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IN THE SUPREME COURT OF THE UNITED STATES

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DONALD J. TRUMP, PRESIDENT OF THE )  
 UNITED STATES, ET AL., )  
   ) Petitioners, )  
   ) v. ) No. 17-965  
 HAWAII, ET AL., )  
   ) Respondents. )

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Washington, D.C.  
 Wednesday, April 25, 2018

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

GEN. NOEL J. FRANCISCO, Solicitor General,  
 Department of Justice, Washington, D.C. ;  
 on behalf of the Petitioners.

NEAL K. KATYAL, ESQ., Washington, D.C. ; on behalf  
 of the Respondents.

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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument today in Case 17-965, Trump, President  
5 of the -- Donald Trump, President of the United  
6 States, versus Hawaii.

7 Mr. Francisco.

8 ORAL ARGUMENT OF GENERAL NOEL J. FRANCISCO

9 ON BEHALF OF THE PETITIONERS

10 GENERAL FRANCISCO: Mr. Chief Justice,  
11 and may it please the Court:

12 After a worldwide multi-agency review,  
13 the President's acting Homeland Security  
14 Secretary recommended that he adopt entry  
15 restrictions on countries that failed to  
16 provide the minimum baseline of information  
17 needed to vet their nationals.

18 The proclamation adopts those  
19 recommendations. It omits the vast majority of  
20 the world, including the vast majority of the  
21 Muslim world, because they met the baseline.  
22 It now applies to only seven countries that  
23 fall below that baseline or had other problems,  
24 and it exerts diplomatic pressure on those  
25 countries to provide the needed information and

1 to protect the country until they do.

2 The proclamation reflects a foreign  
3 policy and national security judgment that  
4 falls well within the President's power under  
5 1182(f) and has been successful, which is why  
6 the country of Chad was recently dropped from  
7 the list. But it --

8 JUSTICE GINSBURG: You -- you  
9 mentioned 1182(f). And the worrisome thing  
10 about this is that the President acts; Congress  
11 is the one responsible for making the laws  
12 about immigration. It has been suggested in  
13 one of the briefs that we read 1182(f) to allow  
14 the President to suspend entry but only for a  
15 period of time long enough for Congress to say  
16 yea or nay.

17 GENERAL FRANCISCO: Your Honor, yes,  
18 1182(f) is a broad and flexible power in a  
19 narrow area. Here, however, I think that you  
20 don't need to explore those outer limits  
21 because the proclamation's meant to help  
22 implement the INA by making sure that we have  
23 the minimum level of information needed to  
24 determine if aliens are admissible under the  
25 INA.

1           In terms of a time limit, I think  
2           that's simply inconsistent with the text of the  
3           statute and inconsistent with virtually every  
4           1182(f) proclamation ever issued. Here, we  
5           have a fair --

6           JUSTICE SOTOMAYOR: I'm sorry, Mr. --  
7           General. I thought that Congress had looked at  
8           the situation and created a statutory system  
9           that addressed the very concern the President  
10          is expressing. Congress said you can have visa  
11          waivers if you -- if you can meet the three  
12          criteria that this special committee of the  
13          President looked at, and if you don't, you have  
14          to have a very heightened, extreme vetting  
15          process. And it created that vetting process  
16          and suggested its parameters.

17          More importantly, it took terrorist  
18          countries and designated which ones supported  
19          terrorism and added another layer of review and  
20          said, if you're a national from one of those  
21          countries or you have visited one of those  
22          countries in the recent past, you also have to  
23          get the permission of the Attorney General and  
24          the Secretary of State to -- to affirm that you  
25          are not a danger to the U.S.

1                   GENERAL FRANCISCO:  And --

2                   JUSTICE SOTOMAYOR:  So I -- but what I  
3   see the President doing here is saying, I'm  
4   going to add more to the limits that Congress  
5   set --

6                   GENERAL FRANCISCO:  Right.

7                   JUSTICE SOTOMAYOR:  -- and to what  
8   Congress said was enough.  Where does a  
9   President get the authority to do more than  
10  Congress has already decided is adequate?

11                  GENERAL FRANCISCO:  Well, there are --  
12  there's a lot packed into your question, Your  
13  Honor, and so let me try to unpack it a little  
14  bit.

15                  I think the basic answer is that  
16  1182(f) gives the President the authority to  
17  impose restrictions in addition to those set  
18  forth in the INA, but to go to the statutes  
19  that Your Honor was --

20                  JUSTICE SOTOMAYOR:  But -- it might,  
21  but --

22                  GENERAL FRANCISCO:  Right, but --

23                  JUSTICE SOTOMAYOR:  -- on the very  
24  grounds that Congress has already looked at?

25                  GENERAL FRANCISCO:  And that's exactly

1 what I was going to address next, Your Honor.  
2 The Visa Waiver Program provides a special  
3 benefit to our closest allies and some of the  
4 safest countries in the world. Neither the  
5 Visa Waiver Program nor any of the other  
6 statutes that they cite addresses whether we  
7 get the minimum level of information needed to  
8 determine the admissibility of individuals  
9 coming in from some of the riskiest countries  
10 in the world.

11 And 1182(f) then does give the  
12 President the authority to supplement that  
13 vetting system. After all, the whole vetting  
14 system is essentially determined by the  
15 executive branch. It's up to the executive  
16 branch to set it up. It's up to the executive  
17 branch to maintain it. And it's up to the  
18 executive branch to constantly improve it.

19 And, here, you have something that  
20 really is at the core of 1182(f) since its main  
21 purpose is to help implement the INA by making  
22 sure we have that minimum baseline of  
23 information.

24 And if you look at the proclamation,  
25 what we're talking about is very basic pieces



1 of information. Not the ideal, but the  
2 minimum. Are they reporting terrorism history  
3 information? Are they reporting criminal  
4 history? Do they cooperate with us on a  
5 real-time basis?

6 And I could give you an example to  
7 help illustrate how this works. Suppose that  
8 Jane Doe shows up at our border with a valid  
9 visa, but after that visa was issued, pursuant  
10 to the entire process, Your Honor, that you  
11 described, her home country learns that she is  
12 associated with a terrorist organization but  
13 doesn't tell us.

14 Once she shows up at the border, we  
15 cannot make an intelligent determination as to  
16 whether or not she's admissible under the INA.  
17 And that's what this proclamation really does  
18 go to: Making sure we have that minimum  
19 baseline of information needed to determine  
20 admissibility.

21 And so the proclamation really does  
22 reflect a -- it is different than past  
23 proclamations, but it is typical in the sense  
24 that it seeks to identify harmful conduct that  
25 a foreign government is engaging in, and then

1 it imposes sanctions in order to pressure that  
2 government to change.

3 That's what President Carter did with  
4 respect to Iran, what President Reagan did with  
5 respect to Cuba. Here, the harmful conduct is  
6 the failure to provide us with that minimum  
7 baseline of information.

8 JUSTICE SOTOMAYOR: Can you represent  
9 that no other country that -- that fails all  
10 three of the criteria was excluded from this  
11 list?

12 GENERAL FRANCISCO: Well, Your Honor,  
13 what I can represent is that the -- the -- the  
14 analysis was holistic. It wasn't if you failed  
15 any one or the others. It was if your overall  
16 score was sufficiently low.

17 JUSTICE SOTOMAYOR: So given --

18 GENERAL FRANCISCO: So I can represent  
19 that all of the countries listed in the  
20 proclamation are the same countries that fell  
21 below the baseline, with the exception of  
22 Somalia, which the proclamation makes quite  
23 clear, and the exception of Iraq, which did  
24 fall below -- below the baseline but was not  
25 subjected to sanctions.

1           And I think that this reflects the  
2 tailored nature of this proclamation and the  
3 fact that it was meant to impose tailored  
4 pressure on these countries while also taking  
5 into account other types of national security  
6 and foreign policy considerations to try to  
7 move those countries across the line into  
8 acceptability, which we've now seen has been  
9 successful, as with the case of the government  
10 of Iraq -- of Chad.

11           JUSTICE KENNEDY: In fact, if you  
12 compare this proclamation to the Reagan and the  
13 Carter proclamations, which I think were one or  
14 two sentences, this is longer than any  
15 proclamation that -- that I've seen in this  
16 particular area.

17           GENERAL FRANCISCO: This is, Your  
18 Honor, the most detailed 1182 --

19           JUSTICE KENNEDY: I'd say "longer  
20 detail" --

21           GENERAL FRANCISCO: Yes.

22           JUSTICE KENNEDY: -- is -- is a better  
23 word.

24           GENERAL FRANCISCO: Yes. This is the  
25 more detailed 1182(f) proclamation in history.

1 It's not --

2 JUSTICE SOTOMAYOR: General, the  
3 proclamations by Reagan and Carter, however,  
4 were not as broad as this one.

5 GENERAL FRANCISCO: Your Honor, they  
6 were almost as broad, but --

7 JUSTICE SOTOMAYOR: And -- and --

8 GENERAL FRANCISCO: -- to complete my  
9 answer to Justice Kennedy's question, this is  
10 the most detailed proclamation ever issued in  
11 American history. Yes, Your Honor, to be sure,  
12 this covers more countries than either  
13 President Reagan's or President Carter's  
14 covered. But it's --

15 JUSTICE SOTOMAYOR: And more -- and  
16 more immigrants, because Carter's only applied  
17 to certain immigrants, not to all.

18 GENERAL FRANCISCO: President Carter's  
19 actually applied to all immigrants but then had  
20 an exception much like the waiver provision  
21 here for national interests and humanitarian  
22 concerns. So I think President Carter's was  
23 actually very similar to the proclamation here.  
24 And --

25 CHIEF JUSTICE ROBERTS: Is your

1 consular non-reviewability argument -- is that  
2 a jurisdictional argument?

3 GENERAL FRANCISCO: Your Honor, I --  
4 yes, I think it is a jurisdictional argument.  
5 And that's why I don't think you really should  
6 address any of these issues.

7 The basic rule is that the exclusion  
8 of aliens is a political act imbued with  
9 foreign policy and national security concerns  
10 and, therefore, subject to --

11 CHIEF JUSTICE ROBERTS: I -- I thought  
12 in Sale, that we decided that this -- this  
13 wasn't jurisdictional or at least decided the  
14 merits despite the non-reviewability argument  
15 that the government made.

16 GENERAL FRANCISCO: I think the second  
17 thing that you just said, Mr. Chief Justice, is  
18 accurate. The Court didn't address the  
19 reviewability issue at all. And so we don't  
20 think it's precedential one way or another.

21 CHIEF JUSTICE ROBERTS: Was the -- was  
22 the argument raised in that case by the  
23 government?

24 GENERAL FRANCISCO: Yes, it was, Your  
25 Honor. I could --

1 CHIEF JUSTICE ROBERTS: So -- so it's  
2 an argument we would have been required to  
3 address if it were, in fact, jurisdictional?

4 GENERAL FRANCISCO: I think so. And  
5 so I think one way you could understand it is  
6 that it doesn't go to Article III jurisdiction,  
7 though it is a justiciability argument and we  
8 would urge this Court to accept it because we  
9 think it's correct.

10 But even if you don't think that it's  
11 correct, we think that this proclamation  
12 satisfies the merits because it does fall well  
13 within the power of the President under  
14 1182(f).

15 JUSTICE BREYER: If you're about --

16 JUSTICE KAGAN: May I turn, General,  
17 to the constitutional claims in this case?

18 GENERAL FRANCISCO: Yes, Your Honor.

19 JUSTICE KAGAN: And your principal  
20 response to the Establishment Clause claim is  
21 to cite Mandel and to say that, once the  
22 government comes forward with a legitimate  
23 reason -- of course, national security is the  
24 most important reason one can come forward with  
25 -- the game is over, essentially. And I just

1 want to press on that a little bit.

2 GENERAL FRANCISCO: Sure.

3 JUSTICE KAGAN: So, first, I want to  
4 ask whether that means -- you started off by  
5 talking a lot about the process of this  
6 proclamation. But I -- I take it that that  
7 argument would apply irrespective of what  
8 process was used.

9 In other words, you would have made  
10 the same Mandel argument to the first executive  
11 order in this case, or would you not?

12 GENERAL FRANCISCO: We would have made  
13 a Mandel argument, but it is far stronger given  
14 that you have the process and substance upon  
15 which this proclamation was based, because  
16 whatever you --

17 JUSTICE KAGAN: Well, I guess I wonder  
18 why that is, just because, when I read Mandel,  
19 I don't see anything about process or you have  
20 to meet a certain kind of bar. Mandel really  
21 is kind of you state a reason and this Court  
22 stops.

23 GENERAL FRANCISCO: And I think that  
24 that is right, but I think that when you, in  
25 addition to that, have the extensive worldwide

1 process that we had that resulted in a  
2 cabinet-level recommendation, that applied a  
3 neutral baseline to every country in the world,  
4 concluded that almost all the world, including  
5 almost all of the Muslim-majority world passed  
6 that baseline, but a tiny number of countries  
7 didn't, I think that whether you apply Mandel  
8 or whether you apply McCreary, that makes the  
9 constitutional case in our favor overwhelmingly  
10 strong. It's --

11 JUSTICE KAGAN: So let me give you a  
12 hypothetical, and it's just -- you know, I  
13 think that there are ways to distinguish Mandel  
14 in this case, but -- but -- but, you know, just  
15 in terms of thinking about what Mandel really  
16 forecloses here.

17 GENERAL FRANCISCO: And I -- because  
18 Mandel, there are only two cases in the area,  
19 and it's -- it's hard to understand the full  
20 contours of it.

21 JUSTICE KAGAN: I agree. So this is a  
22 hypothetical that you've heard a variant of  
23 before that the government has, at any rate,  
24 but I want to just give you.

25 So let's say in some future time a --



1 a President gets elected who is a vehement  
2 anti-Semite and says all kinds of denigrating  
3 comments about Jews and provokes a lot of  
4 resentment and hatred over the course of a  
5 campaign and in his presidency and, in the  
6 course of that, asks his staff or his cabinet  
7 members to issue a proc -- to issue  
8 recommendations so that he can issue a  
9 proclamation of this kind, and they dot all the  
10 i's and they cross all the t's.

11 And what emerges -- and, again, in the  
12 context of this virulent anti-Semitism -- what  
13 emerges is a proclamation that says no one  
14 shall enter from Israel.

15 GENERAL FRANCISCO: Right.

16 JUSTICE KAGAN: Do you say Mandel puts  
17 an end to judicial review of that set of facts?

18 GENERAL FRANCISCO: No, Your Honor, I  
19 don't say Mandel puts an end to it, but I do  
20 say that, in that context, Mandel would be the  
21 starting point of the analysis, because it does  
22 involve the exclusion of aliens, which is where  
23 Mandel applies.

24 If his cabinet -- and this is a very  
25 tough hypothetical that we've dealt with

1 throughout -- but if his cabinet were to  
2 actually come to him and say, Mr. President,  
3 there is honestly a national security risk here  
4 and you have to act, I think then that the  
5 President would be allowed to follow that  
6 advice even if in his private heart of hearts  
7 he also harbored animus.

8 JUSTICE KAGAN: Well, the question is  
9 --

10 GENERAL FRANCISCO: I would also  
11 suggest, though -- if I could finish that, Your  
12 Honor -- that I think it would be very  
13 difficult for that to even satisfy Mandel  
14 rational basis scrutiny. I'd need to know what  
15 the rational was. Given that Israel happens to  
16 be one of the country's closest allies in the  
17 war against terrorism, it's not clear to me  
18 that you actually could satisfy --

19 JUSTICE KAGAN: Well --

20 GENERAL FRANCISCO: -- Mandel's  
21 rational basis standard on that, unless it  
22 truly were based --

23 JUSTICE KAGAN: Yes.

24 GENERAL FRANCISCO: -- on a  
25 cabinet-level recommendation that was about

1 national security.

2 JUSTICE KAGAN: General, I'm -- let's  
3 -- this is a out-of-the-box kind of President  
4 in my hypothetical. And --

5 (Laughter.)

6 GENERAL FRANCISCO: We -- we -- we  
7 don't have those, Your Honor.

8 JUSTICE KAGAN: And -- and, you know,  
9 he thinks that there are good diplomatic  
10 reasons, and there might -- who knows what the  
11 future holds, that there might be good  
12 diplomatic reasons to put pressure on Israel or  
13 to say we want Israel to vote a certain way in  
14 the U.N. and this is a way to better our  
15 diplomatic hand, and so this is what he does.

16 And -- and who knows what his heart of  
17 hearts is. I mean, I take that point. But the  
18 question is not really what his heart of hearts  
19 is. The question is what are reasonable  
20 observers to think --

21 GENERAL FRANCISCO: Right.

22 JUSTICE KAGAN: -- given this context,  
23 in which this hypothetical President --

24 GENERAL FRANCISCO: Sure.

25 JUSTICE KAGAN: -- is making virulent

1 anti-Semitic comments.

2 GENERAL FRANCISCO: Right. And, Your  
3 Honor, it's a tough hypothetical, but it's why  
4 I also think that this is a relatively easy  
5 case, because we're willing to even assume for  
6 the sake of argument that you consider all of  
7 the statements.

8 And we're even willing to assume for  
9 the sake of argument, though we think that it's  
10 wrong, that you applied some kind of domestic  
11 establishment clause jurisprudence, because  
12 we're quite confident that, given the process  
13 and substance that form the basis of this  
14 proclamation, no matter what standard you  
15 apply, this proclamation is constitutional.

16 Since we don't have the extreme  
17 hypothetical that you're suggesting, Your  
18 Honor, we do have a multi-agency worldwide  
19 review and a cabinet-level recommendation that  
20 applied a neutral baseline. And this wasn't  
21 done just by the cabinet secretaries but by the  
22 agencies to every country in the world and  
23 concluded --

24 JUSTICE SOTOMAYOR: Mr. General, you  
25 just --

1 JUSTICE KENNEDY: If -- if you have  
2 that extreme hypothetical, would that present a  
3 free exercise or an Establishment Clause claim  
4 or both?

5 GENERAL FRANCISCO: It could  
6 definitely present a free exercise clause  
7 challenge, Your Honor, just as you had a free  
8 speech type claim in the Mandel case.

9 And there would be people who could  
10 bring that claim and who could potentially  
11 succeed on that claim.

12 JUSTICE KENNEDY: And -- and the  
13 people that could bring that claim, I assume,  
14 were relatives of people that were excluded,  
15 father, son?

16 GENERAL FRANCISCO: On free exercise,  
17 potentially. I think all --

18 JUSTICE KENNEDY: Yeah, what about a  
19 university?

20 GENERAL FRANCISCO: I think a  
21 university could bring a free speech-type claim  
22 under Mandel, much --

23 JUSTICE SOTOMAYOR: Why not an  
24 Establishment Clause claim?

25 GENERAL FRANCISCO: And -- and --

1 because, Your Honor, and the reason why I think  
2 they haven't pursued those types of claims is  
3 because I don't think they would possibly  
4 support the types of nationwide injunction that  
5 they're asking for.

6 Your Honor, the reason why I don't  
7 think that they could bring an Establishment  
8 Clause claim is because the proclamation  
9 doesn't actually apply to the Respondents. It  
10 only applies to aliens abroad who have no  
11 constitutional right to enter.

12 JUSTICE SOTOMAYOR: No, but the claim  
13 is that it -- that the proclamation is in place  
14 because of a dislike of a particular religion.  
15 And I thought the Establishment Clause at its  
16 heart is that we cannot be anything but neutral  
17 with respect to religion or its practice.

18 GENERAL FRANCISCO: That is true, Your  
19 Honor, but as the Valley Forge decision makes  
20 clear, not everybody has standing to challenge  
21 that negative message injury. Otherwise, the  
22 plaintiffs in Valley Forge would have had  
23 standing to challenge the land transfer from  
24 the government to the Christian college on the  
25 ground that it sent a pro-Christian or

1 anti-atheist message. That --

2 JUSTICE SOTOMAYOR: But these people  
3 are saying that that negative religious  
4 attitude is stopping them --

5 GENERAL FRANCISCO: Right.

6 JUSTICE SOTOMAYOR: -- from doing  
7 things that they would otherwise be able to do:  
8 To associate with scholars from these  
9 countries, to bring in students, to have family  
10 members join them.

11 GENERAL FRANCISCO: Right.

12 JUSTICE SOTOMAYOR: Which is one of  
13 the purposes of the INS.

14 GENERAL FRANCISCO: And -- and that's  
15 where they might have free exercise or free  
16 speech claims along the type that Justice  
17 Kennedy suggested --

18 JUSTICE SOTOMAYOR: Well, but I --

19 GENERAL FRANCISCO: -- but which  
20 couldn't support a nationwide injunction. I  
21 don't think that that gives them an  
22 Establishment Clause claim when the  
23 proclamation doesn't actually apply to them  
24 because --

25 JUSTICE SOTOMAYOR: General, today,

1 can we go back to something that's been  
2 bothering me here, which is -- and it was  
3 argued in a case this week about the unitary  
4 executive theory, which basically says the  
5 President is at the head, I think -- I'm  
6 summarizing in an incomplete way --

7 GENERAL FRANCISCO: Uh-huh.

8 JUSTICE SOTOMAYOR: -- but that the  
9 President is the head of the executive branch  
10 and that he should have, for those who are in  
11 the extreme of this theory or -- or on one end  
12 of the theory --

13 GENERAL FRANCISCO: Uh-huh.

14 JUSTICE SOTOMAYOR: -- not extreme,  
15 that he can hire or fire anyone he wants and  
16 that he can put in place whatever policy he  
17 wants.

18 GENERAL FRANCISCO: Uh-huh.

19 JUSTICE SOTOMAYOR: If we take Justice  
20 Kagan's hypothetical President --

21 GENERAL FRANCISCO: Uh-huh.

22 JUSTICE SOTOMAYOR: -- who basically  
23 says to his review committee, I want to keep  
24 out Jews --

25 GENERAL FRANCISCO: Uh-huh.



1 JUSTICE SOTOMAYOR: -- period; find a  
2 way. That's their charge.

3 So, in that situation, why would the  
4 actions of the committee, whatever this is,  
5 Executive Committee, not be subject to great  
6 suspicion and to thorough review -- which  
7 actually wasn't completely --

8 GENERAL FRANCISCO: Uh-huh.

9 JUSTICE SOTOMAYOR: -- done here --  
10 given that they are responsible to the  
11 executive --

12 GENERAL FRANCISCO: Right.

13 JUSTICE SOTOMAYOR: -- and they've  
14 been told what the outcome of their  
15 deliberations must be?

16 GENERAL FRANCISCO: Sure. And I have  
17 two responses to that, Your Honor.

18 The first is that the President's  
19 cabinet, just like all of us here, is  
20 duty-bound to protect and defend the  
21 Constitution. So I would expect that if any  
22 cabinet member were given that order, that  
23 cabinet member would refuse to comply or resign  
24 in the face of a plainly unconstitutional  
25 order. So I think that would be the initial

1 check.

2           Secondly, if you had an extreme  
3 scenario where all of that broke down, then, if  
4 the President actually did make that  
5 statement -- I want to keep out a particular  
6 race or a particular religion, no matter  
7 what -- that would undermine the facial  
8 legitimacy of the action, even under the Mandel  
9 standard.

10           Here, however, you don't have anything  
11 like that. Rather, you have the cabinet doing  
12 its job through the agencies, where they ask  
13 the agencies to construct and apply this  
14 neutral standard to every country in the world,  
15 including every Muslim country. They concluded  
16 that the vast majority of the world, including  
17 the vast majority of the Muslim world, was just  
18 fine, but there were problems with a small  
19 number of countries and so imposed pressure,  
20 recommended pressure, to help move those  
21 countries across the line.

22           JUSTICE SOTOMAYOR: General, the  
23 problem is that I don't see that that material  
24 was reviewed by the judges below, by the Ninth  
25 Circuit or the Fourth Circuit judges.

1 I thought that the government had kept  
2 confidential and refused to share, either with  
3 the litigants or the courts, exactly what was  
4 done, how, what the evaluation and how --

5 GENERAL FRANCISCO: Right.

6 JUSTICE SOTOMAYOR: -- it was applied  
7 to all those countries in the world.

8 I understand some of the  
9 confidentiality that might concern you, but if  
10 the backdrop is the way that Justice Kagan  
11 described it --

12 GENERAL FRANCISCO: Right.

13 JUSTICE SOTOMAYOR: -- that -- that  
14 heated --

15 GENERAL FRANCISCO: Well, I -- yeah --

16 JUSTICE SOTOMAYOR: -- anti-Semitic  
17 background, don't you think that once you get  
18 through the Mandel preliminary stage, that you  
19 need an independent arbiter to look at all of  
20 that to ensure the process, in fact, is what is  
21 claimed it was?

22 GENERAL FRANCISCO: Well, Your Honor,  
23 a couple of responses to that.

24 First of all, I think that the  
25 proclamation is very transparent and lays out

1 in great detail both the process and the  
2 substance upon which the proclamation is based.

3 And I think that under the duty of  
4 regularity or good faith, or whatever you want  
5 to call it, that one branch of the government  
6 owes to another coequal branch of the  
7 government, there is a very strong presumption  
8 that what is being set out there is the truth.

9 JUSTICE KAGAN: You -- you said  
10 something earlier, General, I want to make sure  
11 that I got it right. You said if at the time  
12 the President had said we don't want Muslims  
13 coming into this country --

14 GENERAL FRANCISCO: Uh-huh.

15 JUSTICE KAGAN: -- that that would  
16 undermine the proclamation.

17 GENERAL FRANCISCO: Yes.

18 JUSTICE KAGAN: Did I get you right?

19 GENERAL FRANCISCO: Yes.

20 JUSTICE KAGAN: So I -- I think, you  
21 know, honestly, the difference here then seems  
22 to be is everything that the President said  
23 effectively that?

24 GENERAL FRANCISCO: I think there are  
25 two issues, Your Honor. There are the -- the

1 first is whether you can ever consider things  
2 like campaign statements. And we are very much  
3 of the view that campaign statements are made  
4 by a private citizen before he takes the oath  
5 of office and before, under the Opinions Clause  
6 of the Constitution, receives the advice of his  
7 cabinet, and that those are constitutionally  
8 significant acts that mark the fundamental  
9 transformation from being a private citizen to  
10 the embodiment of the executive branch. So  
11 that those statements should be out of bounds.

12 But for --

13 JUSTICE KENNEDY: Suppose you have a  
14 local mayor and, as a candidate, he makes  
15 vituperative hate -- hateful statements, he's  
16 elected, and on day two, he takes acts that are  
17 consistent with those hateful statements.  
18 That's -- whatever he said in the campaign is  
19 irrelevant?

20 GENERAL FRANCISCO: Your -- Your  
21 Honor, if he takes the same oath --

22 JUSTICE KENNEDY: You would say  
23 whatever he said in the campaign is irrelevant?

24 GENERAL FRANCISCO: I would say two  
25 things. And that was the -- and the second

1 thing is the point I was about to turn to. I  
2 would say yes, because we do think that oath  
3 marks a fundamental transformation, but I would  
4 also say here it doesn't matter, because, here,  
5 the statements that they principally rely on  
6 don't actually address the meaning of the  
7 proclamation itself.

8           This is not a so-called Muslim ban.  
9 If it were, it would be the most ineffective  
10 Muslim ban that one could possibly imagine  
11 since not only does it exclude the vast  
12 majority of the Muslim world, it also omits  
13 three Muslim-majority countries that were  
14 covered by past orders, including Iraq, Chad,  
15 and Sudan.

16           And so this order is what it purports  
17 to be and what its process and substance  
18 confirms that it is. It is an order that is  
19 based on a multi-agency worldwide review that  
20 applied neutral criteria all across the world  
21 and concluded, under those neutral criteria,  
22 most of the world was fine, but a small part of  
23 it failed to provide us with that minimum  
24 baseline of information, the minimum, not the  
25 ideal, the bare minimum -- terrorism history,

1 criminal history -- that we need to protect the  
2 country.

3 JUSTICE BREYER: All right. Can --  
4 can I ask a more -- I did read, I think, almost  
5 all the 80 briefs. And now your time -- what  
6 do --

7 CHIEF JUSTICE ROBERTS: Yeah, don't  
8 worry. Please go ahead.

9 JUSTICE BREYER: All right. All  
10 right. All right. Almost 80, and I think I --  
11 some were repetitive, not too many. And I  
12 think I know the basic arguments, but there's  
13 one question I'm left with and it starts with  
14 an assumption, which I think you share, but I  
15 want to be sure. All right.

16 I noticed that the Carter order and  
17 the Reagan order both had case-by-case  
18 exceptions.

19 GENERAL FRANCISCO: Uh-huh.

20 JUSTICE BREYER: And I looked at this  
21 order, and this has case-by-case exceptions.  
22 And then it says -- you know, it says  
23 case-by-case waivers may be appropriate in  
24 individual circumstances, such as, giving some  
25 examples, the following.

1           And then they have to be no  
2 terrorists. Well, that's the law anyway. And  
3 they -- they have to be in the interests of the  
4 United States. And there can't be undue  
5 hardship, which the only time the word  
6 "hardship" appears in the immigration laws, it  
7 says "extreme hardship."

8           GENERAL FRANCISCO: Uh-huh.

9           JUSTICE BREYER: So "undue" must be  
10 less than "extreme."

11          GENERAL FRANCISCO: Uh-huh.

12          JUSTICE BREYER: Okay? So I'm -- then  
13 they have a list: people with foreign contacts  
14 previously established, business reasons,  
15 they've been here studying or other long-term  
16 activity, they want to visit or reside with a  
17 close family member, they have a disease or  
18 something that they need --

19          GENERAL FRANCISCO: Uh-huh.

20          JUSTICE BREYER: -- treatment for,  
21 they -- previously been employed. And there  
22 are about five other things.

23          GENERAL FRANCISCO: Yeah.

24          JUSTICE BREYER: All right. Focus on  
25 that class of individuals.



1                   GENERAL FRANCISCO: Uh-huh.

2                   JUSTICE BREYER: Now, in countries --  
3 150 million people, all together, there must be  
4 quite a few who have -- do fall within that  
5 class. So --

6                   GENERAL FRANCISCO: Well, yes, Your  
7 Honor, but there's only a small number of  
8 people that seek to come into our country.

9                   JUSTICE BREYER: Well, that's what I'm  
10 asking about.

11                  GENERAL FRANCISCO: Yeah.

12                  JUSTICE BREYER: You see?

13                  GENERAL FRANCISCO: Yeah.

14                  JUSTICE BREYER: That's now -- you --  
15 you would think -- now, as far as we're  
16 concerned, if they fall within that class,  
17 there -- there's no reason given here why they  
18 should be excluded, other than the -- the  
19 normal processes?

20                  GENERAL FRANCISCO: Well, a couple of  
21 responses, Your Honor.

22                  JUSTICE BREYER: What?

23                  GENERAL FRANCISCO: First, in terms of  
24 the numbers --

25                  JUSTICE BREYER: I'm not asking about

1 the numbers.

2 GENERAL FRANCISCO: Oh, oh, you're not  
3 asking --

4 JUSTICE BREYER: I want to ask about  
5 --

6 GENERAL FRANCISCO: So -- so, in terms  
7 of the reason --

8 JUSTICE BREYER: Yeah.

9 GENERAL FRANCISCO: -- they should be  
10 excluded, one of the principal purposes of the  
11 proclamation is to exert diplomatic pressure on  
12 governments in order to get them to change and  
13 provide us with the information --

14 JUSTICE BREYER: So you think they  
15 should be excluded?

16 GENERAL FRANCISCO: Not if they meet  
17 the criteria for the --

18 JUSTICE BREYER: Not if they meet the  
19 criteria.

20 GENERAL FRANCISCO: -- for the waiver.

21 JUSTICE BREYER: Okay. Okay. So  
22 there's --

23 GENERAL FRANCISCO: That's why we have  
24 -- that's why we have the waiver.

25 JUSTICE BREYER: That's -- that's --

1 that's what I thought you would say.

2 GENERAL FRANCISCO: Yeah.

3 JUSTICE BREYER: Then I get -- can ask  
4 my question. Sorry.

5 GENERAL FRANCISCO: Yes.

6 JUSTICE BREYER: I want to be sure  
7 we're the same wavelength.

8 GENERAL FRANCISCO: Yes.

9 (Laughter.)

10 JUSTICE BREYER: Okay. Now, falling  
11 within that class, here is the problem. It  
12 seems to me that there are probably a  
13 significant number of such people. And you  
14 read the briefs, you think, hey, there's the  
15 business community complaining, there's the  
16 academic community, there were 46 scholars at  
17 Harvard, there -- there are families in the  
18 Lisa Blatt brief, you know, that -- that they  
19 say we were trying to get medical treatment and  
20 nobody told us about this, and -- and they've  
21 only admitted two and there's supposed to be  
22 guidance, and --

23 GENERAL FRANCISCO: That's not true.

24 JUSTICE BREYER: -- you haven't put in  
25 the guidance, and -- and -- and the most there

1 are is 100. And so there is my question. If  
2 you have done the same thing that the Reagan  
3 people did and the Carter people did, then it  
4 might be -- I'm not expressing a definite  
5 opinion -- but, well, you've got the same thing  
6 here, but if this is, as one brief says, just  
7 window dressing and they never apply it --

8 GENERAL FRANCISCO: Right.

9 JUSTICE BREYER: -- then you have  
10 something new and different going well beyond  
11 what President Reagan did.

12 GENERAL FRANCISCO: Sure.

13 JUSTICE BREYER: Okay. So I want to  
14 know how do I find out -- how do I find out  
15 when there is not that information in the  
16 brief, where do we have to -- can we have  
17 another hearing? Do we send it back? Do we  
18 say, look, the government, of course, thinks  
19 this isn't window dressing --

20 GENERAL FRANCISCO: Right.

21 JUSTICE BREYER: -- but the other side  
22 says there are only two people, no notice,  
23 nobody knows.

24 GENERAL FRANCISCO: So, Your Honor,  
25 two --

1 JUSTICE BREYER: There are people in  
2 Yemen, there are people in Somalia --

3 GENERAL FRANCISCO: Yeah.

4 JUSTICE BREYER: -- decent people.  
5 Business -- you see my point?

6 GENERAL FRANCISCO: Yes.

7 JUSTICE BREYER: What's the answer?

8 GENERAL FRANCISCO: And two responses.

9 JUSTICE BREYER: Yes.

10 GENERAL FRANCISCO: Our reply brief  
11 has our most -- most current number on waivers,  
12 and I believe the number at page 17, footnote  
13 -- well, it's -- it's over 400. I can't  
14 remember the exact statement.

15 JUSTICE BREYER: All right. That's  
16 400 out of 150 million.

17 GENERAL FRANCISCO: And then --

18 JUSTICE BREYER: And -- and is it well  
19 publicized in these countries that they know  
20 all they have to do is go to the visa office  
21 and say: I understand the thing, I want an  
22 exception?

23 GENERAL FRANCISCO: No, Your Honor,  
24 and I have two -- two responses --

25 JUSTICE BREYER: Yeah.

1           GENERAL FRANCISCO:  -- to that.  One  
2   is I don't know how well publicized it is, but  
3   I suspect that people understand how to get it.

4           My second principal response is,  
5   though, that, frankly, in terms of the  
6   legality, I think that the waiver is not  
7   necessary, although it is a very good thing,  
8   which is why --

9           JUSTICE BREYER:  Not necessary.  There  
10  -- there you have President Reagan --

11          GENERAL FRANCISCO:  -- which is why  
12  most -- which is why most governments don't --  
13  which is why it's -- it's a good thing, which  
14  is why most of these proclamations often have  
15  them.  But there's nothing in --

16          JUSTICE BREYER:  Okay.  So you want me  
17  to consider --

18          GENERAL FRANCISCO:  -- the law that  
19  actually requires it.

20          JUSTICE BREYER:  That's what you want.  
21  You want me to consider the lawfulness of this  
22  order on the assumption that there is no  
23  waiver.

24          GENERAL FRANCISCO:  I don't --

25          JUSTICE BREYER:  Which is not what --

1 not what President Reagan did, not what -- not  
2 what President Carter did, and if you go  
3 through every action that Congress took,  
4 waiver, waiver, waiver, possibility,  
5 case-by-case, case-by-case here, that's the --  
6 that's the --

7 GENERAL FRANCISCO: Right. The answer  
8 to my -- your question, Your Honor, is, no, I  
9 don't want you to consider the proclamation on  
10 the -- on the hypothetical situation that it is  
11 what it isn't, but I do think that the  
12 proclamation as written and as applied falls  
13 well within the President's authority under  
14 1182(f).

15 Thank you, Mr. Chief Justice.

16 CHIEF JUSTICE ROBERTS: Thank you,  
17 General. We will afford you rebuttal time.

18 GENERAL FRANCISCO: Thank you.

19 CHIEF JUSTICE ROBERTS: Mr. Katyal.

20 ORAL ARGUMENT OF NEAL K. KATYAL  
21 ON BEHALF OF THE RESPONDENTS

22 MR. KATYAL: Thank you, Mr. Chief  
23 Justice, and may it please the Court:

24 The executive order is unlawful for  
25 three reasons: It conflicts with Congress's

1 policy choices. It defies the bar on  
2 nationality discrimination, something you never  
3 heard my friend talk about. And it violates  
4 the First Amendment.

5 Congress has already specified a  
6 three-part solution to the very same problem  
7 the order addresses: Aliens seeking entry from  
8 countries that don't cooperate with the United  
9 States in vetting, including "state sponsors of  
10 terrorism and countries that provide inaccurate  
11 information."

12 First, aliens have to go through the  
13 individualized vetting process with the burden  
14 placed on them.

15 Second, when Congress became aware  
16 that some countries were failing to satisfy the  
17 very same baseline criteria you just heard  
18 about, that the order uses, Congress rejected a  
19 ban. Instead, it used carrots. When countries  
20 cooperated, they'd get extra credit, a track --  
21 faster track for admission. Legislation to use  
22 big sticks like nationality bans failed.

23 And, third, Congress was aware  
24 circumstances could change on the ground, so it  
25 required reporting to them so it could change



1 the law.

2 CHIEF JUSTICE ROBERTS: Well, let's  
3 take big sticks fail. Let's suppose that the  
4 intelligence agencies go to the President and  
5 say, we have 100 percent solid information that  
6 on a particular day 20 nationals from Syria are  
7 going to enter the United States with chemical  
8 and biological weapons. They could kill tens  
9 of thousands of Americans.

10 In that situation, could the President  
11 ban the entry of Syrian nationals on that one  
12 day?

13 MR. KATYAL: He could for two reasons.  
14 There's two different arguments. There's the  
15 nationality discrimination ban, 1152, and then  
16 there's whether or not this comports with  
17 Congress's policy judgments.

18 And with respect to both, I think it  
19 would. It wouldn't be nationality  
20 discrimination for the reasons Judge Sentelle  
21 said in LAVAS, when you have an emergency  
22 fast-moving situation like the Syria example  
23 you're saying.

24 CHIEF JUSTICE ROBERTS: Well, just to  
25 stop, interrupt you there. I mean, what if

1 it's a week? What if it's a week a month from  
2 now? That's what the intelligence information  
3 is.

4 In other words, I'm trying to --

5 MR. KATYAL: Right.

6 CHIEF JUSTICE ROBERTS: -- respond to  
7 your point that it has to be an immediate  
8 decision.

9 MR. KATYAL: Yeah. So I think, you  
10 know, this Court's dealt with that in  
11 Youngstown and Hamdan and said, look, you know,  
12 the President's going to get a pass absolutely  
13 on, you know, what he says the emergency is.  
14 But the ultimate question is, can you go to  
15 Congress and get any legislative impediment  
16 removed? And that he can have deference about.

17 But here we are 460 days on -- later,  
18 Mr. Chief Justice. He's never even introduced  
19 legislation about this. So we're so far from  
20 that hypothetical, we'll concede the  
21 hypothetical.

22 CHIEF JUSTICE ROBERTS: Well, imagine  
23 -- imagine, if you can, that Congress is unable  
24 to act when the President asked for  
25 legislation.

1 (Laughter.)

2 MR. KATYAL: Right.

3 CHIEF JUSTICE ROBERTS: And someone  
4 introduces a bill saying let's authorize --  
5 first of all, the President may have qualms  
6 about sharing that absolute intelligence  
7 broadly, but let's say there's a bill  
8 introduced to say let's authorize the President  
9 and there's a bill introduced to say let's  
10 block the President, and neither bill moves.

11 MR. KATYAL: Absolutely. We  
12 understand the President will have residual  
13 authority to keep the country safe. Our point  
14 here, though, is that Congress has thought  
15 about this exact problem, including, you know  
16 -- you know, about -- there -- there's only one  
17 problem he's identifying, which is countries  
18 not cooperating.

19 He's not talking about people coming  
20 in or something like that, like your  
21 hypothetical. And with respect to that,  
22 Congress has said here's how we deal with it.  
23 We deal with it with the individualized vetting  
24 system, which pushes all the burdens on a  
25 person coming in. That's 1361.

1           You've got to show biometric ID under  
2 the statute. You've got to have an in-person  
3 interview, if there's any risk that the person  
4 is from a country that's a state sponsor of  
5 terrorism, like your hypothetical or anything  
6 else.

7           So Congress has really said in a  
8 robust way, here is how we would deal with it.  
9 And to the extent countries aren't cooperating,  
10 we offer carrots.

11           Congress rejected exactly what they're  
12 trying to propose here, which is a flat  
13 nationality ban. And that's where I think the  
14 force of our argument lies with respect to the  
15 first point, which is this is countermanding  
16 Congress's policy judgments.

17           My friend on the other side actually  
18 in his brief --

19           JUSTICE ALITO: Well, Congress did --  
20 Congress did act. It enacted 1182(f).

21           MR. KATYAL: Correct.

22           JUSTICE ALITO: Why doesn't this fall  
23 squarely within the language of 1182(f)?

24           MR. KATYAL: For -- for -- we have  
25 both textual reasons that it's not a class, for

1 reasons Justice Breyer was talking about. It's  
2 not perpetuated -- it's perpetual, like Justice  
3 Ginsburg was talking about. But we think  
4 there's a much bigger point, Justice Alito,  
5 which is --

6 JUSTICE ALITO: Well, maybe you could  
7 talk about the text. It's not a class?  
8 Doesn't 11 -- doesn't 1182(f) say whenever the  
9 President finds that the entry of any aliens --

10 MR. KATYAL: Correct.

11 JUSTICE ALITO: -- or any class of  
12 aliens. So put class aside, although I don't  
13 really see why people who are nationals of a  
14 particular country don't constitute a class.  
15 What about any aliens?

16 MR. KATYAL: Right. So we think it is  
17 any -- because the power in 1182 is so broad  
18 and sweeping and does allow the President to  
19 supplement what Congress has done, we think  
20 that you have to -- you have to be careful and  
21 read limit -- you have to read it just the way  
22 you read every other statute to say, how do we  
23 harmonize that broad text of 1182(f) with the  
24 rest of the INA?

25 And our point in our briefs, which I

1 don't think you heard an answer to, is, if you  
2 accept their idea that the President has such a  
3 sweeping power, he could end, for example,  
4 family -- the family preference system and  
5 impose, you know, and end so-called chain  
6 migration or anything like that. He could do  
7 -- countermand any of the provisions of the INA  
8 and turn it into a line item veto.

9           So, for that reason, we think there  
10 has to be some limit. That's something this  
11 Court's dealt with in, you know, the tobacco  
12 case.

13           JUSTICE ALITO: Well, does this  
14 proclamation do anything like that? Does this  
15 proclamation purport to establish a new  
16 permanent immigration policy for the United  
17 States?

18           MR. KATYAL: Absolutely, Your Honor.  
19 This is a perpetual policy that bans. It does  
20 exactly what Congress in 1965 said you can't  
21 do. And it countermands Congress's  
22 fine-grained reticulated judgment from 2001,  
23 2015, and several other times, which is to say,  
24 instead of these flat bans, we're going to have  
25 -- we're going to balance foreign policy

1 considerations, economic considerations, like  
2 the U.S. companies brief, humanitarian, image  
3 of the United States views, all of that  
4 together, and said we won't do the flat ban.

5 Instead, we're going to have a much  
6 more fine-grained approach with individualized  
7 vetting and carrots for the countries that  
8 don't disagree -- that don't cooperate.

9 JUSTICE ALITO: What is your basis for  
10 saying that it is perpetual?

11 MR. KATYAL: Well, there's nothing in  
12 the order that ends it. And you heard my  
13 friend say, oh, that would doom all executive  
14 orders. But that's not true. Half of these --

15 JUSTICE KENNEDY: I thought it had to  
16 be reexamined every 180 days?

17 MR. KATYAL: No, that's not what it  
18 says. It says there's a report that has to  
19 come in at 180 days, and nothing happens at the  
20 end of the report.

21 JUSTICE KENNEDY: Well, that -- that  
22 indicates there will be a reassessment?

23 MR. KATYAL: Well, in --

24 JUSTICE KENNEDY: And then the -- and  
25 -- and the President has continuing discretion?

1 MR. KATYAL: Justice Kennedy, this  
2 argument wouldn't be there if there was  
3 anything about reassessment, the way there are  
4 in about half the orders, including the Cuba  
5 order, which says it sunsets once the crisis  
6 ends. There's nothing like that in this.

7 And it's just like a reporting  
8 requirement to Congress in which Congress isn't  
9 necessarily required to do anything. Congress  
10 has statutes like that all the time.

11 This is that. And that's why this is  
12 unlike any other executive order. If you go  
13 back and look at all 43 executive orders that  
14 Presidents have issued, none of them have even  
15 arguably countermanded Congress's judgment in  
16 the area. They've all been consistent.  
17 They've all been supplements.

18 JUSTICE KENNEDY: Well, the statute  
19 says first that -- that -- that 1182 for such  
20 period as he deems necessary, and he can have  
21 continuing supervision over whether it's still  
22 necessary.

23 MR. KATYAL: Again, we wouldn't have a  
24 problem with that if it was tailored to a  
25 crisis, it says it sunsets, and then, you know,



1 could be re-upped or something like that.  
2 That's not what this says. This is about a  
3 perpetual problem.

4 JUSTICE KENNEDY: So you want the  
5 President to say, I'm convinced that in six  
6 months we're going to have a safe world?

7 MR. KATYAL: Well -- well -- well, no,  
8 Justice Kennedy, that's not our argument. Our  
9 argument is, here, the President is identifying  
10 something that is a perennial problem. Our  
11 brief says it goes back 100 years, you know,  
12 when the Soviet Union was around, we don't have  
13 countries that cooperate with us in vetting.

14 And the solution has always been from  
15 Congress not to have a flat ban but instead to  
16 have a fine-grained vetting system to balance  
17 these considerations.

18 CHIEF JUSTICE ROBERTS: What if the  
19 military advisors tell the President that, in  
20 their judgment, the President ought to order a  
21 strike, an air strike against Syria, and the  
22 President says, well -- does that mean he can't  
23 because you would regard that as discrimination  
24 against a majority Muslim country?

25 MR. KATYAL: Absolutely not. There's

1 nothing to do with the text of the statute.  
2 The 1152 statute's about discrimination and the  
3 "issuance of visas." And that's all that --

4 CHIEF JUSTICE ROBERTS: So, under  
5 1182(f), you would say that there's no problem  
6 under that provision?

7 MR. KATYAL: Well, under 1182, as I  
8 understand, it was a strike. And so I don't  
9 think there's any immigration issue in your  
10 hypothetical. I might be misunderstanding it,  
11 Mr. Chief Justice.

12 CHIEF JUSTICE ROBERTS: Well, any type  
13 of targeted action that would have a impact on  
14 the Muslim population.

15 MR. KATYAL: Absolutely. We think the  
16 President has wide authorities to do things  
17 that have impacts on the Muslim population.  
18 Take the laptop ban that was introduced --

19 CHIEF JUSTICE ROBERTS: Why under your  
20 theory wouldn't that constitute or the argument  
21 would be that that's discrimination under your  
22 Establishment Clause argument --

23 MR. KATYAL: Oh.

24 CHIEF JUSTICE ROBERTS: -- that that's  
25 discrimination on the basis of faith because he

1 has said in the past, if you accept the --

2 MR. KATYAL: Yeah.

3 CHIEF JUSTICE ROBERTS: -- accept the  
4 arguments, that he -- he is anti-Muslim?

5 MR. KATYAL: Not at all, Your Honor,  
6 and no President has run afoul of this, you  
7 know, and that's because, here, the President  
8 and his advisors have directly tied this policy  
9 to those statements. And the red brief at page  
10 70, I think, is the greatest illustration of  
11 that.

12 That's a constitutional claim. And I  
13 certainly want to get there, but before doing  
14 so, I just want to make very clear the  
15 consequences of their position for the INA is  
16 that the President can take a wrecking ball to  
17 the statute and countermand Congress's  
18 fine-grained judgments, that he can never --

19 JUSTICE GORSUCH: Well, Mr. Katyal --

20 JUSTICE KAGAN: You might think --

21 JUSTICE GORSUCH: Mr. Katyal, if I  
22 might on -- on the statutory question before we  
23 leave it. We've been proceeding so far on the  
24 assumption that we can reach the merits, but  
25 the government makes the argument, for example,

1 that aliens who are removed from this country  
2 have to bring their claims personally and third  
3 parties can't vindicate those rights of aliens  
4 being -- who are present in this country, and  
5 asks the question why it should be that third  
6 persons should be able to assert the rights of  
7 aliens who are not present in this country.  
8 What's the answer to that?

9 MR. KATYAL: Well, several. This is  
10 not a third-party case. These are United  
11 States citizens bringing this challenge in a  
12 state --

13 JUSTICE GORSUCH: Oh behalf of --

14 MR. KATYAL: -- of the United States.

15 JUSTICE GORSUCH: -- aliens not  
16 present in the country?

17 MR. KATYAL: Well, but they are  
18 directly -- they are directly harmed  
19 themselves. Let me just give you one example.  
20 Not just the State of Hawaii, whose university  
21 is directly impacted, but let's just take, for  
22 example, the Alomari -- Mr. Alomari, the  
23 10-year-old in the PARS Equality brief, Justice  
24 Breyer, that you were referring to. This is a  
25 10-year-old daughter in Yemen who is -- who's

1 trying to come here because she has cerebral  
2 palsy.

3 JUSTICE GORSUCH: I understand that,  
4 but those arguments don't work with respect to  
5 aliens present in the country. So why do they  
6 work for aliens who are not present in the  
7 country?

8 MR. KATYAL: Because I --

9 JUSTICE GORSUCH: Those very same  
10 arguments would not succeed.

11 MR. KATYAL: Well --

12 JUSTICE GORSUCH: I think you'd  
13 concede that they wouldn't succeed for aliens  
14 present --

15 MR. KATYAL: Right. And they don't  
16 succeed because there you have a better  
17 plaintiff might not be willing to bring them in  
18 the United States, and that's why the court,  
19 you know, says no third party. But, here,  
20 these folks are directly impacted.

21 And the most important thing to say is  
22 Sale answers this. You heard my friend concede  
23 Sale was jurisdictional, the issues in Sale.  
24 That's how they briefed it up. That's how he  
25 just described it. This Court had exactly that

1 situation, United States plaintiffs, and it  
2 reached the merits.

3 Our statutory point to you is that if  
4 you accept this order, you're giving the  
5 President a power no President in 100 years has  
6 exercised, an executive proclamation that  
7 countermands Congress's policy judgments. He  
8 has zero examples to say that when Congress has  
9 stepped into the space and solved the exact  
10 problem, that the President can then come in  
11 and say: No, I want a different solution.

12 If you do that, you're -- it's not  
13 just family preferences that you're allowing  
14 him to get rid of; you'd get rid of all sorts  
15 of even small things in the Code or big things,  
16 like there's a preference for specialty  
17 occupations like software engineers in the INA.  
18 The President could say: The economics are  
19 such I'm going to ban software engineers from  
20 going to California or something like that  
21 under that sweeping 1182 power.

22 JUSTICE KAGAN: I -- I guess the  
23 question, though, Mr. Katyal, is maybe you're  
24 entirely right that 1182(f) needs to have some  
25 limits to prevent the President from doing

1 something that's completely contrary to another  
2 section of the statute.

3 But you're suggesting, well, the  
4 President can't do anything that's not  
5 contemplated by the rest of the statute.

6 MR. KATYAL: That is not our argument.

7 JUSTICE KAGAN: Okay. So then I want  
8 to know what are you saying this is directly  
9 contrary to? Because it seems to me you would  
10 have to point to some kind of clear and direct  
11 conflict between what the President is doing  
12 and another statutory provision.

13 MR. KATYAL: So our view is that the  
14 President can supplement; he just can't  
15 supplant. In this Court's decisions in the  
16 Brown & Williamson case and the UARG greenhouse  
17 gas, and Concepcion and Abilene Cotton, the  
18 Savings Clause cases, all say there are three  
19 things you look at. And it's not a flat bar.  
20 It can't be like a direct contravention. Even  
21 they say it's not a direct contravention in  
22 their reply brief at page 19.

23 So the three things are, first, can  
24 these two solutions coexist or not? Second,  
25 has Congress prescribed a reticulated

1 comprehensive scheme? And, third, you know, is  
2 there any other indication that Congress  
3 considered the issue and went in a different  
4 direction?

5           With respect to all of those for  
6 here -- and, again, only this proclamation  
7 satisfies all three of those factors --  
8 Congress has a comprehensive reticulated scheme  
9 that deals with the exact single problem that  
10 he's identified, which is countries not  
11 cooperating. It can't coexist with the  
12 solution of a flat ban. It makes no sense, for  
13 example, to have the in-person visa requirement  
14 -- visa interview, which is in 12 --  
15 1202(h)(2), which is for -- for people who come  
16 from state sponsors of terrorism or who have a  
17 "group" with a likelihood of providing  
18 inaccurate information. Congress said there  
19 has to be an in-person interview for that.

20           It doesn't make sense to say, well,  
21 you're going to have a flat ban. It doesn't  
22 make sense to have a Visa Waiver Program which  
23 is all about countries that provide zero  
24 information to the United States, state  
25 sponsors of terrorism and the like, and say



1 we're going to give you a carrot and then say,  
2 oh, no, forget about the Visa Waiver Program.

3 JUSTICE ALITO: Can -- can you imagine  
4 any situation in which the threat of the  
5 infiltration of the United States by terrorists  
6 was so severe with respect to a particular  
7 country that the other measures that you have  
8 mentioned could be deemed by a President to be  
9 inadequate?

10 MR. KATYAL: Yes.

11 JUSTICE ALITO: You cannot imagine any  
12 such situation?

13 MR. KATYAL: Yes, I can. And the  
14 President would have a robust authority to deal  
15 with that. That is not our argument. So --

16 JUSTICE KENNEDY: And your argument is  
17 that courts have the -- the duty to review  
18 whether or not there is such a national  
19 contingency; that's for the courts to do, not  
20 the President?

21 MR. KATYAL: No. I think you have  
22 wide deference, Justice Kennedy. It's exactly  
23 what you said when you joined Justice Breyer's  
24 opinion in Hamdan, which is, as long as -- you  
25 know, Presidents have wide berth in this area,

1 but if -- you know, certainly, if there's any  
2 sort of emergency that precludes it.

3 But when you have a statute that  
4 considers the very same problem and there's  
5 nothing new that they've identified in this  
6 worldwide review process that Congress didn't  
7 consider exactly the same types of things, it  
8 is a perennial problem that countries do not  
9 cooperate with the United States when it comes  
10 to vetting. You know, the --

11 CHIEF JUSTICE ROBERTS: But that's in  
12 the abstract. I mean, they may have more --  
13 the President may have more particular problems  
14 in light of particular situations developing on  
15 the ground, and, yes, Congress addressed the  
16 question of the adequacy of vetting, but those  
17 questions arise in particular contexts.

18 And it seems to me a difficult  
19 argument to say that Congress was prescient  
20 enough to address any particular factual  
21 situation that might arise.

22 MR. KATYAL: Well, that, again --  
23 that's, again, Mr. Chief Justice, not our  
24 argument. So, for example, if something came  
25 along like a virus that, you know, wiped out

1 the visa-processing software in all these other  
2 countries, absolutely, the President would have  
3 the power to do it, but here --

4 CHIEF JUSTICE ROBERTS: What about --  
5 what about a change of administration in a  
6 particular country --

7 MR. KATYAL: Yes.

8 CHIEF JUSTICE ROBERTS: -- in which  
9 perhaps the vetting procedures are not going to  
10 be taken seriously?

11 MR. KATYAL: Right.

12 CHIEF JUSTICE ROBERTS: That Congress  
13 could not have anticipated?

14 MR. KATYAL: Well, but, again,  
15 Congress anticipated a country that is a "state  
16 sponsor of terrorism" and even for -- with  
17 respect to that, providing no information and  
18 indeed fomenting against the United States,  
19 Congress said, oh, we're not going to have a  
20 nationality ban. You know, they flatly banned  
21 that and said we're going to have  
22 individualized vetting and this Visa Waiver  
23 Program carrot to try and deal with that, you  
24 know, dangerous regime.

25 Now, again, I can imagine an emergency

1 situation in which the President would have  
2 even greater authority for that, but, here, we  
3 are 460 days later and I would caution the  
4 Court not to make a decision about the  
5 emergency you're concerned about. That can be  
6 bracketed as it was in Youngstown, as it was in  
7 Hamdan. This is so far from that.

8 The text of 1152 is flatly violated  
9 here. It says there shall be no discrimination  
10 on the basis of nationality with the issuance  
11 of visas.

12 That is 39 percent of all the visas  
13 this executive order covers. It's not a small  
14 part. It's a large part. And it is the most  
15 important part because immigrant visas are the  
16 kind of heart about, you know, what the nation  
17 becomes. It's people who want to come here and  
18 become part of our long-term polity. This  
19 executive order flatly contradicts that.

20 Now, if you accept his  
21 interpretation -- he says, well, you know,  
22 we're discriminating at the entry side, not at  
23 the visa side. If you do that, you are giving  
24 the President the power to undo -- and he's  
25 actually just done it -- he's undone the ban on

1 nationality-based discrimination. He's imposed  
2 country quotas of zero for these countries at  
3 the border.

4 CHIEF JUSTICE ROBERTS: If your --  
5 your argument based on discrimination based on  
6 the campaign statements, is there a statute of  
7 -- the one that you do make based on the  
8 campaign statements, is there a statute of  
9 limitations on that, or is that a ban from  
10 presidential findings for the rest of the  
11 administration?

12 MR. KATYAL: So, Mr. Chief Justice, I  
13 first want to be very clear about this. Our  
14 point about 1152 and the discrimination has  
15 nothing to do with any campaign statements or  
16 anything else.

17 It's purely the text of the  
18 proclamation, which is nationality-based  
19 discrimination through and through. Judge  
20 Sentelle said you couldn't imagine a clearer  
21 text than this. And this is -- it violates it.

22 Now --

23 CHIEF JUSTICE ROBERTS: My question  
24 was on the --

25 MR. KATYAL: -- you're asking about

1 the First Amendment.

2 CHIEF JUSTICE ROBERTS: Yes.

3 MR. KATYAL: I just want to make  
4 absolutely clear that we're -- that's not --  
5 you know, you don't need to do any of that for  
6 purposes of 1152. And that would knock out  
7 39 percent of the most important part of the  
8 executive order.

9 CHIEF JUSTICE ROBERTS: My question,  
10 of course --

11 MR. KATYAL: Yes. Now I'm getting --

12 CHIEF JUSTICE ROBERTS: -- was not on  
13 1152.

14 MR. KATYAL: Yes. I'm getting there.  
15 Okay.

16 With respect to that, we don't think  
17 -- we think that the test, as this Court has  
18 said, a reasonable, objective observer viewing  
19 all the statements, and we think, absolutely,  
20 my friend is right, you shouldn't look to  
21 campaign statements in general or stuff like  
22 that, statements of a private citizen.

23 The only thing is, here, they  
24 themselves, the President and his staff, have  
25 rekindled exactly that. If you look at page 70

1 of our red brief, you have a very good example  
2 of this.

3 After the executive order, this latest  
4 executive order was promulgated, the President  
5 tweeted these three virulent anti-Muslim  
6 videos. And then the press spokesman was  
7 asked: What does this mean? What is this  
8 about? And the answer was: The President has  
9 spoken about exactly this in the proclamation.

10 CHIEF JUSTICE ROBERTS: My question  
11 was whether or not the inhibition on the  
12 ability to -- to enter one of the proclamations  
13 applies forever?

14 MR. KATYAL: Right. No, I think the  
15 President could have disclaimed -- you know,  
16 easily moved away from all of these statements,  
17 you know, but instead they embraced them.  
18 That's the difference.

19 And so, absolutely, the President  
20 would have wide berth to say that's a --

21 CHIEF JUSTICE ROBERTS: So, if  
22 tomorrow he issues a proclamation saying he's  
23 disavowing all those statements, then the next  
24 day he can reenter this proclamation?

25 MR. KATYAL: That's exactly what this

1 Court said in McCreary. This Court in McCreary  
2 said, you know, the same policy can be  
3 constitutional if said -- if promulgated by one  
4 entity and not by another, depending on the  
5 circumstances around it.

6 CHIEF JUSTICE ROBERTS: Is your answer  
7 to my question yes?

8 MR. KATYAL: Yes. The answer is --

9 CHIEF JUSTICE ROBERTS: Tomorrow, he  
10 issues a proclamation disavowing those  
11 statements --

12 MR. KATYAL: Absolutely. And that's a  
13 --

14 CHIEF JUSTICE ROBERTS: -- then the  
15 next day he could reenter this and your  
16 discrimination argument would not be  
17 applicable?

18 MR. KATYAL: And -- and -- and, Mr.  
19 Chief Justice, that's exactly what I told the  
20 Ninth Circuit in May. The President didn't do  
21 that. That's what's -- that's -- you know,  
22 that's what a reasonable, objective observer --

23 JUSTICE SOTOMAYOR: So if another --

24 JUSTICE ALITO: Mr. Katyal, would any  
25 reasonable observer reading this proclamation,



1 with -- without taking into account statements,  
2 think that this was a Muslim ban?

3 I mean, there are -- I think there are  
4 50 predominantly Muslim countries in the world.  
5 Five -- five countries -- five predominantly  
6 Muslim countries are on this list.

7 The population of the -- of the  
8 predominantly Muslim countries on this list  
9 make up about 8 percent of the world's Muslim  
10 population.

11 MR. KATYAL: Absolutely.

12 JUSTICE ALITO: If you looked at the  
13 10 countries with the most Muslims, exactly  
14 one --

15 MR. KATYAL: Right.

16 JUSTICE ALITO: -- Iran, would be on  
17 that list of the top 10.

18 MR. KATYAL: Right.

19 JUSTICE ALITO: So would a reasonable  
20 observer think this was a Muslim ban?

21 MR. KATYAL: If it were -- if it were  
22 just the text of the order alone, it might  
23 raise eyebrows, for fit and other reasons that  
24 the briefs go into, but we wouldn't be here.  
25 We absolutely agree that just -- it's the same

1 test as in Lukumi and other cases. You have to  
2 look to all the circumstances around it that  
3 are said, the publicly available ones.

4 You know, and, Justice Alito, the fact  
5 that the order only come -- encompasses some  
6 Muslim countries I don't think means it's not  
7 religious discrimination. For example, if I'm  
8 an employer and I have 10 African-Americans  
9 working for me and I only fire two of them, I  
10 don't think -- you know, and say, well, I've  
11 left the other eight in, I don't think anyone  
12 can say that's not discrimination.

13 JUSTICE ALITO: No, I -- I understand  
14 that. And it is one of our fundamental values  
15 that there is religious freedom here for  
16 everybody in that, number -- adherence to every  
17 religion are entitled to equal treatment.

18 My only point is that if you look at  
19 what was done, it does not look at all like a  
20 Muslim ban. There are other justifications  
21 that jump out as to why these particular  
22 countries were put on -- on the list.

23 So you -- it seems to me the list  
24 creates a strong inference that this was not  
25 done for that invidious purpose.

1           MR. KATYAL: Justice Alito, I think if  
2     it were just the list, I think we'd be right --  
3     you'd be right, although I'd point out that  
4     you, yourself, in the Stormans case said that  
5     it's a religious -- it raises an inference of  
6     religious gerrymander, of "the burden imposed  
7     falls almost exclusively on those with  
8     religious objections."

9           This is a ban that really does fall  
10    almost exclusively on Muslims, between  
11    90.2 percent and 99.8 percent Muslims. And so  
12    it does look very much like what you said in  
13    Stormans. But even then, we wouldn't be here  
14    if it weren't for all of the different  
15    statements.

16           And the best evidence of this, about  
17    what a reasonable, objective observer would  
18    think, is to look at the wide variety of amicus  
19    briefs in this case from every corner of  
20    society representing millions and millions of  
21    people from the U.S. Conference of Catholic  
22    Bishops, which calls it "blatant religious  
23    discrimination."

24           JUSTICE GORSUCH: Mr. Katyal, on that,  
25    it's been a long time since this court has used

1 the Lemon test, reasonable observer, even to  
2 strike down a domestic statute, let alone  
3 something with purely international  
4 application. What -- what do we do about that?

5 MR. KATYAL: Yeah, so two things.  
6 Number one is I think the very fact that this  
7 is immigration cuts the other way. I mean, the  
8 heart of the First Amendment is about  
9 immigration restrictions on, for example,  
10 Catholics at the founding and our protest of  
11 King George, which is all about using the  
12 immigration power to exclude people of a  
13 different faith. And that's what our  
14 Constitution is about, so that's the first  
15 thing.

16 And the second is we don't think you  
17 have to get into Lemon and all these other  
18 tests that you all have struggled with. I  
19 think this Court in Lukumi was very clear in  
20 saying that when you're talking about  
21 denigration of religion, all the tests point in  
22 the same direction.

23 JUSTICE SOTOMAYOR: Mr. Katyal, you  
24 said something earlier, you said you wouldn't  
25 be here if all of those statements, the

1 background statements, were not made. Do you  
2 mean that on all of your bases? You wouldn't  
3 be here on the Establishment Clause claim?

4 MR. KATYAL: Only on the Establishment  
5 Clause claim, not on anything else. And our  
6 point is, you know, he talks about, for  
7 example, this worldwide vetting process.

8 Remember his own argument on 1182 is  
9 the statute puts the President --

10 JUSTICE SOTOMAYOR: So let's go back  
11 to not being here without the statements.  
12 Clearly, the statements, even conceded by your  
13 adversary, do give you a basis to look behind,  
14 all right, the reason.

15 So, if we're looking behind it, how do  
16 you deal with the General's suggestion that  
17 there was a cleansing that occurred because of  
18 all of the agencies and departments who  
19 participated in this process?

20 MR. KATYAL: Yeah. So there's three  
21 things. Number one is that his -- his own  
22 argument is that 1182 puts the President in the  
23 driver's seat, so the cabinet's not important.  
24 It's the President's proclamation.

25 Second, the order itself says in its

1 first lines, it harkens back to Executive  
2 Orders 1 and 2, and it says it's an outgrowth  
3 of that. So it was infected by the same thing  
4 that was struck down on Establishment Clause  
5 grounds in other cases.

6 And third, and most importantly, the  
7 President before this review process even began  
8 tweeted and said that he wanted a tougher ban,  
9 a non-politically-correct ban and the like.

10 So given all of those things, but, in  
11 particular, given the fact that 1182 itself  
12 forces the President to make the proclamation,  
13 it's the President's proclamation, so I don't  
14 think you even have to get into this whole  
15 unitary executive thing, but I do agree with  
16 you, Justice Sotomayor, that that's another  
17 problem, which is they're coming before the  
18 Court and saying: Nope, it's the President  
19 who's in charge. And now they're saying here:  
20 Oh, no, no, no, it's these other people.

21 This is the President's proclamation  
22 through and through. No President has ever  
23 said anything -- anything like this. And  
24 that's what makes this different.

25 And the President --

1           JUSTICE KAGAN:  And -- and yet, Mr.  
2   Katyal, you have a proclamation that says there  
3   are important national security interests at  
4   stake.  And the question is how to do the kind  
5   of analysis that you want us to do without in  
6   some sense evaluating the adequacy of those  
7   national security interests, which for the most  
8   part we've said courts are not equipped to do.

9           MR. KATYAL:  Right.  We're not asking  
10  you to second-guess a national security  
11  judgment at all with the purpose of the  
12  Establishment Clause.

13           We're saying you just have to look to  
14  what a reasonable, objective observer would do.  
15  That's the ordinary test that you've used in  
16  cases like Lukumi.  Is there an official  
17  purpose to disparage a religion?  Here, there  
18  very much is.  That's, you know, everything  
19  that the President has said and that the order  
20  itself embodies.  That's our fundamental  
21  problem.

22           JUSTICE BREYER:  What do you think --  
23  it's a -- it's a -- it's still something I'm --  
24  I'm thinking about, perhaps to the side, but  
25  the statute you point to, one of the ones that

1 is stronger for you. There are obviously  
2 objections to what you're saying in quite a few  
3 briefs, all right, but the one that you talked  
4 about, it does say you have to have an  
5 interview with a consular official if the  
6 person is from a country officially designated  
7 by the Secretary as a state sponsor of  
8 terrorism. It does say that.

9 So they'll say, but we do have that in  
10 respect to everyone under the exception. So  
11 there isn't much problem. We've gone beyond  
12 that in respect to other people. All right.  
13 Take their argument for a moment.

14 Because my question is, which I  
15 couldn't find in the briefs, is, is it true --  
16 I'm just taking what they say -- that really  
17 that isn't so, they don't publicize it, they  
18 haven't put forth a guidance, people don't know  
19 they can come in and qualify for this.

20 And if it turns out that that is  
21 something that is important to the lawfulness  
22 of the order, because there are many, many  
23 categories there --

24 MR. KATYAL: Right.

25 JUSTICE BREYER: -- what do we do?



1           MR. KATYAL: So two things. Number  
2 one, this waiver process has excluded -- and  
3 you have this in the PARS Equality brief at  
4 page 14. A 10-year-old with cerebral palsy who  
5 wants to come to the United States to save her  
6 life and she can't move or talk. The  
7 10-year-old was denied a waiver, Justice  
8 Breyer.

9           He says there is 430 people who have  
10 gotten waivers. They've never told you the  
11 denominator and there is no publication of this  
12 process and how -- how often it is. And the  
13 data that we do have suggests as a matter of  
14 percentages it is very weak.

15           Just to give you some evidence of  
16 that, just the State of Hawaii has gotten about  
17 a thousand letters from people, most of which  
18 say we're not even getting waivers and the  
19 like.

20           JUSTICE GORSUCH: That --

21           MR. KATYAL: We've heard very few --

22           JUSTICE GORSUCH: -- raises a question  
23 of remedy for me. We have this troubling rise  
24 of this nationwide injunction, cosmic  
25 injunction --

1 MR. KATYAL: Yeah, yeah.

2 JUSTICE GORSUCH: -- not limited to  
3 relief for the parties at issue or even a class  
4 action.

5 MR. KATYAL: Right.

6 JUSTICE GORSUCH: And, near as I can  
7 tell, that's -- that's a really new development  
8 where a district court asserts the right to  
9 strike down a -- a federal statute with regard  
10 to anybody anywhere in the world.

11 MR. KATYAL: Yeah.

12 JUSTICE GORSUCH: What -- what do we  
13 do about that?

14 MR. KATYAL: Obviously the injunction  
15 here has been trimmed by this Court itself and  
16 others. And I do think -- I share your  
17 impulse, Justice Gorsuch. That's something  
18 that I think lower courts are debating right  
19 now in a number of different contexts, like the  
20 contraception case and the like.

21 I think this case is the poorest  
22 example to get into it because of United States  
23 versus Texas's point, which is this is an  
24 immigration case. And Article I Section 8 puts  
25 Congress in the driver's seat and says there

1 must be a uniform rule of naturalization.

2 So I think for those reasons, you  
3 know, I get why the Court might want to get  
4 into it. Getting into it here, I think, in the  
5 Supreme Court, probably doesn't make a  
6 tremendous amount of sense. It would almost be  
7 an advisory opinion.

8 Our fundamental point to you, though,  
9 is that Congress is in the driver's seat when  
10 it comes to immigration, and that this  
11 executive order transgresses the limits that  
12 every President has done with this proclamation  
13 power since 1918. And to accept it here is to  
14 accept that the President can take an iron  
15 wrecking ball to the statute and pick and  
16 choose things that he doesn't want for purposes  
17 of our immigration code. That can't be the law  
18 of the United States.

19 CHIEF JUSTICE ROBERTS: Take five  
20 extra minutes.

21 MR. KATYAL: Okay. Okay.

22 (Laughter.)

23 CHIEF JUSTICE ROBERTS: You don't have  
24 to.

25 (Laughter.)

1 MR. KATYAL: Well, if there -- if  
2 there are any other questions I'm happy to take  
3 anything. Okay? Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel. Five minutes for rebuttal, General.

6 REBUTTAL ARGUMENT OF GENERAL NOEL J. FRANCISCO  
7 ON BEHALF OF THE PETITIONERS

8 GENERAL FRANCISCO: Mr. Chief Justice  
9 and may it please the Court:

10 I -- I really do have just a few quick  
11 points, unless Your Honors have additional  
12 questions.

13 Justice Breyer, I did want to respond  
14 in more detail to your question about how the  
15 waiver process works. The State Department  
16 does publish the waiver process on its web  
17 site, but the waiver process actually is  
18 applied automatically by consular officers.

19 So when somebody applies for a visa,  
20 the waiver -- the visa officer first determines  
21 whether the person is otherwise admissible  
22 under other provisions of the INA.

23 If they're inadmissible, you never  
24 even get to the proclamation. Then, for those  
25 people who are not inadmissible under other

1 parts of the INA, like 1182(a), the consular  
2 officer then turns to the proclamation and  
3 first asks: Are you subject to an exception  
4 within the proclamation? If you are, fine, and  
5 the proclamation never applies.

6 If you're not subject to an exception,  
7 then the consular officer, him or herself,  
8 turns to the waiver provision and applies the  
9 criteria of the waiver provision.

10 JUSTICE GINSBURG: How do you deal  
11 with the --

12 GENERAL FRANCISCO: So it does get  
13 applied in every single case.

14 JUSTICE GINSBURG: How -- how do you  
15 deal with the example that was brought up of  
16 the child with cerebral palsy?

17 GENERAL FRANCISCO: Your Honor, the  
18 waiver is built to address those issues. I am  
19 not familiar enough with the details of that  
20 case to tell you what happened in that  
21 particular case.

22 But that's what the waiver provision  
23 --

24 JUSTICE BREYER: But that's -- that's,  
25 you see --

1                   GENERAL FRANCISCO:  -- is intended to  
2                   address.

3                   JUSTICE BREYER:  You've read the  
4                   briefs, as have I.  All right.  Now, there's  
5                   some that lists about ten or 15 instances like  
6                   the cerebral palsy.  One has Parkinson's.  Then  
7                   there's another brief that lists all the people  
8                   who are professors, scholars, at universities,  
9                   and there are a lot.

10                  And -- and then there are people, they  
11                  list the students from these countries, a lot.

12                  GENERAL FRANCISCO:  Yeah.

13                  JUSTICE BREYER:  And then the business  
14                  community lists a -- a whole bunch and says, my  
15                  goodness, they have been unable to get -- we  
16                  don't know what's going on.

17                  And then they say:  Well, what's going  
18                  on is nothing is going on.

19                  GENERAL FRANCISCO:  Well, Your Honor  
20                  --

21                  JUSTICE BREYER:  Now, I don't -- I'm  
22                  not taking sides on that.  I'm just saying I  
23                  don't know.

24                  GENERAL FRANCISCO:  Right.  And the  
25                  principal purpose of the proclamation is, of

1 course, to assert pressure on these countries  
2 in order to provide us with the needed  
3 information, which brings me to the second  
4 point in the four that I am hoping to try to  
5 make.

6 And, that is, that the individual  
7 vetting process depends upon us having the  
8 minimum baseline of information needed to  
9 determine in that vetting process whether the  
10 person is admissible.

11 So when the person shows up at our  
12 border with a visa that we may have validly  
13 issued, pursuant to that individual vetting  
14 process, but if her home government knows  
15 something that we don't and doesn't tell us, we  
16 cannot intelligently make the admissibility  
17 determination.

18 Third, I'd like to address the  
19 1152(a)(1)(A) point about nationality-based  
20 discrimination.

21 JUSTICE SOTOMAYOR: General, could you  
22 stop just one second?

23 GENERAL FRANCISCO: Yes, Your Honor,  
24 of course.

25 JUSTICE SOTOMAYOR: I for one am, like

1 Justice Breyer, concerned about is this window  
2 dressing or not? What's in place to ensure  
3 it's not? What are you personally doing to  
4 represent to us that it is, in fact, a real  
5 waiver process?

6 GENERAL FRANCISCO: Your Honor, State  
7 Department consular officers automatically  
8 apply the waiver process in the course of every  
9 visa application. And they are doing that,  
10 which is why there have been -- and I looked at  
11 our brief -- 430 waivers that have been issued  
12 since --

13 JUSTICE SOTOMAYOR: Have you bothered  
14 --

15 GENERAL FRANCISCO: -- the  
16 proclamation was issued.

17 JUSTICE SOTOMAYOR: -- to look to see  
18 if there are reasons for all of those people's  
19 exclusions?

20 GENERAL FRANCISCO: Your Honor, I  
21 cannot claim that I have looked into every  
22 individual case.

23 JUSTICE KENNEDY: Could you make your  
24 1152 point?

25 GENERAL FRANCISCO: Yes, Your Honor.



1 1152(a)(1)(A) addresses one thing, the issuance  
2 of immigrant visas. It doesn't address the  
3 broader question over whether somebody is  
4 allowed to enter in the first place.

5 That's governed by 1182, including  
6 1182(f). So essentially 1182 sets the universe  
7 of people who are eligible to come into the  
8 country in the first place.

9 And that is often a foreign policy and  
10 national security judgment. 1152(a)(1)(A) is  
11 one of the rules that governs how we distribute  
12 visas amongst that group that's eligible to  
13 come in.

14 And it is not just nationality-based  
15 distinctions that it applies to. It also  
16 applies to things like place of residence. So  
17 once you have that universe of eligible people,  
18 1152(a)(1)(A) governs how you distribute them.

19 But let's assume that you disagreed  
20 with me. All it would really mean is that we  
21 have to implement this proclamation in a  
22 slightly different way.

23 We would have to issue immigrant  
24 visas, but not non-immigrant visas to people  
25 who aren't allowed to enter, but we wouldn't

1 have to allow anyone to enter and we wouldn't  
2 have to issue any non-immigrant visas.

3 So the bottom line is I think they're  
4 simply wrong on that case -- on that issue.

5 My final point has to do with my -- my  
6 brother's recognition that, if the President  
7 were to say tomorrow that he was sorry, all of  
8 this would go away. Well, the President has  
9 made crystal clear on September 25th that he  
10 had no intention of imposing the Muslim ban.

11 He has made crystal clear that Muslims  
12 in this country are great Americans and there  
13 are many, many Muslim countries who love this  
14 country and he has praised Islam as one of the  
15 great countries of the world.

16 This proclamation is about what it  
17 says it's about: Foreign policy and national  
18 security. And we would ask that you reverse  
19 the court below.

20 CHIEF JUSTICE ROBERTS: Thank you,  
21 counsel. The case is submitted.

22 (Whereupon, at 11:09 a.m., the case  
23 was submitted.)

24

25

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