

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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

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UNITED STATES, ET AL.,)
Petitioners,)
v.) No. 17-965
HAWAII, ET AL.,)
Respondents.)

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:
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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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