public safety, and to induce improvement by their home countries. The Proclamation therefore “craft[ed]...country-specific restrictions that would be most likely to encourage cooperation given each country’s distinct circumstances,” while securing the Nation “until such time as improvements occur.” *Ibid*.

Plaintiffs believe that these findings are insufficient. They argue, as an initial matter, that the Proclamation fails to provide a persuasive rationale for why nationality alone renders the covered foreign nationals a security risk. And they further discount the President’s stated concern about deficient vetting because the Proclamation allows many aliens from the designated countries to enter on nonimmigrant visas.

Such arguments are grounded on the premise that §1182(f) not only requires the President to *make* a finding that entry “would be detrimental to the interests of the United States,” but also to explain that finding with sufficient detail to enable judicial review. That premise is questionable. See *Webster v. Doe*, 486 U. S. 592, 600 (1988) (concluding that a statute authorizing the CIA Director to terminate an employee when the Director “shall deem such termination necessary or advisable in the interests of the United States” forecloses “any meaningful judicial standard of review”). But even assuming that some form of review is appropriate, plaintiffs’ attacks on the sufficiency of the President’s findings cannot be sustained.

The 12-page Proclamation—which thoroughly describes the process, agency evaluations, and recommendations underlying the President’s chosen restrictions—is more detailed than any prior order a President has issued under §1182(f). Contrast Presidential Proclamation No. 6958, 3 CFR 133 (1996) (President Clinton) (explaining in one sentence why suspending entry of members of the Sudanese government and armed forces “is in the foreign policy interests of the United States”); Presidential Proclamation No. 4865, 3 CFR 50–51 (1981) (President Reagan) (explaining in five sentences why measures to curtail “the continuing illegal migration by sea of large numbers of undocumented aliens into the southeastern United States” are “necessary”).

Moreover, plaintiffs’ request for a searching inquiry into the persuasiveness of the President’s justifications is inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere. “Whether the President’s chosen method” of addressing perceived risks is justified from a policy perspective is “irrelevant to the scope of his [§1182(f)] authority.” *Sale*, 509 U. S., at 187–188. And when the President adopts “a preventive measure ... in the context of international affairs and national security,” he is “not required to conclusively link all of the pieces in the puzzle before [courts] grant weight to [his] empirical conclusions.” *Holder v. Humanitarian Law Project*, 561 U. S. 1, 35 (2010).

The Proclamation also comports with the remaining textual limits in §1182(f). We agree with plaintiffs that the word “suspend” often connotes a “defer[ral] till later,” Webster’s Third New International Dictionary 2303 (1966). But that does not mean that the President is required to prescribe in advance a fixed end date for the entry restrictions. Section 1182(f) authorizes the President to suspend entry “for such period as he shall deem necessary.” It follows that when a President suspends entry in response to a diplomatic dispute or policy concern, he may link the duration of those restrictions, implicitly or explicitly, to the resolution of the triggering condition. See, e.g., Presidential Proclamation No. 5829, 3 CFR 88 (1988) (President Reagan) (suspending the entry of certain Panamanian nationals “until such time as ... democracy has been restored in Panama”); Presidential Proclamation No. 8693, 3 CFR 86–87 (2011) (President Obama) (suspending the entry of individuals subject to a travel restriction under United Nations Security Council resolutions “until such time as the Secretary of State determines that [the suspension] is no longer necessary”). In fact, not one of the 43 suspension orders issued prior to this litigation has specified a precise end date.

Like its predecessors, the Proclamation makes clear that its “conditional restrictions” will remain in force only so long as necessary to “address” the identified “inadequacies and risks” within the covered nations. Proclamation Preamble, and §1(h); see *ibid.* (explaining that the aim is to “relax[] or remove[]” the entry restrictions “as soon as possible”). To that end, the Proclamation establishes an ongoing process to engage covered nations and assess every 180 days whether the entry restrictions should be modified or terminated. §§4(a), (b). Indeed, after the initial review period, the President determined that Chad had made sufficient improvements to its identity-management protocols, and he accordingly lifted the entry suspension on its nationals. See Proclamation No. 9723, 83 Fed. Reg. 15937.

Finally, the Proclamation properly identifies a “class of aliens”—nationals of select countries—whose entry is suspended. Plaintiffs argue that “class” must refer to a well-defined group of individuals who share a common “characteristic” apart from nationality. Brief for Respondents 42. But the text of §1182(f), of course, does not say that, and the word “class” comfortably encompasses a group of people linked by nationality. Plaintiffs also contend that the class cannot be “overbroad.” Brief for Respondents 42. But that simply amounts to an unspoken

tailoring requirement found nowhere in Congress’s grant of authority to suspend entry of not only “any class of aliens” but “all aliens.”

In short, the language of §1182(f) is clear, and the Proclamation does not exceed any textual limit on the President’s authority.

B

Confronted with this “facially broad grant of power,” 878 F. 3d, at 688, plaintiffs focus their attention on statutory structure and legislative purpose. They seek support in, first, the immigration scheme reflected in the INA as a whole, and, second, the legislative history of §1182(f) and historical practice. Neither argument justifies departing from the clear text of the statute.

1

Plaintiffs’ structural argument starts with the premise that §1182(f) does not give the President authority to countermand Congress’s considered policy judgments. The President, they say, may supplement the INA, but he cannot supplant it. And in their view, the Proclamation falls in the latter category because Congress has already specified a two-part solution to the problem of aliens seeking entry from countries that do not share sufficient information with the United States. First, Congress designed an individualized vetting system that places the burden on the alien to prove his admissibility. See §1361. Second, instead of banning the entry of nationals from particular countries, Congress sought to encourage information sharing through a Visa Waiver Program offering fast-track admission for countries that cooperate with the United States. See §1187.

We may assume that §1182(f) does not allow the President to expressly override particular provisions of the INA. But plaintiffs have not identified any conflict between the statute and the Proclamation that would implicitly bar the President from addressing deficiencies in the Nation’s vetting system.

To the contrary, the Proclamation supports Congress’s individualized approach for determining admissibility. The INA sets forth various inadmissibility grounds based on connections to terrorism and criminal history, but those provisions can only work when the consular officer has sufficient (and sufficiently reliable) information to make that determination. The Proclamation promotes the effectiveness of the vetting process by helping to ensure the availability of such information.

Plaintiffs suggest that the entry restrictions are unnecessary because consular officers can simply deny visas in individual cases when an alien fails to carry his burden of proving admissibility—for example, by failing to produce certified records regarding his criminal history. Brief for Respondents 48. But that misses the point: A critical finding of the Proclamation is that the failure of certain countries to provide reliable information prevents the Government from accurately determining whether an alien is inadmissible or poses a threat. Proclamation §1(h). Unless consular officers are expected to apply categorical rules and deny entry from those countries across the board, fraudulent or unreliable documentation may thwart their review in individual cases. And at any rate, the INA certainly does not *require* that systemic problems such as the lack of reliable information be addressed only in a progression of case-by-case admissibility determinations. One of the key objectives of the Proclamation is to encourage foreign governments to improve their practices, thus facilitating the Government’s vetting process overall. *Ibid.*

Nor is there a conflict between the Proclamation and the Visa Waiver Program. The Program allows travel without a visa for short-term visitors from 38 countries that have entered into a “rigorous security partnership” with the United States. DHS, U. S. Visa Waiver Program (Apr. 6, 2016), <http://www.dhs.gov/visa-waiver-program> (as last visited June 25, 2018). Eligibility for that partnership involves “broad and consequential assessments of [the country’s] foreign security standards and operations.” *Ibid.* A foreign government must (among other things) undergo a comprehensive evaluation of its “counterterrorism, law enforcement, immigration enforcement, passport security, and border management capabilities,” often including “operational site inspections of airports, seaports, land borders, and passport production and issuance facilities.” *Ibid.*

Congress’s decision to authorize a benefit for “many of America’s closest allies,” *ibid.*, did not implicitly foreclose the Executive from imposing tighter restrictions on nationals of certain high-risk countries. The Visa Waiver Program creates a special exemption for citizens of countries that maintain exemplary security standards and offer “reciprocal [travel] privileges” to United States citizens. 8 U. S. C. §1187(a)(2)(A). But in establishing a select partnership covering less than 20% of the countries in the world, Congress did not address what requirements should govern the entry of nationals from the vast majority of countries that fall short of that gold standard—particularly those nations presenting heightened terrorism concerns. Nor did Congress attempt to determine—as the multi-agency review process did—whether those high-risk countries provide a minimum baseline of information to adequately vet their nationals. Once again, this is not a situation where “Congress has stepped into the space and solved the exact problem.” Tr. of Oral Arg. 53.

Although plaintiffs claim that their reading preserves for the President a flexible power to “supplement” the INA, their understanding of the President’s authority is remarkably cramped: He may suspend entry by classes of aliens “similar in nature” to the existing categories of inadmissibility—but not too similar—or only in response to “some exigent circumstance” that Congress did not already touch on in the INA. Brief for Respondents 31, 36, 50; see also Tr. of Oral Arg. 57 (“Presidents have wide berth in this area ...if there’s any sort of emergency.”). In any event, no Congress that wanted to confer on the President only a residual authority to address emergency situations would ever use language of the sort in §1182(f). Fairly read, the provision vests authority in the President to impose additional limitations on entry beyond the grounds for exclusion set forth in the INA—including in response to circumstances that might affect the vetting system or other “interests of the United States.”

Because plaintiffs do not point to any contradiction with another provision of the INA, the President has not exceeded his authority under §1182(f).

Plaintiffs seek to locate additional limitations on the scope of §1182(f) in the statutory background and legislative history. Given the clarity of the text, we need not consider such extra-textual evidence. See *State Farm Fire & Casualty Co. v. United States ex rel. Rigsby*, 580 U. S. ___, ___ (2016) (slip op., at 9). At any rate, plaintiffs’ evidence supports the plain meaning of the provision.

Drawing on legislative debates over §1182(f), plaintiffs suggest that the President’s suspension power should be limited to exigencies where it would be difficult for Congress to react promptly. Precursor provisions enacted during the First and Second World Wars confined the President’s exclusion authority to times of “war” and “national emergency.” See Act of May 22, 1918, §1(a), 40 Stat. 559; Act of June 21, 1941, ch. 210, §1, 55 Stat. 252. When Congress enacted §1182(f) in 1952, plaintiffs note, it borrowed “nearly verbatim” from those predecessor

statutes, and one of the bill’s sponsors affirmed that the provision would apply only during a time of crisis. According to plaintiffs, it therefore follows that Congress sought to delegate only a similarly tailored suspension power in §1182(f). Brief for Respondents 39–40.

If anything, the drafting history suggests the opposite. In borrowing “nearly verbatim” from the pre-existing statute, Congress made one critical alteration—it removed the national emergency standard that plaintiffs now seek to reintroduce in another form. Weighing Congress’s conscious departure from its wartime statutes against an isolated floor statement, the departure is far more probative. See *NLRB v. SW General, Inc.*, 580 U. S. ___, ___ (2017) (slip op., at 16) (“[F]loor statements by individual legislators rank among the least illuminating forms of legislative history.”). When Congress wishes to condition an exercise of executive authority on the President’s finding of an exigency or crisis, it knows how to say just that. See, e.g., 16 U.S.C. §824o–1(b); 42 U. S. C. §5192; 50 U. S. C. §§1701, 1702. Here, Congress instead chose to condition the President’s exercise of the suspension authority on a different finding: that the entry of an alien or class of aliens would be “detrimental to the interests of the United States.”

Plaintiffs also strive to infer limitations from executive practice. By their count, every previous suspension order under §1182(f) can be slotted into one of two categories. The vast majority targeted discrete groups of foreign nationals engaging in conduct “deemed harmful by the immigration laws.” And the remaining entry restrictions that focused on entire nationalities—namely, President Carter’s response to the Iran hostage crisis and President Reagan’s suspension of immigration from Cuba—were, in their view, designed as a response to diplomatic emergencies “that the immigration laws do not address.” Brief for Respondents 40–41.

Even if we were willing to confine expansive language in light of its past applications, the historical evidence is more equivocal than plaintiffs acknowledge. Presidents have repeatedly suspended entry not because the covered nationals themselves engaged in harmful acts but instead to retaliate for conduct by their governments that conflicted with U. S. foreign policy interests. See, e.g., Exec. Order No. 13662, 3 CFR 233 (2014) (President Obama) (suspending entry of Russian nationals working in the financial services, energy, mining, engineering, or defense sectors, in light of the Russian Federation’s “annexation of Crimea and its use of force in Ukraine”); Presidential Proclamation No. 6958, 3 CFR 133 (1997) (President Clinton) (suspending entry of Sudanese governmental and military personnel, citing “foreign policy interests of the United States” based on Sudan’s refusal to comply with United Nations resolution). And while some of these reprisals were directed at subsets of aliens from the countries at issue, others broadly suspended entry on the basis of nationality due to ongoing diplomatic disputes. For example, President Reagan invoked §1182(f) to suspend entry “as immigrants” by almost all Cuban nationals, to apply pressure on the Cuban Government. Presidential Proclamation No. 5517, 3 CFR 102 (1986). Plaintiffs try to fit this latter order within their carve-out for emergency action, but the proclamation was based in part on Cuba’s decision to breach an immigration agreement some 15 months earlier.

More significantly, plaintiffs’ argument about historical practice is a double-edged sword. The more ad hoc their account of executive action—to fit the history into their theory—the harder it becomes to see such a refined delegation in a statute that grants the President sweeping authority to decide whether to suspend entry, whose entry to suspend, and for how long.

* * * *

IV
A

We now turn to plaintiffs’ claim that the Proclamation was issued for the unconstitutional purpose of excluding Muslims. Because we have an obligation to assure ourselves of jurisdiction under Article III, we begin by addressing the question whether plaintiffs have standing to bring their constitutional challenge.

* * * *

... We agree that a person’s interest in being united with his relatives is sufficiently concrete and particularized to form the basis of an Article III injury in fact. This Court has previously considered the merits of claims asserted by United States citizens regarding violations of their personal rights allegedly caused by the Government’s exclusion of particular foreign nationals. See *Kerry v. Din*, 576 U. S. ___, ___ (2015) (plurality opinion) (slip op., at 15); *id.*, at ___ (KENNEDY, J., concurring in judgment) (slip op., at 1); *Kleindienst v. Mandel*, 408 U. S. 753, 762 (1972). Likewise, one of our prior stay orders in this litigation recognized that an American individual who has “a bona fide relationship with a particular person seeking to enter the country ... can legitimately claim concrete hardship if that person is excluded.” *Trump v. IRAP*, 582 U. S., at ___ (slip op., at 13).

The Government responds that plaintiffs’ Establishment Clause claims are not justiciable because the Clause does not give them a legally protected interest in the admission of particular foreign nationals. But that argument—which depends upon the scope of plaintiffs’ Establishment Clause rights—concerns the merits rather than the justiciability of plaintiffs’ claims. We therefore conclude that the individual plaintiffs have Article III standing to challenge the exclusion of their relatives under the Establishment Clause.

B

The First Amendment provides, in part, that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” Our cases recognize that “[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.” *Larson v. Valente*, 456 U. S. 228, 244 (1982). Plaintiffs believe that the Proclamation violates this prohibition by singling out Muslims for disfavored treatment. The entry suspension, they contend, operates as a “religious gerrymander,” in part because most of the countries covered by the Proclamation have Muslim-majority populations. And in their view, deviations from the information-sharing baseline criteria suggest that the results of the multi-agency review were “foreordained.” Relying on Establishment Clause precedents concerning laws and policies applied domestically, plaintiffs allege that the primary purpose of the Proclamation was religious animus and that the President’s stated concerns about vetting protocols and national security were but pretexts for discriminating against Muslims. Brief for Respondents 69–73.

At the heart of plaintiffs’ case is a series of statements by the President and his advisers casting doubt on the official objective of the Proclamation. For example, while a candidate on the campaign trail, the President published a “Statement on Preventing Muslim Immigration” that called for a “total and complete shutdown of Muslims entering the United States until our country’s representatives can figure out what is going on.” App. 158. That statement remained on his campaign website until May 2017. *Id.*, at 130–131. Then-candidate Trump also stated that “Islam hates us” and asserted that the United States was “having problems with Muslims coming into the country.” *Id.*, at 120–121, 159. Shortly after being elected, when asked whether violence

in Europe had affected his plans to “ban Muslim immigration,” the President replied, “You know my plans. All along, I’ve been proven to be right.” *Id.*, at 123.

One week after his inauguration, the President issued EO–1. In a television interview, one of the President’s campaign advisers explained that when the President “first announced it, he said, ‘Muslim ban.’ He called me up. He said, ‘Put a commission together. Show me the right way to do it legally.’” *Id.*, at 125. The adviser said he assembled a group of Members of Congress and lawyers that “focused on, instead of religion, danger.... [The order] is based on places where there [is] substantial evidence that people are sending terrorists into our country.” *Id.*, at 229.

Plaintiffs also note that after issuing EO–2 to replace EO–1, the President expressed regret that his prior order had been “watered down” and called for a “much tougher version” of his “Travel Ban.” Shortly before the release of the Proclamation, he stated that the “travel ban ... should be far larger, tougher, and more specific,” but “stupidly that would not be politically correct.” *Id.*, at 132–133. More recently, on November 29, 2017, the President re-tweeted links to three anti-Muslim propaganda videos. In response to questions about those videos, the President’s deputy press secretary denied that the President thinks Muslims are a threat to the United States, explaining that “the President has been talking about these security issues for years now, from the campaign trail to the White House” and “has addressed these issues with the travel order that he issued earlier this year and the companion proclamation.” *IRAP v. Trump*, 883 F. 3d 233, 267 (CA4 2018).

The President of the United States possesses an extraordinary power to speak to his fellow citizens and on their behalf. Our Presidents have frequently used that power to espouse the principles of religious freedom and tolerance on which this Nation was founded. In 1790 George Washington reassured the Hebrew Congregation of Newport, Rhode Island that “happily the Government of the United States ... gives to bigotry no sanction, to persecution no assistance [and] requires only that they who live under its protection should demean themselves as good citizens.” 6 Papers of George Washington 285 (D. Twohig ed. 1996). President Eisenhower, at the opening of the Islamic Center of Washington, similarly pledged to a Muslim audience that “America would fight with her whole strength for your right to have here your own church,” declaring that “[t]his concept is indeed a part of America.” Public Papers of the Presidents, Dwight D. Eisenhower, June 28, 1957, p. 509 (1957). And just days after the attacks of September 11, 2001, President George W. Bush returned to the same Islamic Center to implore his fellow Americans—Muslims and non-Muslims alike—to remember during their time of grief that “[t]he face of terror is not the true faith of Islam,” and that America is “a great country because we share the same values of respect and dignity and human worth.” Public Papers of the Presidents, George W. Bush, Vol. 2, Sept. 17, 2001, p. 1121 (2001). Yet it cannot be denied that the Federal Government and the Presidents who have carried its laws into effect have—from the Nation’s earliest days—performed unevenly in living up to those inspiring words.

Plaintiffs argue that this President’s words strike at fundamental standards of respect and tolerance, in violation of our constitutional tradition. But the issue before us is not whether to denounce the statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility. In doing so, we must consider not only the statements of a particular President, but also the authority of the Presidency itself.

The case before us differs in numerous respects from the conventional Establishment Clause claim. Unlike the typical suit involving religious displays or school prayer, plaintiffs seek to invalidate a national security directive regulating the entry of aliens abroad. Their claim accordingly raises a number of delicate issues regarding the scope of the constitutional right and the manner of proof. The Proclamation, moreover, is facially neutral toward religion. Plaintiffs therefore ask the Court to probe the sincerity of the stated justifications for the policy by reference to extrinsic statements—many of which were made before the President took the oath of office. These various aspects of plaintiffs’ challenge inform our standard of review.

C

For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a “fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.” *Fiallo v. Bell*, 430 U. S. 787, 792 (1977); see *Harisiades v. Shaughnessy*, 342 U. S. 580, 588–589 (1952) (“[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations [and] the war power.”). Because decisions in these matters may implicate “relations with foreign powers,” or involve “classifications defined in the light of changing political and economic circumstances,” such judgments “are frequently of a character more appropriate to either the Legislature or the Executive.” *Mathews v. Diaz*, 426 U. S. 67, 81 (1976).

Nonetheless, although foreign nationals seeking admission have no constitutional right to entry, this Court has engaged in a circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U. S. citizen. In *Kleindienst v. Mandel*, the Attorney General denied admission to a Belgian journalist and self-described “revolutionary Marxist,” Ernest Mandel, who had been invited to speak at a conference at Stanford University. 408 U. S., at 756–757. The professors who wished to hear Mandel speak challenged that decision under the First Amendment, and we acknowledged that their constitutional “right to receive information” was implicated. *Id.*, at 764–765. But we limited our review to whether the Executive gave a “facially legitimate and bona fide” reason for its action. *Id.*, at 769. Given the authority of the political branches over admission, we held that “when the Executive exercises this [delegated] power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification” against the asserted constitutional interests of U. S. citizens. *Id.*, at 770.

The principal dissent suggests that *Mandel* has no bearing on this case, *post*, at 14, and n. 5 (opinion of SOTOMAYOR, J.) (hereinafter the dissent), but our opinions have reaffirmed and applied its deferential standard of review across different contexts and constitutional claims. In *Din*, JUSTICE KENNEDY reiterated that “respect for the political branches’ broad power over the creation and administration of the immigration system” meant that the Government need provide only a statutory citation to explain a visa denial. 576 U. S., at ___ (opinion concurring in judgment) (slip op., at 6). Likewise in *Fiallo*, we applied *Mandel* to a “broad congressional policy” giving immigration preferences to mothers of illegitimate children. 430 U. S., at 795. Even though the statute created a “categorical” entry classification that discriminated on the basis of sex and legitimacy, *post*, at 14, n. 5, the Court concluded that “it is not the judicial role in cases of this sort to probe and test the justifications” of immigration policies. 430 U. S., at 799 (citing *Mandel*, 408 U. S., at 770). Lower courts have similarly applied *Mandel* to broad executive action. See *Rajah v. Mukasey*, 544 F. 3d 427, 433, 438–439 (CA2 2008) (upholding National Security Entry-Exit Registration System instituted after September 11, 2001).

Mandel's narrow standard of review "has particular force" in admission and immigration cases that overlap with "the area of national security." *Din*, 576 U. S., at ____ (KENNEDY, J., concurring in judgment) (slip op., at 3). For one, "[j]udicial inquiry into the national-security realm raises concerns for the separation of powers" by intruding on the President's constitutional responsibilities in the area of foreign affairs. *Ziglar v. Abbasi*, 582 U. S. ____, ____ (2017) (slip op., at 19) (internal quotation marks omitted). For another, "when it comes to collecting evidence and drawing inferences" on questions of national security, "the lack of competence on the part of the courts is marked." *Humanitarian Law Project*, 561 U. S., at 34.

The upshot of our cases in this context is clear: "Any rule of constitutional law that would inhibit the flexibility" of the President "to respond to changing world conditions should be adopted only with the greatest caution," and our inquiry into matters of entry and national security is highly constrained. *Mathews*, 426 U. S., at 81–82. We need not define the precise contours of that inquiry in this case. A conventional application of *Mandel*, asking only whether the policy is facially legitimate and bona fide, would put an end to our review. But the Government has suggested that it may be appropriate here for the inquiry to extend beyond the facial neutrality of the order. See Tr. of Oral Arg. 16–17, 25–27 (describing *Mandel* as "the starting point" of the analysis). For our purposes today, we assume that we may look behind the face of the Proclamation to the extent of applying rational basis review. That standard of review considers whether the entry policy is plausibly related to the Government's stated objective to protect the country and improve vetting processes. See *Railroad Retirement Bd. v. Fritz*, 449 U. S. 166, 179 (1980). As a result, we may consider plaintiffs' extrinsic evidence, but will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.

D

Given the standard of review, it should come as no surprise that the Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny. On the few occasions where we have done so, a common thread has been that the laws at issue lack any purpose other than a "bare...desire to harm a politically unpopular group." *Department of Agriculture v. Moreno*, 413 U. S. 528, 534 (1973). In one case, we invalidated a local zoning ordinance that required a special permit for group homes for the intellectually disabled, but not for other facilities such as fraternity houses or hospitals. We did so on the ground that the city's stated concerns about (among other things) "legal responsibility" and "crowded conditions" rested on "an irrational prejudice" against the intellectually disabled. *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 448–450 (1985) (internal quotation marks omitted). And in another case, this Court overturned a state constitutional amendment that denied gays and lesbians access to the protection of antidiscrimination laws. The amendment, we held, was "divorced from any factual context from which we could discern a relationship to legitimate state interests," and "its sheer breadth [was] so discontinuous with the reasons offered for it" that the initiative seemed "inexplicable by anything but animus." *Romer v. Evans*, 517 U. S. 620, 632, 635 (1996).

The Proclamation does not fit this pattern. It cannot be said that it is impossible to "discern a relationship to legitimate state interests" or that the policy is "inexplicable by anything but animus." Indeed, the dissent can only attempt to argue otherwise by refusing to apply anything resembling rational basis review. But because there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification.

The Proclamation is expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices. The text says nothing about religion. Plaintiffs and the dissent nonetheless emphasize that five of the seven nations currently included in the Proclamation have Muslim-majority populations. Yet that fact alone does not support an inference of religious hostility, given that the policy covers just 8% of the world's Muslim population and is limited to countries that were previously designated by Congress or prior administrations as posing national security risks. See 8 U.S.C. §1187(a)(12)(A) (identifying Syria and state sponsors of terrorism such as Iran as “countr[ies] or area[s] of concern” for purposes of administering the Visa Waiver Program); Dept. of Homeland Security, DHS Announces Further Travel Restrictions for the Visa Waiver Program (Feb. 18, 2016) (designating Libya, Somalia, and Yemen as additional countries of concern); see also *Rajah*, 544 F. 3d, at 433, n. 3 (describing how nonimmigrant aliens from Iran, Libya, Somalia, Syria, and Yemen were covered by the National Security Entry-Exit Registration System).

The Proclamation, moreover, reflects the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies. Plaintiffs seek to discredit the findings of the review, pointing to deviations from the review's baseline criteria resulting in the inclusion of Somalia and omission of Iraq. But as the Proclamation explains, in each case the determinations were justified by the distinct conditions in each country. Although Somalia generally satisfies the information-sharing component of the baseline criteria, it “stands apart . . . in the degree to which [it] lacks command and control of its territory.” Proclamation §2(h)(i). As for Iraq, the Secretary of Homeland Security determined that entry restrictions were not warranted in light of the close cooperative relationship between the U.S. and Iraqi Governments and the country's key role in combating terrorism in the region. §1(g). It is, in any event, difficult to see how exempting one of the largest predominantly Muslim countries in the region from coverage under the Proclamation can be cited as evidence of animus toward Muslims.

The dissent likewise doubts the thoroughness of the multi-agency review because a recent Freedom of Information Act request shows that the final DHS report “was a mere 17 pages.” *Post*, at 19. Yet a simple page count offers little insight into the actual substance of the final report, much less predecisional materials underlying it. See 5 U. S. C. §552(b)(5) (exempting deliberative materials from FOIA disclosure).

More fundamentally, plaintiffs and the dissent challenge the entry suspension based on their perception of its effectiveness and wisdom. They suggest that the policy is overbroad and does little to serve national security interests. But we cannot substitute our own assessment for the Executive's predictive judgments on such matters, all of which “are delicate, complex, and involve large elements of prophecy.” *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U. S. 103, 111 (1948); see also *Regan v. Wald*, 468 U. S. 222, 242–243 (1984) (declining invitation to conduct an “independent foreign policy analysis”). While we of course “do not defer to the Government's reading of the First Amendment,” the Executive's evaluation of the underlying facts is entitled to appropriate weight, particularly in the context of litigation involving “sensitive and weighty interests of national security and foreign affairs.” *Humanitarian Law Project*, 561 U. S., at 33–34.

Three additional features of the entry policy support the Government's claim of a legitimate national security interest. First, since the President introduced entry restrictions in January 2017, three Muslim-majority countries—Iraq, Sudan, and Chad—have been removed from the list of covered countries. The Proclamation emphasizes that its “conditional restrictions” will remain in force only so long as necessary to “address” the identified

“inadequacies and risks,” Proclamation Preamble, and §1(h), and establishes an ongoing process to engage covered nations and assess every 180 days whether the entry restrictions should be terminated, §§4(a), (b). In fact, in announcing the termination of restrictions on nationals of Chad, the President also described Libya’s ongoing engagement with the State Department and the steps Libya is taking “to improve its practices.” Proclamation No. 9723, 83 Fed. Reg. 15939.

Second, for those countries that remain subject to entry restrictions, the Proclamation includes significant exceptions for various categories of foreign nationals. The policy permits nationals from nearly every covered country to travel to the United States on a variety of nonimmigrant visas. See, e.g., §§2(b)–(c), (g), (h) (permitting student and exchange visitors from Iran, while restricting only business and tourist nonimmigrant entry for nationals of Libya and Yemen, and imposing no restrictions on nonimmigrant entry for Somali nationals). These carve-outs for nonimmigrant visas are substantial: Over the last three fiscal years—before the Proclamation was in effect—the majority of visas issued to nationals from the covered countries were nonimmigrant visas. Brief for Petitioners 57. The Proclamation also exempts permanent residents and individuals who have been granted asylum. §§3(b)(i), (vi).

Third, the Proclamation creates a waiver program open to all covered foreign nationals seeking entry as immigrants or nonimmigrants. According to the Proclamation, consular officers are to consider in each admissibility determination whether the alien demonstrates that (1) denying entry would cause undue hardship; (2) entry would not pose a threat to public safety; and (3) entry would be in the interest of the United States. §3(c)(i); see also §3(c)(iv) (listing examples of when a waiver might be appropriate, such as if the foreign national seeks to reside with a close family member, obtain urgent medical care, or pursue significant business obligations). On its face, this program is similar to the humanitarian exceptions set forth in President Carter’s order during the Iran hostage crisis. See Exec. Order No. 12206, 3 CFR 249; Public Papers of the Presidents, Jimmy Carter, Sanctions Against Iran, at 611–612 (1980) (outlining exceptions). The Proclamation also directs DHS and the State Department to issue guidance elaborating upon the circumstances that would justify a waiver.

Finally, the dissent invokes *Korematsu v. United States*, 323 U. S. 214 (1944). Whatever rhetorical advantage the dissent may see in doing so, *Korematsu* has nothing to do with this case. The forcible relocation of U. S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority. But it is wholly inapt to liken that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission. See *post*, at 26–28. The entry suspension is an act that is well within executive authority and could have been taken by any other President—the only question is evaluating the actions of this particular President in promulgating an otherwise valid Proclamation.

The dissent’s reference to *Korematsu*, however, affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—“has no place in law under the Constitution.” 323 U. S., at 248 (Jackson, J., dissenting).

Under these circumstances, the Government has set forth a sufficient national security justification to survive rational basis review. We express no view on the soundness of the policy. We simply hold today that plaintiffs have not demonstrated a likelihood of success on the merits of their constitutional claim.

V

Because plaintiffs have not shown that they are likely to succeed on the merits of their claims, we reverse the grant of the preliminary injunction as an abuse of discretion. *Winter v. Natural Resources Defense Council, Inc.*, 555 U. S. 7, 32 (2008). The case now returns to the lower courts for such further proceedings as may be appropriate.

Our disposition of the case makes it unnecessary to consider the propriety of the nationwide scope of the injunction issued by the District Court.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

* * * *

d. Visa restrictions relating to Nicaragua

On June 7, 2018, the State Department spokesperson issued a press statement announcing the imposition of visa restrictions on individuals involved in human rights abuses or undermining democracy in Nicaragua. See press statement, available at <https://www.state.gov/visa-restrictions-against-individuals-involved-in-human-rights-abuses-or-undermining-democracy-in-nicaragua/>. The press statement follows.

* * * *

The political violence by police and pro-government thugs against the people of Nicaragua, particularly university students, shows a blatant disregard for human rights and is unacceptable. Secretary Mike Pompeo today decided to impose U.S. visa restrictions on individuals responsible for human rights abuses or undermining democracy in Nicaragua.

Affected individuals include National Police officials, municipal government officials, and a Ministry of Health officials—specifically those directing or overseeing violence against others exercising their rights of peaceful assembly and freedom of expression, thereby undermining Nicaragua’s democracy. These officials have operated with impunity across the country, including in Managua, León, Estelí, and Matagalpa. In certain circumstances, family members of those individuals will also be subject to visa restrictions.

We will not publicly identify these individuals due to U.S. visa confidentiality laws, but we are sending a clear message that human rights abusers and those who undermine democracy are not welcome in the United States.

We emphasize the action we are announcing today is specific to certain officials and not directed at the Nicaraguan people. We will continue to monitor the situation and take additional steps as necessary. The United States continues to call for an end to violence and supports peaceful negotiations to end this crisis.

* * * *

4. Removals and Repatriations

The Department of State works closely with the Department of Homeland Security in effecting the removal of aliens subject to final orders of removal. It is the belief of the United States that every country has an international legal obligation to accept the return of its nationals whom another state seeks to expel, remove, or deport.

On August 21, 2018, the State Department spokesperson issued a press statement regarding Germany's acceptance of a former Nazi slave-labor camp guard who was removed from the United States. See August 21, 2018 press statement, available at <https://www.state.gov/germany-accepts-former-nazi-slave-labor-camp-guard-jakiw-palij/>. The statement includes the following:

The United States expresses its deep appreciation to the Federal Republic of Germany for re-admitting former Nazi slave-labor camp guard Jakiw Palij, who was removed from the United States on August 20.

During World War II, Palij served as an armed guard at the Trawniki slave-labor camp for Jews in Nazi-occupied Poland. He concealed his Nazi service when he immigrated to the United States from Germany in 1949. A federal court stripped Palij of his citizenship in 2003 and a U.S. immigration judge ordered him removed from the United States in 2004 based on his wartime activities and postwar immigration fraud.

5. Agreements for the Sharing of Visa Information

On April 18, 2018, the United States and Argentina signed an agreement for the exchange of visa information. The agreement is available at <https://www.state.gov/argentina-19-314>.***

C. ASYLUM, REFUGEE, AND MIGRANT PROTECTION ISSUES

1. Temporary Protected Status

Section 244 of the Immigration and Nationality Act ("INA" or "Act"), as amended, 8 U.S.C. § 1254a, authorizes the Secretary of Homeland Security, after consultation with appropriate agencies, to designate a state (or any part of a state) for temporary protected status ("TPS") after finding that (1) there is an ongoing armed conflict within the state (or part thereof) that would pose a serious threat to the safety of nationals returned there; (2) the state has requested designation after an environmental disaster resulting in a substantial, but temporary, disruption of living conditions that renders the state temporarily unable to handle the return of its nationals; or (3) there are other extraordinary and temporary conditions in the state that prevent nationals from

*** Editor's note: The agreement entered into force on March 14, 2019.

returning in safety, unless permitting the aliens to remain temporarily would be contrary to the national interests of the United States. The TPS designation means that eligible nationals of the state (or stateless persons who last habitually resided in the state) can remain in the United States and obtain work authorization documents. For background on previous designations of states for TPS, see *Digest 1989–1990* at 39–40; *Cumulative Digest 1991–1999* at 240–47; *Digest 2004* at 31–33; *Digest 2010* at 10–11; *Digest 2011* at 6–9; *Digest 2012* at 8–14; *Digest 2013* at 23–24; *Digest 2014* at 54–57; *Digest 2015* at 21–24; *Digest 2016* at 36–40; and *Digest 2017* at 33–37. In 2018, the United States extended TPS designations for Syria, Yemen, and Somalia, and announced the termination of TPS for El Salvador, Nepal, and Honduras, as discussed below.

a. *El Salvador*

On January 18, 2018, the Department of Homeland Security provided notice of the termination of the designation of El Salvador for TPS. 83 Fed. Reg. 2654 (Jan. 18, 2018). The Secretary of Homeland Security determined that conditions in El Salvador no longer support its designation for TPS. *Id.* Termination is effective September 9, 2019. *Id.* The termination is based on the determination that recovery efforts relating to the 2001 earthquakes, which were the basis for the original designation, have largely been completed. *Id.* at 2655–56.

b. *Syria*

On March 5, 2018, the Department of Homeland Security (“DHS”) announced the extension of the designation of Syria for TPS for 18 months, from April 1, 2018 through September 30, 2019. 83 Fed. Reg. 9329 (Mar. 5, 2018). The extension is based on the determination that the conditions in Syria that prompted the 2016 TPS redesignation continue to exist, specifically, the ongoing armed conflict and extraordinary and temporary conditions that have persisted and pose a serious threat to the personal safety of Syrian nationals if they were required to return to their country. *Id.* at 9331–32.

c. *Nepal*

On May 22, 2018, the Department of Homeland Security announced its determination, after reviewing country conditions and consulting with the appropriate U.S. Government agencies, that conditions in Nepal no longer support its designation for TPS. 83 Fed. Reg. 23,705 (May 22, 2018). Termination is effective June 24, 2019, in order to allow for an orderly transition. DHS designated Nepal in 2015 after a severe earthquake and extended the designation through 2018 in 2016 due to civil unrest and obstruction of the border with India. See *Digest 2016* at 40. DHS determined in 2018 that the conditions supporting Nepal’s 2015 designation for TPS on the basis of environmental disaster are no longer met; that Nepal has made considerable progress in

post-earthquake recovery and reconstruction; and that conditions in Nepal have significantly improved since the TPS extension in 2016. 83 Fed. Reg. 23,706.

d. Honduras

On June 5, 2018, DHS announced the termination of the designation of Honduras for TPS, effective January 5, 2020, in order to provide time for an orderly transition. 83 Fed. Reg. 26,074 (June 5, 2018). Termination is based on the determination that the conditions supporting Honduras's 1999 designation for TPS on the basis of environmental disaster due to the damage caused by Hurricane Mitch in October 1998 are no longer met. *Id.* at 26,076. The notice states that recovery and reconstruction efforts after Hurricane Mitch "have largely been completed." *Id.*

e. Yemen

On August 14, 2018, DHS announced the extension of the designation of Yemen for TPS for 18 months, from September 4, 2018, through March 3, 2020. 83 Fed. Reg. 40,307 (Aug. 14, 2018). The extension was based on the determination that the ongoing armed conflict and extraordinary and temporary conditions that prompted Yemen's 2017 extension and new designation for TPS persist. *Id.* at 40,308.

f. Somalia

On August 27, 2018, DHS announced the extension of the designation of Somalia for TPS for 18 months, from September 18, 2018 through March 17, 2020. 83 Fed. Reg. 43,695 (Aug. 27, 2018). The extension was based on the determination that conditions in Somalia supporting the TPS designation continue to be met, namely, ongoing armed conflict and extraordinary and temporary conditions that prevent Somali nationals from returning in safety. *Id.* As discussed in *Digest 2017* at 34, DHS last extended Somalia's TPS designation in 2017.

g. Ramos v. Nielsen and other litigation

On October 3, 2018, the U.S. District Court for the Northern District of California in *Ramos v. Nielsen*, No. 18–01554 (N.D. Cal.), issued a preliminary injunction, enjoining enforcement of the termination of TPS for Sudan, Nicaragua, Haiti, and El Salvador. On October 31, 2018 DHS announced through a notice in the Federal Register that it would comply with the preliminary injunction by extending TPS for Sudan, Nicaragua, Haiti, and El Salvador so long as the preliminary injunction remains in effect. 83 Fed. Reg. 54,764 (Oct. 31, 2018). The notice also announced automatic extensions of the validity

of TPS-related documentation for TPS beneficiaries from Sudan and Nicaragua. *Id.***** The preliminary injunction followed the denial by the court of the U.S. Government’s motion to dismiss the case. Excerpts follow (with footnotes omitted) from the court’s decision issuing the preliminary injunction in *Ramos*. The decision is available in full at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>. *Trump v. Hawaii* is discussed in section B.2.c, *supra*.

* * * *

The federal government seeks to terminate the Temporary Protected Status (“TPS”) designations for four countries: Haiti, Sudan, Nicaragua, and El Salvador. Under three prior administrations, the TPS designations of these countries have been repeatedly extended based on adverse and dangerous conditions in these countries. Under the designations, approximately 300,000 TPS beneficiaries have been allowed to stay and work in the United States because of dangerous or unsafe conditions in their home countries. Without TPS designations, these beneficiaries will be subject to removal from the United States.

Plaintiffs in this case are TPS beneficiaries (who have resided in the United States for years) along with their U.S.-citizen children. In this suit, Plaintiffs challenge the Trump administration’s decision to terminate TPS status for the affected countries. Currently pending before the Court is Plaintiffs’ motion for a preliminary injunction. Plaintiffs seek to enjoin the government from implementing or enforcing the decisions of the Secretary of the Department of Homeland Security to terminate TPS designations of these countries pending a final resolution of the case on the merits.

As described below, absent injunctive relief, TPS beneficiaries and their children indisputably will suffer irreparable harm and great hardship. TPS beneficiaries who have lived, worked, and raised families in the United States (many for more than a decade), will be subject to removal. Many have U.S.-born children; those may be faced with the Hobson’s choice of bringing their children with them (and tearing them away from the only country and community they have known) or splitting their families apart. In contrast, the government has failed to establish any real harm were the status quo (which has been in existence for as long as two decades) is maintained during the pendency of this litigation. Indeed, if anything, Plaintiffs and amici have established without dispute that local and national economies will be hurt if hundreds of thousands of TPS beneficiaries are uprooted and removed.

The balance of hardships thus tips sharply in favor of TPS beneficiaries and their families. And Plaintiffs have made substantial showing on the merits of their claims, both on the facts and the law. They have presented a substantial record supporting their claim that the Acting Secretary or Secretary of DHS, in deciding to terminate the TPS status of Haiti, El Salvador, Nicaragua and Sudan, changed the criteria applied by the prior administrations, and did so without any explanation or justification in violation of the Administrative Procedure Act. There

**** Editor’s note: To comply with the court’s injunction, on March 1, 2019, DHS published a second notice in the Federal Register extending through January 2, 2020, the validity of TPS-related documentation for eligible, affected beneficiaries of TPS for Sudan, Nicaragua, Haiti, and El Salvador.

is also evidence that this may have been done in order to implement and justify a pre-ordained result desired by the White House. Plaintiffs have also raised serious questions whether the actions taken by the Acting Secretary or Secretary was influenced by the White House and based on animus against non-white, non-European immigrants in violation of Equal Protection guaranteed by the Constitution. The issues are at least serious enough to preserve the status quo.

Having considered the parties' briefs and accompanying submissions, as well as the oral argument of counsel, the Court hereby **GRANTS** Plaintiffs' motion. ...

* * * *

... The Court previously held that a deferential standard was applied in *Trump v. Hawaii* because the case involved “the entry of aliens from outside the United States, express national security concerns[,] and active involvement of foreign policy.” Docket No. 55 (Order at 50). The instant case was distinguishable from *Trump v. Hawaii* because (1) there was no indication that national security or foreign policy was a reason to terminate TPS designations; (2) unlike the aliens in *Trump v. Hawaii*, the aliens here (*i.e.*, the TPS beneficiaries) are already in the United States and “aliens within the United States have greater constitutional protections than those outside who are seeking admission for the first time”; and (3) “the executive order in *Trump [v. Hawaii]* was issued pursuant to a very broad grant of statutory discretion” whereas “Congress has not given the Secretary *carte blanche* to terminate TPS for any reason whatsoever.” Docket No. 55 (Order at 52-53); *see also* Docket No. 55 (Order at 53) (stating that *Trump v. Hawaii* “did not address the standard of review to be applied under the equal protection doctrine when steps are taken to *withdraw* an immigration status or benefit from aliens lawfully present and admitted into the United States for reasons unrelated to national security or foreign affairs”) (emphasis in original). In another TPS case pending in the District of Massachusetts, the district court made a similar analysis of *Trump v. Hawaii*. *See Centro Presente*, 2018 U.S. Dist. LEXIS 122509, at *44 (stating that the Supreme Court’s “decision to apply rational basis review [in *Trump v. Hawaii*] was based on two considerations not at issue here: first, the limited due process rights afforded to foreign nationals seeking entry into the United States and the particular deference accorded to the executive in making national security determinations”). Applying *Arlington Heights*, the Massachusetts court found that there were sufficient allegations in the complaint to withstand the government’s motion to dismiss. *See id.* at *56 (“find[ing] that the combination of a disparate impact on particular racial groups, statements of animus by people plausibly alleged to be involved in the decision-making process, and an allegedly unreasoned shift in policy sufficient to allege plausibly that a discriminatory purpose was a motivating factor in a decision”).

The government argues that the Court’s analysis above is inconsistent with cases cited in *Trump v. Hawaii*, *see* Opp’n at 19-20 (arguing that *Trump v. Hawaii* “is not limited to executive actions rooted in national security concerns or to actions restricting entry of foreign nationals”). The Court does not agree.

Kleindienst v. Mandel, 408 U.S. 753 (1972), is a case that involved *admission* of an alien into the United States, and thus is distinguishable from the instant case where the TPS beneficiaries are already lawfully present and admitted into the country. In fact, the alien in *Mandel* was actually ineligible for a visa under the Immigration and Nationality Act (because of his advocacy of Communist doctrines) and could only enter the United States if he first obtained a waiver from the Attorney General. *See id.* at 756-59.

Similarly, *Fiallo v. Bell*, 430 U.S. 787 (1977), is an admission case and is therefore distinguishable. *See id.* at 790 n.3 The Court acknowledges that, in *Fiallo*, the appellants “characterize[d] [the Supreme Court’s] prior immigration cases as involving foreign policy matters and congressional choices to exclude or expel groups of aliens that were specifically and clearly perceived to pose a grave threat to the national security . . . or to the general welfare of this country” and that the Supreme Court noted there was no indication in our prior cases that the scope of judicial review is a function of the nature of the policy choice at issue. To the contrary, [s]ince decisions in these matters may implicate our foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary, and [t]he reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization. *Id.* at 796 (internal quotation marks omitted). *Fiallo* also contains other broad language that could be read unfavorably to Plaintiffs (*i.e.*, suggesting limited judicial review). *See Fiallo*, 430 U.S. at 792 (“Our cases ‘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.’”). However, this language of “expel” and “exclude” appears to be a dated or historical phrase, *see Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893) (indicating that “[t]he control of the people within its limits, and the right to expel from its territory persons who and dangerous to the peace of the State, are too clearly within the essential attributes of sovereignty to be seriously contested”), and does not detract from evolved and well-established authority that aliens lawfully within the United States have rights from those seeking admission in the first instance into the United States. *See Zadvydas*, 533 U.S. at 693 (noting that “certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders”); *cf. Yamataya v. Fisher*, 189 U.S. 86, 101 (1903) (stating that “it is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States”).

In any event, this Court does not hold that *Trump v. Hawaii* [is] inapplicable to the instant case solely because the decisions to terminate did not rest on national security—or foreign policy—concerns. Rather, the Court’s holding is predicated on an amalgam of factors: the fact that the TPS beneficiaries are living and have lived in the United States for lengthy periods with established ties to the community, no foreign policy or national security interest has been relied upon [by] the DHS to support its decision to terminate TPS status for the affected countries, and the TPS statute does not confer[] unfettered authority upon the Secretary. The justification for a kind of super deference advocated by the government in this case is not warranted.

Finally, *Rajah v. Mukasey*, 544 F.3d 427 (2d Cir. 2008), is distinguishable from the instant case as well. Although *Rajah*, like the instant case, is *not* an admission case, it is still distinguishable because the aliens in *Rajah* were, undisputedly, deportable from the country, and the only issue was whether the aliens might be able to get a reprieve from deportation because the “deportation proceedings were so tainted by the [post-9/11] Program [that required nonimmigrant alien males over the age of 16 from designated countries to appear for registration and fingerprinting] and associated events.” *Id.* at 434. ...Moreover, *Rajah* is distinguishable

because, while the case (like the instant case) involved an Equal Protection claim, the claim was really one for selective prosecution/enforcement, an area in which the courts have applied substantial deference to the exercise of prosecutorial discretion. *See, e.g., Reno v. Am.- Arab Anti-Discrim. Comm.*, 525 U.S. 471, 489-90 (1999) (noting that, “[e]ven in the criminal-law field, a selective prosecution claim is a *rara avis*” because “such claims invade a special province of the Executive” and therefore a “criminal defendant [must] introduce ‘clear evidence’ displacing the presumption that a prosecutor has acted lawfully”; adding that “[t]hese concerns are greatly magnified in the deportation context” but also stating that “we need not rule out the possibility of a rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations can be overcome”).

At the very least, the above analysis indicates that there are serious questions going to the merits as to whether *Trump v. Hawaii* governs in the instant case. Even if *Trump v. Hawaii* did provide the governing legal standard for the Equal Protection claim here, the Court nevertheless finds that there are serious questions going to the merits that warrant a preliminary injunction. In *Trump v. Hawaii*, the Supreme Court stated that the “standard of review considers whether the [challenged decision] is plausibly related to the Government’s stated objective.” *Trump v. Hawaii*, 138 S. Ct. at 2420. The Supreme Court also indicated that, in spite of this deferential standard of review, it assumed a court could “look behind the face of the [challenged decision] to the extent of applying rational basis review.” *Id.* In other words, a court could “consider [a plaintiff’s] extrinsic evidence,” including statements by the President, and should “uphold [the challenged decision] so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.” *Id.* Judicial review, though more deferential than traditional strict scrutiny, remains fact based. Here, considering the substantial extrinsic evidence submitted by Plaintiffs, there are serious questions as to whether the terminations of TPS designations could “reasonably be understood to result from a justification independent of unconstitutional grounds.” *Id.*; *see also Centro Presente*, 2018 U.S. Dist. LEXIS 122509, at *58-59 (in similar TPS case, stating that, “even if rational basis review were to apply, Plaintiffs’ claims, at this early stage of litigation, would still survive”; noting that “there is no justification, explicit or otherwise, for Defendants’ switch to focusing on whether the conditions that caused the initial designation had abated rather than a fuller evaluation of whether the country would be able to safely accept returnees”).

* * * *

In addition to *Ramos* and *Centro Presente*, No. 18-10340 (D. Mass.), referenced by the *Ramos* court, *supra*, other cases in which district courts have denied motions to dismiss claims challenging TPS terminations include: *Saget*, No. 18-1599 (E.D. NY) (Haiti); and *Casa de Maryland*, No. 18-845 (D. Md.) (El Salvador).

2. Executive Actions on Refugees and Migration

a. Refugee Admissions

On October 4, 2018, the President determined that the admission of 30,000 refugees to the United States during Fiscal Year 2019 is justified by humanitarian concerns or otherwise in the national interest and authorized the admission of that number. 83 Fed.

Reg. 55,091 (Nov. 1, 2018). The President made the determination in accordance with section 207 of the Immigration and Nationality Act (the “Act”) (8 U.S.C. 1157), after appropriate consultations with the Congress, and consistent with the Report on Proposed Refugee Admissions for Fiscal Year 2019 submitted to the Congress on September 17, 2018. *Id.*

b. *Presidential Proclamation on Migration through the Southern Border*

On November 9, 2018, the President issued a proclamation regarding mass migration through the southern border of the United States. 83 Fed. Reg. 57,661 (Nov. 15, 2018). The proclamation responds to the large groups of migrants, primarily from Central America, approaching the U.S. border. The President suspended and limited the entry of aliens across the border with Mexico pursuant to authority in sections 212(f) and 215(a) of the Immigration and Nationality Act (INA) (8 U.S.C. 1182(f) and 1185(a), respectively). Excerpts follow from the proclamation.

* * * *

Section 1. *Suspension and Limitation on Entry.* The entry of any alien into the United States across the international boundary between the United States and Mexico is hereby suspended and limited, subject to section 2 of this proclamation. That suspension and limitation shall expire 90 days after the date of this proclamation or the date on which an agreement permits the United States to remove aliens to Mexico in compliance with the terms of section 208(a)(2)(A) of the INA (8 U.S.C. 1158(a)(2)(A)), whichever is earlier.

Sec. 2. *Scope and Implementation of Suspension and Limitation on Entry.* (a) The suspension and limitation on entry pursuant to section 1 of this proclamation shall apply only to aliens who enter the United States after the date of this proclamation.

(b) The suspension and limitation on entry pursuant to section 1 of this proclamation shall not apply to any alien who enters the United States at a port of entry and properly presents for inspection, or to any lawful permanent resident of the United States.

(c) Nothing in this proclamation shall limit an alien entering the United States from being considered for withholding of removal under section 241(b)(3) of the INA (8 U.S.C. 1231(b)(3)) or protection pursuant to the regulations promulgated under the authority of the implementing legislation regarding the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, or limit the statutory processes afforded to unaccompanied alien children upon entering the United States under section 279 of title 6, United States Code, and section 1232 of title 8, United States Code.

(d) No later than 90 days after the date of this proclamation, the Secretary of State, the Attorney General, and the Secretary of Homeland Security shall jointly submit to the President, through the Assistant to the President for National Security Affairs, a recommendation on whether an extension or renewal of the suspension or limitation on entry in section 1 of this proclamation is in the interests of the United States.

Sec. 3. *Interdiction.* The Secretary of State and the Secretary of Homeland Security shall consult with the Government of Mexico regarding appropriate steps—consistent with applicable law and the foreign policy, national security, and public-safety interests of the United States—to address the approach of large groups of aliens traveling through Mexico with the intent of entering the United States unlawfully, including efforts to deter, dissuade, and return such aliens before they physically enter United States territory through the southern border.

* * * *

Also on November 9, 2018, the U.S. Departments of Justice and Homeland Security published an interim final rule (“Rule”), effective immediately, that an alien entering “along the southern border with Mexico” may not be granted asylum if the alien is “subject to a presidential proclamation ... suspending or limiting the entry of aliens” on this border. 83 Fed. Reg. 55,934 (Nov. 9, 2018). The new rule, in concert with the Proclamation, discussed *supra*, bars aliens from eligibility for asylum if they have entered the United States anywhere but through lawful ports of entry. *Id.*

The Rule was challenged in federal district court by organizations representing asylum applicants. On November 19, 2018, the district court issued a temporary restraining order, finding the Rule to be inconsistent with the INA, which allows aliens to apply for asylum whether or not they arrived at a designated port of entry. *East Bay Sanctuary Covenant v. Trump*, No. 18-16810 (N.D. Cal.), available at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>.

On December 7, 2018, the Court of Appeals for the Ninth Circuit denied the U.S. Government’s motion for a stay of the district court’s temporary restraining order pending appeal, also finding that the Rule is likely inconsistent with existing United States law. *East Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219 (9th Cir. 2018).

c. *Migration Protection Protocols (“MPP”)*

On December 20, 2018, the Department of Homeland Security announced that, effective immediately, in accordance with Section 235(b)(2)(C) of the INA and new Migration Protection Protocols (“MPP”), “individuals arriving in or entering the United States from Mexico—illegally or without proper documentation—may be returned to Mexico for the duration of their immigration proceedings.” DHS press release, available at <https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration>. Secretary of Homeland Security Kirstjen M. Nielsen, provided a statement on the action, *id.*, which is excerpted below:

Today we are announcing historic measures to bring the illegal immigration crisis under control... We will confront this crisis head on, uphold the rule of law, and strengthen our humanitarian commitments. Aliens trying to game the system to get into our country illegally will no longer be able to disappear into the United States, where many skip their court dates. Instead, they will wait for an immigration court decision while they are in Mexico. ‘Catch and release’ will be

replaced with ‘catch and return.’ In doing so, we will reduce illegal migration by removing one of the key incentives that encourages people from taking the dangerous journey to the United States in the first place. This will also allow us to focus more attention on those who are actually fleeing persecution.

Let me be clear: we will undertake these steps consistent with all domestic and international legal obligations, including our humanitarian commitments. We have notified the Mexican government of our intended actions. In response, Mexico has made an independent determination that they will commit to implement essential measures on their side of the border. We expect affected migrants will receive humanitarian visas to stay on Mexican soil, the ability to apply for work, and other protections while they await a U.S. legal determination.

Secretary of State Michael R. Pompeo issued a press statement regarding the actions to counter illegal immigration. His statement follows and is available at <https://www.state.gov/united-states-action-to-confront-illegal-immigration/>.

Today the United States Government announced historic action to confront the illegal immigration crisis facing the United States. We notified the Government of Mexico that the United States is invoking Section 235(b)(2)(c) of the Immigration and Nationality Act. We will begin implementation immediately. Individuals arriving in the United States from Mexico—illegally or without proper documentation—will be returned to Mexico for the duration of their immigration proceedings. In response, the Mexican government has informed us that it will support the human rights of migrants by affording affected migrants humanitarian visas to stay on Mexican soil, the ability to apply for work, and other protections while they await U.S. proceedings.

3. Rohingya Refugees

On June 7, 2018, the United States expressed its support for a Memorandum of Understanding (“MOU”) signed by UNHCR, UNDP, and the Burmese government regarding the voluntary return of Rohingya refugees to Burma. See Department of State Press Statement, available at <https://www.state.gov/u-s-support-of-memorandum-of-understanding-between-unhcr-undp-and-the-government-of-burma-to-create-the-conditions-for-the-voluntary-return-of-rohingya-refugees-from-bangladesh/>. The June 7 press statement includes the following:

This is a positive step. We see this MOU as a confidence-building measure that, if effectively implemented, could allow much-needed humanitarian assistance to reach all affected communities and assist Burma in creating the necessary conditions for voluntary return and to support recovery and resilience-based development for the benefit of all communities living in Rakhine State.

We encourage the Burmese government to fulfill its commitment to work

with UNHCR and UNDP to implement the recommendations of the Kofi Annan-led Advisory Commission on Rakhine State.

Cross References

Nicaragua, **Ch. 7.D.1.b**

Migration, **Ch. 7.D.1.c**

IACHR petition regarding David Johnson (Jamaican national seeking U.S. citizenship), **Ch. 7.D.2.d**

IACHR submission regarding migration policy, **Ch. 7.D.2.d**

IACHR hearing on Temporary Protected Status (“TPS”) and Deferred Action for Childhood Arrivals (“DACA”), **Ch. 7.D.2.f**

Migration talks with Cuba, **Ch. 9.A.4**

Visa restrictions relating to human rights and corruption, **Ch. 16.A.10.b**

Nicaragua sanctions, **Ch. 16.A.11.a**

Burma sanctions, **Ch. 16.A.11.b**

Nicaragua, **Ch. 17.B.6**

South Sudan, **Ch. 17.B.8**

Burma, **Ch. 17.C.1**