2017

Section 4: Immigration Law Panel

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IV. Immigration Law Panel

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The state of Hawaii and Dr. Elshikh filed a claim seeking a temporary restraining order (TRO) on Executive Order 13780 on the basis that it violated the Establishment Clause of the First Amendment; the equal protection guarantees of the Fifth Amendment's Due Process Clause on the basis of religion and/or national origin, nationality, or alienage; the Due Process Clause of the Fifth Amendment based on substantive due process rights; the Due Process Clause of the Fifth Amendment based on procedural due process rights; the Immigration and Nationality Act; the Religious Freedom Restoration Act; and the Administrative Procedure Act.

Hawaii issued a nationwide TRO on the grounds that it was likely the plaintiffs could prove their claims. The government appealed. The 9th Circuit affirmed without ruling on the merits of the claims.

**Question Presented:** Whether respondents' challenge to the temporary suspension of entry of aliens abroad under Section 2(c) of Executive Order No. 13,780 is justiciable?

Whether Section 2(c)'s temporary suspension of entry violates the Establishment Clause?

Whether the global injunction, which rests on alleged injury to a single individual plaintiff, is impermissibly overbroad?

Whether the challenges to Section 2(c) became moot on June 14, 2017?

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**The State of Hawai’i,**

v.

**Donald J. Trump.**

United States Court of Appeals for the Fourth Circuit

Decided on June 12, 2017

[Excerpt; some citations and footnotes omitted]
conclude that the President, in issuing the Executive Order, exceeded the scope of the authority delegated to him by Congress. In suspending the entry of more than 180 million nationals from six countries, suspending the entry of all refugees, and reducing the cap on the admission of refugees from 110,000 to 50,000 for the 2017 fiscal year, the President did not meet the essential precondition to exercising his delegated authority: The President must make a sufficient finding that the entry of these classes of people would be "detrimental to the interests of the United States." Further, the Order runs afoul of other provisions of the INA that prohibit nationality-based discrimination and require the President to follow a specific process when setting the annual cap on the admission of refugees. On these statutory bases, we affirm in large part the district court's order preliminarily enjoining Sections 2 and 6 of the Executive Order.

I

A

One week after inauguration and without interagency review, President Donald J. Trump issued Executive Order 13769 ("EO1"). Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017). Entitled "Protecting the Nation From Foreign Terrorist Entry Into the United States," EO1's stated purpose was to "protect the American people from terrorist attacks by foreign nationals admitted to the United States." Id. EO1 recited that "[n]umerous foreign-born individuals have been convicted or implicated in terrorism-related crimes since September 11, 2001, including foreign nationals who entered the United States after receiving visitor, student, or employment visas, or who entered through the United States refugee resettlement program." Id.

EO1 mandated two main courses of action to assure that the United States remain "vigilant during the visa-issuance process to ensure that those approved for admission do not intend to harm Americans and that they have no ties to terrorism." Id. In Section 3, the President invoked his authority under 8 U.S.C. § 1182(f) to suspend for 90 days immigrant and nonimmigrant entry into the United States of nationals from seven majority-Muslim countries: Iraq, Iran, Libya, Sudan, Somalia, Syria, and Yemen. See id. at 8978. In Section 5, the President immediately suspended the U.S. Refugee Admissions Program ("USRAP") for 120 days, imposed a ban of indefinite duration on the entry of refugees from Syria, and limited the entry of refugees to 50,000 in fiscal year 2017. Id. at 8979. EO1 also ordered that changes be made to the refugee screening process "to prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality." Id. EO1 permitted the Secretaries of State and Homeland Security to make case-by-case exceptions to these restrictions "when in the national interest," and explained that it would be in the national interest "when the person is a religious minority in his country of nationality facing religious persecution." Id.

EO1 took immediate effect, causing great uncertainty as to the scope of the order, particularly in its application to lawful permanent residents. Notably, federal officials themselves were unsure as to the scope of EO1, which caused mass confusion at airports and other ports of entry. See Brief of the Foundation of Children of Iran and Iranian Alliance Across Borders as Amici Curiae, Dkt. No. 77 at 11-12 (describing how an Iranian visa holder was turned away
while en route to the United States because of the confusion regarding the contours of EO1’s scope); Brief of Former National Security Officials as Amici Curiae, Dkt. No. 108 at 25 n.53 & 54 (noting confusion at airports because officials were neither consulted nor informed of EO1 in advance). Shortly after EO1 issued, the States of Washington and Minnesota filed suit in the Western District of Washington to enjoin EO1. On February 3, 2017, the district court granted a temporary restraining order ("TRO"). Washington v. Trump, No. C17-0141JLR, 2017 U.S. Dist. LEXIS 16012, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017). On February 4, 2017, the Government filed an emergency motion in our court, seeking a stay of the TRO pending appeal. On February 9, 2017, this court denied the Government’s emergency motion for a stay of the injunction. Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017) (per curiam), reconsideration en banc denied, 853 F.3d 933 (9th Cir. 2017). In so doing, the panel rejected the Government’s arguments that EO1 was wholly unreviewable. See id. at 1161-64. After determining that the states had standing based on the alleged harms to their proprietary interests, id. at 1159-61, this court concluded that the states demonstrated a likelihood of success on their procedural due process claim, at least as to lawful permanent residents and nonimmigrant visa holders, id. at 1164-66. The panel did not review the states’ other claims, including the statutory-based claims. Id. at 1164.

Rather than continue with the litigation, the Government filed an unopposed motion to voluntarily dismiss the underlying appeal after the President signed EO2. On March 8, 2017, this court granted that motion, which substantially ended the story of EO1. The curtain opens next to the present controversy regarding EO2.

B

On March 6, 2017, the President issued EO2, also entitled "Protecting the Nation From Foreign Terrorist Entry Into the United States." Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 6, 2017). The revised Order was to take effect on March 16, 2017, at which point EO1 would be revoked. Id. at 13218. The Order expressly stated that EO1 "did not provide a basis for discriminating for or against members of any particular religion" and was "not motivated by animus toward any religion." Id. at 13210.

Section 2—"Temporary Suspension of Entry for Nationals of Countries of Particular Concern During Review Period"—reinstates the 90-day ban on travel for nationals of six of the seven majority-Muslim countries identified in EO1: Iran, Libya, Somalia, Sudan, Syria, and Yemen. Id. at 13213. Section 2 also directs the Secretary of Homeland Security, the Secretary of State, and the Director of National Intelligence to "conduct a worldwide review to identify whether, and if so what, additional information will be needed from each foreign country to adjudicate an application by a national of that country for a visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual is not a security or public-safety threat." Id. at 13212. Section 2(c) states in full:

To temporarily reduce investigative burdens on relevant agencies during the review period described in subsection (a) of this section, to ensure the proper review and maximum utilization of available resources for the screening and vetting of foreign nationals, to ensure that adequate standards are established to prevent infiltration by foreign terrorists, and in light of the national security concerns referenced in section 1 of this order, I hereby proclaim, pursuant to sections
212(f) and 215(a) of the INA, 8 U.S.C. [§§] 1182(f) and 1185(a), that the unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen would be detrimental to the interests of the United States. I therefore direct that the entry into the United States of nationals of those six countries be suspended for 90 days from the effective date of this order, subject to the limitations, waivers, and exceptions set forth in sections 3 and 12 of this order.

Regarding the six identified countries, EO2 explains:

Each of these countries is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones. Any of these circumstances diminishes the foreign government's willingness or ability to share or validate important information about individuals seeking to travel to the United States. Moreover, the significant presence in each of these countries of terrorist organizations, their members, and others exposed to those organizations increases the chance that conditions will be exploited to enable terrorist operatives or sympathizers to travel to the United States. Finally, once foreign nationals from these countries are admitted to the United States, it is often difficult to remove them, because many of these countries typically delay issuing, or refuse to issue, travel documents.

Id. at 13210. Based on the conditions of these six countries, "the risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harm the national security of the United States is unacceptably high." Id. at 13211.

The Order states that it no longer includes Iraq on the list of designated countries because of Iraq's "close cooperative relationship" with the United States and its recent efforts to enhance its travel documentation procedures. Id. at 13212. The Order also states that its scope has been narrowed from EO1 in response to "judicial concerns" about the suspension of entry with respect to certain categories of aliens. Id. EO2 applies only to individuals outside of the United States who do not have a valid visa as of the issuance of EO1 or EO2. EO2, unlike EO1, expressly exempts lawful permanent residents, dual citizens traveling under a passport issued by a country not on the banned list, asylees, and refugees already admitted to the United States. See id. at 13213-14. The Order also provides that consular officers or Customs and Border Protection officials can exercise discretion in authorizing case-by-case waivers to issue visas and grant entry during the suspension period, and offers examples of when waivers "could be appropriate." See id. at 13214-15.

Section 6—"Realignment of the U.S. Refugee Admissions Program for Fiscal Year 2017"—suspends USRAP for 120 days. Id. at 13215. During this period, the heads of certain executive agencies are directed to review the current USRAP application and adjudication processes, and to determine the additional procedures that "should" be required for individuals seeking admission as refugees. See id. at 13215-16. Invoking 8 U.S.C. § 1182(f), Section 6(b) reduces the number of refugees to be admitted from 110,000 to 50,000 in fiscal year 2017. Id. at 13216. The Order also removes EO1's preference for refugees facing persecution as a member of a minority religion, and no longer imposes a complete ban on Syrian refugees. Section 6 further provides for discretionary case-by-case waivers. Id.

EO2 supplies additional information relevant to national security concerns. The Order includes excerpts from the State
Department's 2015 Country Reports on Terrorism, that it asserts demonstrate "why . . . nationals [from the designated countries] continue to present heightened risk to the security of the United States." Id. at 13210; see id. at 13210-11 (providing a brief description of country conditions for each of the designated countries). The Order states that foreign nationals and refugees have committed acts of terrorism:

Recent history shows that some of those who have entered the United States through our immigration system have proved to be threats to our national security. Since 2001, hundreds of persons born abroad have been convicted of terrorism-related crimes in the United States. They have included not just persons who came here legally on visas but also individuals who first entered the country as refugees. For example, in January 2013, two Iraqi nationals admitted to the United States as refugees in 2009 were sentenced to 40 years and to life in prison, respectively, for multiple terrorism-related offenses. And in October 2014, a native of Somalia who had been brought to the United States as a child refugee and later became a naturalized United States citizen was sentenced to 30 years in prison for attempting to use a weapon of mass destruction as part of a plot to detonate a bomb at a crowded Christmas-tree-lighting ceremony in Portland, Oregon. The Attorney General has reported to me that more than 300 persons who entered the United States as refugees are currently the subjects of counterterrorism investigations by the Federal Bureau of Investigation.

Id. at 13212. EO2 does not discuss any instances of domestic terrorism involving nationals from Iran, Libya, Sudan, Syria, or Yemen.

Two versions of a report from the Department of Homeland Security ("DHS") surfaced after EO1 issued. First, a draft report from DHS, prepared about one month after EO1 issued and two weeks prior to EO2's issuance, concluded that citizenship "is unlikely to be a reliable indicator of potential terrorist activity" and that citizens of countries affected by EO1 are "[r]arely [i]mplicated in U.S.-[b]ased [t]errorism." Specifically, the DHS report determined that since the spring of 2011, at least eighty-two individuals were inspired by a foreign terrorist group to carry out or attempt to carry out an attack in the United States. Slightly more than half were U.S. citizens born in the United States, and the remaining persons were from twenty-six different countries—with the most individuals originating from Pakistan, followed by Somalia, Bangladesh, Cuba, Ethiopia, Iraq, and Uzbekistan. Id. Of the six countries included in EO2, only Somalia was identified as being among the "top" countries-of-origin for the terrorists analyzed in the report. During the time period covered in the report, three offenders were from Somalia; one was from Iran, Sudan, and Yemen each; and none was from Syria or Libya. The final version of the report, issued five days prior to EO2, concluded "that most foreign-born, [U.S.-]based violent extremists likely radicalized several years after their entry to the United States, [thus] limiting the ability of screening and vetting officials to prevent their entry because of national security concerns" (emphasis added).

The same day EO2 issued, Attorney General Jefferson B. Sessions III and Secretary of Homeland Security John F. Kelly submitted a letter to the President recommending that he "direct[] a temporary pause in entry" from countries that are "unable or unwilling to provide the United States with adequate information about their
nationals" or are designated as "state sponsors of terrorism."

D

The State of Hawai‘i ("the State") filed a motion for a TRO seeking to enjoin EO1, which the District of Hawai‘i did not rule on because of the nationwide TRO entered in the Western District of Washington. After EO2 issued, the State filed an amended complaint challenging EO2 in order "to protect its residents, its employers, its educational institutions, and its sovereignty." Dr. Elshikh, the Imam of the Muslim Association of Hawai‘i, joined the State's challenge because the Order "inflicts a grave injury on Muslims in Hawai‘i, including Dr. Elshikh, his family, and members of his Mosque." In 2015, Dr. Elshikh's wife filed an I-130 Petition for Alien Relative on behalf of her mother—Dr. Elshikh's mother-in-law—a Syrian national living in Syria. Dr. Elshikh fears that his mother-in-law will not be able to enter the United States if EO2 is implemented. Plaintiffs named as Defendants Donald J. Trump, in his official capacity as President of the United States; the U.S. Department of Homeland Security; John F. Kelly, in his official capacity as Secretary of Homeland Security; the U.S. Department of State; Rex W. Tillerson, in his official capacity as Secretary of State; and the United States of America (collectively referred to as "the Government").

Plaintiffs allege that EO2 suffers similar constitutional and statutory defects as EO1 and claim that the Order violates: the Establishment Clause of the First Amendment; the equal protection guarantees of the Fifth Amendment's Due Process Clause on the basis of religion and/or national origin, nationality, or alienage; the Due Process Clause of the Fifth Amendment based on substantive due process rights; the Due Process Clause of the Fifth Amendment based on procedural due process rights; the Immigration and Nationality Act; the Religious Freedom Restoration Act; and the Administrative Procedure Act. For their INA claim, Plaintiffs specifically contend that EO2 violates the INA by discriminating on the basis of nationality, ignoring and modifying the statutory criteria for determining terrorism-related inadmissibility, and exceeding the President's delegated authority under the INA. Plaintiffs also filed a motion for a TRO along with their amended complaint.


Defendants and all their respective officers, agents, servants, employees, and attorneys, and persons in active concert or participation with them, are hereby enjoined from enforcing or implementing Sections 2 and 6 of the Executive Order across the Nation.
Enforcement of these provisions in all places, including the United States, at all United States borders and ports of entry, and in the issuance of visas is prohibited, pending further orders from this Court.

On March 30, 2017, the Government filed a notice of appeal. This court granted the Government's unopposed motion to expedite the case. The Government requests that this court vacate the preliminary injunction, or at least narrow the injunction, and also stay the injunction pending appeal.

II

The district court held that Plaintiffs were entitled to preliminary relief because they had made a strong showing of success on the merits of their Establishment Clause claim. Applying the secular purpose test from *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971), and relying on the historical record that contained "significant and unrebutted evidence of religious animus driving the promulgation of the Executive Order," the district court concluded that EO2 was issued with an intent to disfavor people of Islamic faith. *See Hawai'i TRO*, 2017 U.S. Dist. LEXIS 36935, 2017 WL 1011673, at *12-16. In so doing, the district court decided an important and controversial constitutional claim without first expressing its views on Plaintiffs' statutory claims, including their INA-based claim. *See* 2017 U.S. Dist. LEXIS 36935, [WL] at *11 n.11.

The INA claim was squarely before the district court and briefed and argued before this court. Mindful of the Supreme Court's admonition that "courts should be extremely careful not to issue unnecessary constitutional rulings," "[p]articularly where, as here, a case implicates the fundamental relationship between the Branches," we think it appropriate to turn first to the INA claim. *Am. Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153, 161, 109 S. Ct. 1693, 104 L. Ed. 2d 139 (1989) (per curiam); *accord Lying v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445, 108 S. Ct. 1319, 99 L. Ed. 2d 534 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.").

After first determining that Plaintiffs have standing to assert their INA-based statutory claim, we conclude that Plaintiffs have shown a likelihood of success on the merits of that claim and that the district court's preliminary injunction order can be affirmed in large part based on statutory grounds. For reasons further explained below, we need not, and do not, reach the Establishment Clause claim to resolve this appeal. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347, 56 S. Ct. 466, 80 L. Ed. 688 (1936) (Brandeis, J., concurring) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.").

III

Before turning to our review of Plaintiffs' statutory claim, we first address the Government's challenge to the preliminary injunction order on justiciability grounds. The Government contends both that Plaintiffs lack standing to pursue this case and that the case is not yet ripe. The Government further contends that the consular nonreviewability doctrine bars this court from reviewing EO2. We address each contention in turn.

A

"Article III of the Constitution limits federal-court jurisdiction to 'Cases' and
'Controversies.' Massachusetts v. EPA, 549 U.S. 497, 516, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007). "Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy" and limits who may "maintain a lawsuit in federal court to seek redress for a legal wrong." Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016). "[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)(citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). "At this very preliminary stage of the litigation, [ Plaintiffs] may rely on the allegations in their [amended complaint] and whatever other evidence they submitted in support of their [preliminary injunction] motion to meet their burden." Washington, 847 F.3d at 1159; see Lujan, 504 U.S. at 561.

The district court determined that both the State of Hawai‘i and Dr. Elshikh have standing to pursue their Establishment Clause claim. See Hawai‘i TRO, 2017 U.S. Dist. LEXIS 36935, 2017 WL 1011673, at *7-10. The Government argues that Plaintiffs fail to satisfy the requirements of Article III standing to bring their Establishment Clause claim. Plaintiffs must establish standing for each of their claims. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (2006). As we do not reach Plaintiffs' Establishment Clause claim, we address only whether Plaintiffs have standing to challenge EO2 based on their INA-based statutory claim and conclude that they do.

1

Dr. Elshikh is an American citizen of Egyptian descent. He alleges that EO2 will prevent his mother-in-law from obtaining a visa to reunite with her family. His mother-in-law is a Syrian national currently living in Syria; she last visited her family in Hawai‘i in 2005 and has not yet met two of her five grandchildren. Dr. Elshikh's wife filed an I-130 Petition for Alien Relative on behalf of her mother in September 2015, and the petition was approved in February 2016. After EO1 issued, Dr. Elshikh was told that his mother-in-law's visa application for an immigrant visa had been put on hold. After EO1 was enjoined, he was notified that the application had progressed to the next stage of the process, and that her interview would be scheduled at an embassy overseas. Dr. Elshikh understandably and reasonably fears that EO2 will prevent his mother-in-law from entering the country. Dr. Elshikh asserts that he has standing based on the barriers EO2 imposes in preventing him from reuniting his mother-in-law with his family.

This court and the Supreme Court have reviewed the merits of cases brought by U.S. residents with a specific interest in the entry of a foreigner. See, e.g., Kerry v. Din, 135 S. Ct. 2128, 2131, 192 L. Ed. 2d 183 (2015) (involving a challenge by a U.S. citizen to the denial of her husband's visa); Kleindienst v. Mandel, 408 U.S. 753, 756-60, 92 S. Ct. 2576, 33 L. Ed. 2d 683 (1972) (addressing a challenge by American professors to the denial of a visa to a journalist they had invited to speak at several academic events); Cardenas v. United States, 826 F.3d 1164, 1167 (9th Cir. 2016) (determining that a U.S. citizen could challenge the denial of her husband's visa).
Most similar to this case, in *Legal Assistance for Vietnamese Asylum Seekers v. Department of State, Bureau of Consular Affairs*, the D.C. Circuit determined that visa sponsors had standing to assert that the State Department's refusal to process visa applications of Vietnamese citizens living in Hong Kong violated 8 U.S.C. § 1152. 45 F.3d 469, 471-73, 310 U.S. App. D.C. 168 (D.C. Cir. 1995), *vacated on other grounds*, 519 U.S. 1, 117 S. Ct. 378, 136 L. Ed. 2d 1 (1996). The court explained that the State Department's actions prolonged the separation of immediate family members, which resulted in injury to the sponsors. *Id.*

Dr. Elshikh seeks to reunite his mother-in-law with his family and similarly experiences prolonged separation from her. By suspending the entry of nationals from the six designated countries, including Syria, EO2 operates to delay or prevent the issuance of visas to nationals from those countries, including Dr. Elshikh's mother-in-law. Dr. Elshikh has alleged a concrete harm because EO2, specifically the operation of Section 2, is a barrier to reunification with his mother-in-law in light of her stalled visa process. See *id.* (holding that U.S. resident sponsors had standing to challenge the State Department's refusal to process visa applications); *Int'l Refugee Assistance Project v. Trump*, No. 17-1351, 857 F.3d 554, 2017 U.S. App. LEXIS 9109, 2017 WL 2273306, at *10 (4th Cir. May 25, 2017) (en banc), as amended (May 31, 2017) (identifying prolonged separation between plaintiff and his wife as a concrete harm). That his mother-in-law's visa application process was placed on hold when EO1 took effect, but moved forward when EO1 was enjoined, further shows that Dr. Elshikh's injury is concrete, real, and immediate if EO2 takes effect. Dr. Elshikh has thus alleged a sufficient injury-in-fact. While not challenged by the Government, it is also clear that Dr. Elshikh has established causation and redressability. His injuries are fairly traceable to the Order, satisfying causation, and enjoining EO2 will remove a barrier to reunification and redress that injury, satisfying redressability.

Dr. Elshikh has met the requirements for constitutional standing with respect to the INA-based statutory claim. 2

The State of Hawai'i alleges two primary theories of harm in asserting its standing: harm to its proprietary interests and impairment of its sovereign interests. "[L]ike other associations and private parties, a State is bound to have a variety of proprietary interests. A State may, for example, own land or participate in a business venture." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601, 102 S. Ct. 3260, 73 L. Ed. 2d 995 (1982). "And like other such proprietors [the State] may at times need to pursue those interests in court." *Id.* at 601-02.

The State asserts that it has standing because of the injuries inflicted on its university. The University of Hawai'i ("the University"), which the State operates, has twenty-three graduate students, at least twenty-nine visiting faculty members, and other permanent faculty members from the six countries designated in EO2. The State asserts that EO2 constrains the University's ability to recruit and enroll undergraduate and graduate students, and recruit and hire visiting faculty from the affected countries. The State also contends that EO2 threatens the University's ability to fulfill its educational mission by hampering recruitment of diverse students, preventing scholars from considering employment at the University, dissuading current professors and scholars from continuing their scholarship at
the University, hindering the free flow of ideas, and harming its values of inclusiveness and tolerance.

Given the timing of the admissions cycle and this litigation, the State concedes that it is too soon to determine the full impact on recruitment, but asserts that individuals who are not current visa holders or lawful permanent residents would be precluded from considering the University. In its opposition brief, the State gave updated information, explaining that eleven graduate students from the countries affected by the Order have been admitted, and the University was still considering applications from twenty-one other affected applicants. After the case was submitted, Plaintiffs supplemented the record with further updates on the University's admissions cycle. At least three graduate students, each from one of the six designated countries, have accepted their offers of admission and have committed to attending the University. There are eleven graduate student applicants, each from one of the six designated countries, with pending offers of admission for the 2017-18 school year. University classes begin on August 21, 2017, but at least two of the students who have accepted their offers of admission must be present on campus by August 1, 2017 and August 10, 2017, respectively, for their graduate programs. The State further explains that if EO2 takes effect now, these students' ability to obtain visas will be impeded.

Before Plaintiffs supplemented the record, the Government argued that the State had not identified any prospective student or faculty member who wished to enter the country during Section 2(c)'s 90-day period. However, the State's alleged harm is that EO2 presently constrains their recruitment efforts for students and faculty, and that EO2 deters prospective students and faculty members. Given the short admissions cycle—from when the University offers admissions to when international students must decide whether to attend—and the uncertainty of whether EO2 will inhibit their ability to secure a visa before the fall semester begins, EO2's deterrent effect is an injury that is "concrete" and "imminent," as opposed to merely "speculative." See Lujan, 504 U.S. at 560-61 (internal quotation marks omitted). Of course, a student who is not permitted to obtain a visa and enter our country would not accept an offer of admission.

The Government next contends that Plaintiffs cannot rely on events that unfolded after the filing of the complaint to establish standing. This argument is not persuasive. The State had previously contended that its recruitment was constrained by EO2 and its supplemental declaration merely provides greater detail regarding the students who may be unable to join the academic community this fall if EO2 takes effect. We consider the supplemental information as further evidence that EO2 will harm the State because students affected by Section 2(c) may not attend the University, and the University will lose tuition and educational benefits.

The State's standing can thus be grounded in its proprietary interests as an operator of the University. EO2 harms the State's interests because (1) students and faculty suspended from entry are deterred from studying or teaching at the University; and (2) students who are unable to attend the University will not pay tuition or contribute to a diverse student body. See Washington, 847 F.3d at 1161 (holding that states, as operators of universities, had Article III standing to challenge EO1 based on harms to their proprietary interests); Texas v. United States, 809 F.3d 134, 155-63 (5th Cir. 2015), as revised (Nov. 25, 2015), aff'd by an equally divided Court, 136 S. Ct. 2271, 195 L. Ed. 2d 638 (2016) (holding that the state of Texas
had standing to challenge the Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") program based on its alleged injury of subsidizing driver's licenses to DAPA beneficiaries). We further conclude that the State has shown that its injury is fairly traceable to EO2 and that enjoining EO2 would redress its harm.

The State also presents an alternative standing theory: that the Order impairs its sovereign interests in carrying out its refugee policies, among other things. A state has an interest in its "exercise of sovereign power over individuals and entities within the relevant jurisdiction," which "involves the power to create and enforce a legal code." *Alfred L. Snapp & Son*, 458 U.S. at 601. The State contends that EO2 hinders the exercise of its sovereign power to enforce its laws and policies and this inflicts an injury sufficient to provide the State standing to challenge the Order. The State has laws protecting equal rights, barring discrimination, and fostering diversity. *See*, e.g., Haw. Const. art. 1, §§ 2, 5; Haw. Rev. Stat. §§ 489-3, 515-3. Specific to refugees, the State created the Office of Community Services ("OCS"), which is directed to "[a]ssist and coordinate the efforts of all public and private agencies providing services which affect the disadvantaged, refugees, and immigrants." Haw. Rev. Stat. § 371K-4. OCS operates multiple programs for refugees.

The State has resettled three refugees this fiscal year, and at least twenty since 2010. EO2 would prevent the State from assisting with refugee resettlement and thus prevent it from effectuating its policies aimed at assisting refugee and immigrant populations. *See id.* The State's requested injunctive relief would permit it to assist in the resettlement of refugees, at least through fiscal year 2017. As the State exercises "sovereign power over individuals and entities within the relevant jurisdiction" in administering OCS, we conclude, at this preliminary stage, that the State has made sufficient allegations to support standing to challenge the refugee-related provisions of EO2. *See Alfred L. Snapp & Son*, 458 U.S. at 601; *see also Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 269 (4th Cir. 2011) (collecting cases where state was found to possess sovereign standing based on state statutes that regulated behavior or provided for the administration of a state program).

Concluding that Dr. Elshikh and the State have satisfied Article III's standing requirements, we turn to whether Plaintiffs are within the "zone of interests" protected by the INA.

3

Because Plaintiffs allege a statutory claim, we must determine whether they meet the requirement of having interests that "fall within the zone of interests protected by the law invoked." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388, 188 L. Ed. 2d 392 (2014) (internal quotation marks omitted).

We have little trouble determining that Dr. Elshikh is within the zone of interests of the INA to challenge EO2 based on this statutory claim. He asserts that the travel ban prevents his mother-in-law from reuniting with his family. *See Legal Assistance for Vietnamese Asylum Seekers*, 45 F.3d at 471-72 ("The INA authorizes the immigration of family members of United States citizens and permanent resident aliens. In originally enacting the INA, Congress implemented the underlying intention of our immigration laws regarding the preservation of the family unit. Given the nature and purpose of the statute, the resident appellants fall well within the zone of interest Congress intended to
Likewise, the State's efforts to enroll students and hire faculty members who are nationals from the six designated countries fall within the zone of interests of the INA. The INA makes clear that a nonimmigrant student may be admitted into the United States. See 8 U.S.C. § 1101(a)(15)(F) (identifying students qualified to pursue a full course of study); 8 C.F.R. § 214.2(f) (providing the requirements for nonimmigrant students, including those in colleges and universities). The INA also provides that nonimmigrant scholars and teachers may be admitted into the United States. See, e.g., 8 U.S.C. § 1101(a)(15)(J) (identifying students, scholars, trainees, teachers, professors, research assistants, specialists, or leaders in fields of specialized knowledge or skill); id. § 1101(a)(15)(H) (identifying aliens coming to perform services in a specialty occupation); id. §1101(a)(15)(O) (identifying aliens with extraordinary abilities in the sciences, arts, education, business, or athletics). International students and visiting faculty may qualify for F-1 visas, J-1 visas, H-1B visas, or O-1 visas. See Directory of Visa Categories, U.S. Dep't of State, https://travel.state.gov/content/visas/e n/general/all-visa-categories.html (last visited June 6, 2017). The INA leaves no doubt that the State's interests in student-and employment-based visa petitions for its students and faculty are related to the basic purposes of the INA.

The State's interest in effectuating its refugee resettlement policies and programs also falls within the zone of interests protected by the INA. See 8 U.S.C. § 1101(a)(42) (defining "refugees"); id. § 1157 (providing the procedure for determining the number of refugee admissions). These provisions of the INA were amended to provide a "systematic procedure" for the admission of refugees into the United States, as well as "uniform provisions for the effective resettlement and absorption of those refugees who are admitted." Refugee Act of 1980, Pub. L. No. 96-212, § 101, 94 Stat. 102 (1980). The State argues that EO2 upsets this finely-tuned system devised by Congress.

We conclude that Plaintiffs' claims of injury as a result of the alleged statutory violations are, at the least, "arguably within the zone of interests" that the INA protects. Bank of Am. Corp. v. City of Miami, Fla., 137 S. Ct. 1296, 1303, 197 L. Ed. 2d 678 (2017) (quoting Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970)).

Plaintiffs have standing to assert their INA-based statutory claim that EO2 exceeds the scope of the President's authority under the INA and conflicts with various INA provisions.

The Government next argues that Plaintiffs' claims are speculative and not ripe. "Ripeness is peculiarly a question of timing, designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." Stormans, Inc. v. Selecky, 586 F.3d 1109, 1122 (9th Cir. 2009) (internal quotations marks and alteration omitted). "Our role is neither to issue advisory opinions nor to declare rights in hypothetical cases, but to adjudicate live cases or controversies consistent with the powers granted the judiciary in Article III of the Constitution." Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1138 (9th Cir. 2000).

We are unpersuaded by the Government's arguments that until a student or faculty member requests a waiver and it is denied, or until Dr. Elshikh's mother-in-law requests
a waiver and she is denied, Plaintiffs injuries are not ripe because they assume "contingent future events that may not occur." *Texas v. United States*, 523 U.S. 296, 300, 118 S. Ct. 1257, 140 L. Ed. 2d 406 (1998) (internal quotation marks omitted)).

Although the waiver may, in theory, provide students, visiting faculty members, or Dr. Elshikh's mother-in-law an opportunity to obtain visas, the waiver is discretionary. Indeed, no one can count on it. The Order poses hardships to nationals from the six designated countries by barring throughout the suspension period their ability to obtain visas. The waiver provision neither guarantees that waivers will be granted nor provides a process for applying for a waiver; moreover, the ultimate decision is clearly committed to a consular officer's discretion. See 82 Fed. Reg. at 13214 ("Case-by-case waivers could be appropriate in circumstances such as the following . . . .") (emphasis added); id. at 13219 (stating that nothing in the Order provides any "enforceable" rights). The discretionary waiver is not "a sufficient safety valve," *Washington*, 847 F.3d at 1169, and is a far cry from the "contingent future" argued by the Government. Here, nationals from the six designated countries, including Dr. Elshikh's mother-in-law and students who have accepted, or been offered, admission to the University of Hawai'i, are burdened by EO2 because they are not permitted entry, and whether they might obtain a waiver is speculative and at the discretion of a consular officer or a Customs and Border Protection official. See 82 Fed. Reg. at 13214.

We decline the Government's invitation to wait until Plaintiffs identify a visa applicant who was denied a discretionary waiver to assess whether Plaintiffs have shown a likelihood of success on the merits of their claims. Regardless of whether Dr. Elshikh's mother-in-law or the University's prospective students and faculty members might conceivably obtain such a waiver, they will face substantial hardship if we were to first require that they try to obtain a waiver before we will consider their case. *Cf. Abbott Labs. v. Gardner*, 387 U.S. 136, 149, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967). We conclude that the claim is ripe for review.

C

Finally, the Government renews the argument it made before this court in *Washington v. Trump* that we may not review EO2 because the consular nonreviewability doctrine counsels that the decision to issue or withhold a visa is not subject to judicial review. *See Li Hing of Hong Kong, Inc. v. Levin*, 800 F.2d 970, 971 (9th Cir. 1986) ("[I]t has been consistently held that the consular official's decision to issue or withhold a visa is not subject either to administrative or judicial review."). We reject this argument.

Plaintiffs do not seek review of an individual consular officer's decision to grant or to deny a visa pursuant to valid regulations, which could implicate the consular nonreviewability doctrine. Plaintiffs instead challenge "the President's promulgation of sweeping immigration policy." *Washington*, 847 F.3d at 1162. Courts can and do review both constitutional and statutory "challenges to the substance and implementation of immigration policy." *Id.* at 1163; *see, e.g., Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187-88, 113 S. Ct. 2549, 125 L. Ed. 2d 128 (1993)(addressing the merits of a challenge that an executive order violated the INA and the United Nations Convention Relating to the Status of Refugees); *INS v. Chadha*, 462 U.S. 919, 940-41, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983)(addressing
whether a section of the INA that authorized one House of Congress to invalidate a decision of the Executive to allow a deportable alien to remain in the United States was unconstitutional).

This case is justiciable because Plaintiffs seek judicial review of EO2, contending that EO2 exceeds the statutory authority delegated by Congress and constitutional boundaries. "This is a familiar judicial exercise." Zivotofsky ex rel. Zivotofsky v. Clinton, 566 U.S. 189, 196, 132 S. Ct. 1421, 182 L. Ed. 2d 423 (2012). We reject the Government's argument that the Order is not subject to judicial review. Although "[t]he Executive has broad discretion over the admission and exclusion of aliens, [] that discretion is not boundless. It extends only as far as the statutory authority conferred by Congress and may not transgress constitutional limitations. It is the duty of the courts, in cases properly before them, to say where those statutory and constitutional boundaries lie." Abourezk v. Reagan, 785 F.2d 1043, 1061, 251 U.S. App. D.C. 355 (D.C. Cir. 1986), aff'd, 484 U.S. 1, 108 S. Ct. 252, 98 L. Ed. 2d 1 (1987).


We do not abdicate the judicial role, and we affirm our obligation "to say what the law is" in this case. Marbury v. Madison, 5 U.S. 137, 177, 2 L. Ed. 60 (1803). We turn to the merits of the appeal of the preliminary injunction order.

IV

A

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." Winter v. NRDC, Inc., 555 U.S. 7, 22, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). "A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." Id. at 20. We may affirm the district court's entry of the preliminary injunction "on any ground supported by the record." Enyart v. Nat'l Conference of Bar Exam'rs, Inc., 630 F.3d 1153, 1159 (9th Cir. 2011).

B

We consider whether Plaintiffs are entitled to preliminary relief based on the likelihood that EO2 violates the INA. First, we address whether the President complied with the conditions set forth in § 1182(f), which are necessary for invoking his authority. We next address the conflicts between EO2 and other provisions of the INA.

I

Under Article I of the Constitution, the power to make immigration laws "is entrusted exclusively to Congress." Galvan v. Press, 347 U.S. 522, 531, 74 S. Ct. 737, 98 L. Ed. 911 (1954); see U.S. Const. art. I, § 8, cl. 4 ("The Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization .
Fiallo v. Bell, 430 U.S. 787, 792, 97 S. Ct. 1473, 52 L. Ed. 2d 50 (1977) ("[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." (internal quotation marks omitted)); [**49] id. at 796 ("The conditions of entry for every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification . . . have been recognized as matters solely for the responsibility of the Congress . . . ") (internal quotation marks omitted)).

In the INA of 1952, Congress delegated some of its power to the President through Section 212(f), which provides:

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.


In Section 2(c) of the Order, the President invokes this power along with § 1185(a) to suspend for 90 days the entry of nationals from the six designated countries. See 82 Fed. Reg. at 13213. In Section 6(a) of the Order, the President invokes neither section to suspend travel of refugees and to suspend decisions on applications for refugee status for 120 days, but, in Section 6(b), the President invokes § 1182(f) to cap refugee admissions at 50,000 for the 2017 fiscal year. Id. at 13215-16.

The parties dispute whether EO2 falls clearly within the President's congressionally delegated authority. To be sure, § 1182(f) gives the President broad authority to suspend the entry of aliens or classes of aliens. However, this authority is not unlimited. Cf. Kent v. Dulles, 357 U.S. 116, 129, 78 S. Ct. 1113, 2 L. Ed. 2d 1204 (1958) ("[I]f that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests."); J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409, 48 S. Ct. 348, 72 L. Ed. 624, Treas. Dec. 42706 (1928) ("[L]egislative action is not a forbidden delegation of legislative power" if Congress provides an "intelligible principle to which the person or body authorized . . . is directed to conform."). Section 1182(f) requires that the President find that the entry of a class of aliens into the United States would be detrimental to the interests of the United States. This section requires that the President's findings support the conclusion that entry of all nationals from the six designated countries, all refugees, and refugees in excess of 50,000 would be harmful to the national interest. There is no sufficient finding in EO2 that the entry of the excluded classes would be detrimental to the interests of the United States.

Section 2(c) declares that "the unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen would be detrimental to the interests of the United States" and directs that the entry of nationals from those designated countries be barred for 90 days. 82 Fed. Reg. at 13213. The provision bans more than 180 million people from entry based on their national origin, including nationals who may have never been physically present in those countries. See Brief of Former National Security Officials as Amici Curiae, Dkt. No. 108 at 17. Section 2(c) states:

[1] To temporarily reduce investigative burdens on relevant agencies during the review period [of the United States’ vetting
procedures], [2] to ensure the proper review and maximum utilization of available resources for the screening and vetting of foreign nationals, [3] to ensure that adequate standards are established to prevent infiltration by foreign terrorists, and [4] in light of the national security concerns referenced in section 1 of this order, I hereby proclaim, pursuant to sections 212(f) and 215(a) of the INA, 8 U.S.C. [§§] 1182(f) and 1185(a), that the unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen would be detrimental to the interests of the United States. I therefore direct that the entry into the United States of nationals of those six countries be suspended.

82 Fed. Reg. at 13213. The Government explains that the Order's objective "is to address the risk that potential terrorists might exploit possible weaknesses in the Nation's screening and vetting procedures while the review of those procedures is underway." We reject the first three reasons provided in Section 2(c) because they relate to preservation of government resources to review existing procedures and ensure adequate vetting procedures. There is no finding that present vetting standards are inadequate, and no finding that absent the improved vetting procedures there likely will be harm to our national interests. These identified reasons do not support the conclusion that the entry of nationals from the six designated countries would be harmful to our national interests.

We turn to the fourth reason—national security concerns—and examine whether it confers a legally sufficient basis for the President's conclusion that the nationality-based entry restriction is warranted. Section 1(d) of the Order explains that nationals from Iran, Libya, Somalia, Sudan, Syria, and Yemen warrant additional scrutiny because:

Each of these countries is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, contains active conflict zones. Any of these circumstances diminishes the foreign government's willingness or ability to share or validate important information about individuals seeking to travel to the United States. Moreover, the significant presence in each of these countries of terrorist organizations, their members, and others exposed to those organizations increases the chance that conditions will be exploited to enable terrorist operatives or sympathizers to travel to the United States. Finally, once foreign nationals from these countries are admitted to the United States, it is often difficult to remove them, because many of these countries typically delay issuing, or refuse to issue, travel documents. Id. at 13210 (emphasis added).

Because of these country conditions, the Order concludes that "the risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harm the national security of the United States is unacceptably high." Id. at 13211. The Order further indicates that "hundreds of persons born abroad have been convicted of terrorism-related crimes in the United States[,]" but does not identify the number of nationals from the six designated countries who have been so convicted. See id. at 13212.

The Order makes no finding that nationality alone renders entry of this broad class of individuals a heightened security risk to the United States. See Int'l Refugee Assistance Project, 2017 U.S. App. LEXIS 9109, 2017 WL 2273306, at *31 (Keenan, J., concurring in part and concurring in the judgment) ("[T]he Second Executive Order does not state that any nationals of the six identified countries, by virtue of their nationality, intend to commit terrorist acts in the United
States or otherwise pose a detriment to the interests of the United States.

The Order does not tie these nationals in any way to terrorist organizations within the six designated countries. It does not identify these nationals as contributors to active conflict or as those responsible for insecure country conditions. It does not provide any link between an individual's nationality and their propensity to commit terrorism or their inherent dangerousness. In short, the Order does not provide a rationale explaining why permitting entry of nationals from the six designated countries under current protocols would be detrimental to the interests of the United States.

The Order's discussion of country conditions fails to bridge the gap. Indeed, its use of nationality as the sole basis for suspending entry means that nationals without significant ties to the six designated countries, such as those who left as children or those whose nationality is based on parentage alone, should be suspended from entry. Yet, nationals of other countries who do have meaningful ties to the six designated countries—and may be contributing to the very country conditions discussed—fall outside the scope of Section 2(c). Consequently, EO2's focus on nationality "could have the paradoxical effect of barring entry by a Syrian national who has lived in Switzerland for decades, but not a Swiss national who has immigrated to Syria during its civil war." Hawai’i TRO, 2017 U.S. Dist. LEXIS 36935, 2017 WL 1011673, at *15 (internal quotation marks and alterations omitted); see also Brief of the Cato Institute as Amicus Curiae, Dkt. No. 170 at 14-15 (providing statistics on nationals of the designated countries living in other countries as migrants, refugees, or asylum seekers and explaining that Syrian and Iranian nationals do not gain nationality by virtue of their place of birth).

Although the Order explains that country conditions in the six designated countries lessen their governments' ability to share information about nationals seeking to travel to our country, the Order specifically avoids making any finding that the current screening processes are inadequate. As the law stands, a visa applicant bears the burden of showing that the applicant is eligible to receive a visa or other document for entry and is not inadmissible. See 8 U.S.C. § 1361. The Government already can exclude individuals who do not meet that burden. See id. The Order offers no further reason explaining how this individualized adjudication process is flawed such that permitting entry of an entire class of nationals is injurious to the interests of the United States.

Finally, the Order relies on 8 U.S.C. § 1187(a)(12) to explain why the six countries have been designated. 82 Fed. Reg. at 13210. In § 1187(a)(12), Congress prevented use of the Visa Waiver Program by dual nationals of, or those who have visited in the last six years, (1) Iraq and Syria, (2) any country designated by the Secretary of State as a state sponsor of terrorism, and (3) any other country designated as a country of concern by the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence. Rather than setting an outright ban on entry of nationals from these countries, Congress restricted access to the tourist Visa Waiver Program and instead required that persons who are nationals of or have recently traveled to these countries enter the United States with a visa. This provision reflects Congress's considered view on similar security concerns that the Order seeks to address. See Chadha, 462 U.S. at 951, 959 (explaining that our founders "consciously" chose to place the legislative process in the hands of a "deliberate and deliberative" body). The Order identifies no new information to justify Section 2(c)'s
blanket ban as contrasted with § 1187(a)(12)'s restriction from the Visa Waiver Program. Moreover, relying on § 1187(a)(12) alone, which requires that aliens from these countries undergo vetting through visa procedures, does not explain why their entry would be detrimental to the interests of the United States. To the contrary, it effectively negates the Order's statement of detriment—that the "unrestricted entry into the United States of nationals [of the six designated countries] would be detrimental to the interests of the United States." 82 Fed. Reg. at 13213 (emphasis added). Section 1187(a)(12) dictates that the entry of individuals covered by the Order is never "unrestricted."

In conclusion, the Order does not offer a sufficient justification to suspend the entry of more than 180 million people on the basis of nationality. National security is not a "talismanic incantation" that, once invoked, can support any and all exercise of executive power under § 1182(f). United States v. Robel, 389 U.S. 258, 263-64, 88 S. Ct. 419, 19 L. Ed. 2d 508 (1967); see also Korematsu v. United States, 323 U.S. 214, 235, 65 S. Ct. 193, 89 L. Ed. 194 (1944) (Murphy, J., dissenting) ("[T]he exclusion order necessarily must rely for its reasonableness upon the assumption that all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage and to aid our Japanese enemy in other ways. It is difficult to believe that reason, logic or experience could be marshalled in support of such an assumption."). Section 1182(f) requires that the President exercise his authority only after meeting the precondition of finding that entry of an alien or class of aliens would be detrimental to the interests of the United States. Here, the President has not done so.

EO2 does not reveal any threat or harm to warrant suspension of USRAP for 120 days and does not support the conclusion that the entry of refugees in the interim time period...
would be harmful. Nor does it provide any indication that present vetting and screening procedures are inadequate. Instead, EO2 justifies the 120-day suspension as a review period of USRAP application and adjudication processes. 82 Fed. Reg. at 13215. The Government reiterates that the President directed the suspension "in order to allow the Secretary of State to review application and adjudication processes." These explanations do not support a finding that the travel and admission of refugees would be detrimental to the interests of the United States.

iii

Section 6(b) of EO2 restricts entry of refugees to no more than 50,000 in the 2017 fiscal year because entry in excess of 50,000 "would be detrimental to the interests of the United States." 82 Fed. Reg. at 13216. But in accordance with 8 U.S.C. § 1157, President Obama previously determined that the admission of 110,000 refugees to the United States during fiscal year 2017 was justified by humanitarian concerns or otherwise in the national interest. See Presidential Determination on Refugee Admissions for Fiscal Year 2017, Presidential Determination No. 2016-13, 81 Fed. Reg. 70315 (Sept. 28, 2016); see also Proposed Refugee Admissions for Fiscal Year 2017: Report to the Congress, https://www.state.gov/documents/organization/262168.pdf.

To the extent that 60,000 additional refugees can be considered a class of aliens, EO2 makes no findings to justify barring entry in excess of 50,000 as detrimental to the interests of the United States. EO2 gives no explanation for why the 50,001st to the 110,000th refugee would be harmful to the national interest, nor does it specify any further threat to national security. And there is not any rationale explaining why the previous target admission of 110,000 refugees this fiscal year was justified by humanitarian concerns or otherwise in the national interest, see 8 U.S.C. § 1157(a)(2), but that the entry of more than 50,000 refugees this same fiscal year would be detrimental to the national interest. Here too, the President did not meet the statutory precondition of exercising his authority under § 1182(f) to cap refugee admissions. The actions taken in Sections 2 and 6 require the President first to make sufficient findings that the entry of nationals from the six designated countries and the entry of all refugees would be detrimental to the interests of the United States. We conclude that the President did not satisfy this precondition before exercising his delegated authority. Plaintiffs have shown a likelihood of success on the merits of their claim that the President exceeded his authority under §§ 1182(f) and 1185(a).

2

Plaintiffs contend that Section 2(c) of the Order violates the INA because it discriminates on the basis of nationality, thus violating the non-discrimination mandate of § 1152(a)(1)(A) of the INA. They argue that although the President is given broad authority under § 1182(f), this authority is restrained by § 1152(a)(1)(A).

Contemporaneous to enacting the Civil Rights Act of 1964 and the Voting Rights Act of 1965, Congress passed the INA of 1965 to eliminate the "national origins system as the basis for the selection of immigrants to the United States." H.R. Rep. No. 89-745, at 8 (1965). Section 1152(a)(1)(A) was enacted as part of that act, and provides:

[N]o person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the
person's race, sex, nationality, place of birth, or place of residence.

8 U.S.C. § 1152(a)(1)(A) (emphasis added). Section 1152(a)(1)(A) contains specific exemptions, and § 1182(f) is not among them.

The Government tries to reconcile the Order's Section 2(c) with § 1152(a)(1)(A) by arguing that Section 2(c) bars entry of nationals from the six designated countries but does not deny the issuance of immigrant visas based on nationality. EO2's suspension of entry on the basis of nationality, however, in substance operates as a ban on visa issuance on the basis of nationality. The Order's text confirms as much. Its primary purpose is to evaluate screening and vetting procedures associated with the visa issuance process. 82 Fed. Reg. at 13209. EO2 affects nationals of the six designated countries who were outside of the United States on the effective date of the Order but did not have a valid visa at specific times, such as the effective date of EO1. 82 Fed. Reg. at 13213. Further, it provides for a waiver so consular officers or Customs and Border Protection officials may authorize the issuance of visas during the suspension period. Id. at 13214. The Government also stresses that it should not be required to issue visas for aliens who are validly barred from entry, explaining that "[r]equiring that such aliens be issued visas permitting them to travel to this country, only to be denied entry upon arrival, would create needless difficulties and confusion." Indeed, the Government clarified at oral argument that as a practical matter, the entry ban would be implemented through visa denials. Moreover, the statute makes clear that aliens deemed inadmissible under § 1182, including under § 1182(f) "are ineligible to receive visas," thus confirming the substantial overlap between a denial of entry under § 1182(f) and a visa denial. See 8 U.S.C. § 1182(a); see also Int’l Refugee Assistance Project, 2017 U.S. App. LEXIS 9109, 2017 WL 2273306, at *52 (Thacker, J., concurring) (explaining that the Government's "own arguments and the text and operation of [EO2] belie [the] notion" that the visa issuance process is a different activity than suspension of entry).

We cannot blind ourselves to the fact that, for nationals of the six designated countries, EO2 is effectively a ban on the issuance of immigrant visas. If allowed to stand, EO2 would bar issuance of visas based on nationality in violation of § 1152(a)(1)(A). The Government did not dispute this point at oral argument, and it stands to reason that the whole system of the visa issuance would grind to a halt for nationals of the six designated countries whose entry is barred from the United States. Issuance of visas will automatically stop for those who are banned based on nationality. Yet Congress could not have used "more explicit language" in "unambiguously direct[ing] that no nationality-based discrimination shall occur." Legal Assistance for Vietnamese Asylum Seekers, 45 F.3d at 473.

The Government additionally argues that § 1152(a)(1)(A) does not displace the President's preexisting authority under § 1182(f), because the President may validly bar entry and the non-discrimination mandate applies strictly to the issuance of visas. Based on the plain statutory text, the Government contends that the non-discrimination mandate of § 1152(a)(1)(A) does not reach the President's suspension of entry under § 1182(f).

This argument, however, presents a clear conflict between § 1152(a)(1)(A) and § 1182, because it would enable the President to restore discrimination on the basis of nationality that Congress sought to eliminate. It is our duty, if possible, to reconcile the President's statutory authority under § 1182(f) with the non-discrimination
mandate of § 1152(a)(1)(A). We begin with the instruction that "all parts of a statute, if at all possible, are to be given effect." *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633, 93 S. Ct. 2469, 37 L. Ed. 2d 207 (1973); accord *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000) ("A court must . . . fit, if possible, all parts into an harmonious whole." (internal citation and quotation marks omitted)). We also look "to the design of the statute as a whole and to its object and policy." *Gozlon-Peretz v. United States*, 498 U.S. 395, 407, 111 S. Ct. 840, 112 L. Ed. 2d 919 (1991) (quoting *Crandon v. United States*, 494 U.S. 152, 158, 110 S. Ct. 997, 108 L. Ed. 2d 132 (1990)).

Under the Government's argument, the President could circumvent the limitations set by § 1152(a)(1)(A) by permitting the issuance of visas to nationals of the six designated countries, but then deny them entry. Congress could not have intended to permit the President to flout § 1152(a) so easily. *See Dada v. Mukasey*, 554 U.S. 1, 16, 128 S. Ct. 2307, 171 L. Ed. 2d 178 (2008) (courts should not read statutes in such a way that renders them a "nullity" or is "unsustainable").

To avoid this result, and to give effect to § 1152(a)(1)(A), the section "is best read to prohibit discrimination throughout the visa process, which must include the decision whether to admit a visa holder upon presenting the visa." Brief of Former Immigration and Homeland Security Officials as Amici Curiae, Dkt. No. 180 at 20. We do not suggest that visa holders must gain automatic entry into the United States, but rather, that visa holders cannot be discriminated against on the basis of "race, sex, nationality, place of birth, or place of residence" throughout the visa process, whether during the issuance of a visa or at the port of entry.

Our conclusion that § 1152(a)(1)(A)'s non-discrimination mandate cabins the President's authority under § 1182(f) is reinforced by other canons of statutory construction. First, a later enacted, more specific statute generally governs over an earlier, more general one. *See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts* 183-87 (2012). Here, § 1152(a)(1)(A) was enacted in 1965, after § 1182(f) was enacted in 1952. Section 1152(a)(1)(A) is also more specific, and sets a limitation on the President's broad authority to exclude aliens—he may do so, but not in a way that discriminates based on nationality. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 132 S. Ct. 2065, 2071, 182 L. Ed. 2d 967 (2012) ("The general/specific canon is perhaps most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission. To eliminate the contradiction, the specific provision is construed as an exception to the general one.").

Second, § 1152(a)(1)(A) specifically identifies exemptions from the non-discrimination mandate, implying that unmentioned sections are not exempted. *See United Dominion Indus., Inc. v. United States*, 532 U.S. 822, 836, 121 S. Ct. 1934, 150 L. Ed. 2d 45 (2001) ("The logic that invests the omission with significance is familiar: the mention of some implies the exclusion of others not mentioned."). Section 1152(a)(1)(A) explicitly exempted three
different INA provisions from its application—8 U.S.C. §§ 1101(a)(27), 1151(b)(2)(A)(i), and 1153—all of which deal with giving preference to certain immigrants, such as family members of current citizens and permanent residents. Had Congress likewise intended to permit § 1182(f) to override § 1152(a)(1)(A)'s non-discrimination requirement, it would have done so in the same way it did for the other provisions.

The Government contends that §§ 1182(f) and 1185(a)(1) "have long been understood to permit the president to draw nationality-based distinctions." However, as discussed above, supra note 13, prior executive orders and proclamations did not suspend classes of aliens on the basis of national origin, but instead on the basis of affiliation or culpable conduct. See Kate M. Manuel, Executive Authority to Exclude Aliens: In Brief 6-10, Congressional Research Service (2017). The other instances cited by the Government are distinguishable. The executive order at issue in Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 113 S. Ct. 2549, 125 L. Ed. 2d 128 (1993), made no nationality-based distinctions and concerned "suspend[ing] the entry of aliens coming by sea to the United States without necessary documentation." Exec. Order No. 12807, 57 Fed. Reg. 23133 (May 24, 1992). President Carter's executive orders in response to the Iranian hostage crisis delegated authority to the Secretary of State and the Attorney General to prescribe limitations governing the entry of Iranian nationals and did not ban Iranian immigrants outright. See Exec. Order 12172, 44 Fed. Reg. 67947 (Nov. 26, 1979), amended by Exec. Order 12206, 45 Fed. Reg. 24101 (Apr. 7, 1980). Finally, President Reagan's Proclamation 5517 suspended the entry of Cuban nationals coming as immigrants, with some exceptions. 51 Fed. Reg. 30470 (Aug. 22, 1986). The proclamation did not exclude all foreign nationals, as exceptions were provided, and the proclamation was in response to Cuba's decision "to suspend all types of procedures regarding the execution' of the December 14, 1984, immigration agreement between the United States and Cuba." Id. To be clear, Presidents have invoked §§ 1182(f) and 1185(a)(1) to restrict certain aliens or classes of aliens from entering the United States, but EO2 is unprecedented in its scope, purpose, and breadth.

The Government also argues that the President may engage in discrimination on the basis of nationality because of the exception provided in § 1152(a)(1)(B). Section 1152(a)(1)(B) provides, "[n]othing in § 1152(a)(1)(A) shall be construed to limit the authority of the Secretary of State to determine the procedures for the processing of immigrant visa applications or the locations where such applications will be processed." However, this provision governs the Secretary of State's manner and place for processing applications, not the President's asserted ability to deny immigrant visas on the basis of nationality.

Having considered the President's authority under § 1182(f) and the non-discrimination mandate of § 1152(a)(1)(A), we also conclude that Plaintiffs have shown a likelihood of success on the merits of their claim that Section 2(c) of the Order, in suspending the issuance of immigrant visas and denying entry based on nationality, exceeds the restriction of § 1152(a)(1)(A) and the overall statutory scheme intended by Congress.

3

Aside from the President's failure to make the requisite findings to justify reducing the entry
of refugees in fiscal year 2017 as an exercise of authority under § 1182(f), Plaintiffs contend that 8 U.S.C. § 1157 circumscribes the President's actions in setting the number of refugees to be admitted this fiscal year. We agree.

The Refugee Act of 1980 amended the INA "to provide a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States, and to provide comprehensive and uniform provisions for the effective resettlement and absorption of those refugees who are admitted." Pub. L. No. 96-212, § 101, 94 Stat. 102 (1980).

The Act requires that the President, after consulting with Congress, set the annual admission of refugees before the beginning of every fiscal year:

[T]he number of refugees who may be admitted under this section in any fiscal year . . . shall be such number as the President determines, before the beginning of the fiscal year and after appropriate consultation, is justified by humanitarian concerns or is otherwise in the national interest. 8 U.S.C. § 1157(a)(2). "Appropriate consultation" is defined as "discussions in person by designated Cabinet-level representatives of the President with members of the Committees on the Judiciary of the Senate and of the House of Representatives." Id. § 1157(e). After undergoing this process in 2016, President Obama determined that the admission of 110,000 refugees to the United States during fiscal year 2017 was justified by humanitarian concerns or otherwise in the national interest. See 81 Fed. Reg. at 70315. Section 6(b) of EO2 reduced the refugee admission cap for the same year to 50,000. See 82 Fed. Reg. at 13216.

The statute requires the President to set the number of annual refugee admissions (1) before the start of the new fiscal year, and (2) after appropriate consultation with Congress. The Government responds that § 1157 only refers to a ceiling—not the floor—for the number of refugees who may be admitted, and that §§ 1182(f) and 1185(a)(1) permit the President to lower the number of refugees permitted to enter.

We disagree. This interpretation reads out the language that the number of refugees who may be admitted shall be the number determined by the President. See 8 U.S.C. § 1157(a)(2). The Government's argument would require us to conclude that Congress set forth very specific requirements for the President to provide the number and allocation of the refugees to be admitted as justified by humanitarian concerns or the national interest, after appropriate consultation, only to permit the President to order a midyear reduction in the level of refugee admissions, and to do so without consulting Congress. Section 1157 contemplates that the President, after consultation with Congress, may increase the number of refugees admitted in the middle of the fiscal year, but does not provide a mechanism for the President to decrease the number of refugees to be admitted mid-year. See id. § 1157(b) (describing how, after appropriate consultation, the President may fix a number of additional refugees to be admitted to the United States).

Well-settled interpretive canons further explain why § 1182(f) does not give the President authority to override the requirements of § 1157. First, applying the "later in time" canon, § 1182(f) was adopted in 1952, and § 1157 was adopted in 1980, indicating that this subsequent statute shapes the scope of the President's authority. See Brown & Williamson Tobacco Corp., 529 U.S. at 143 ("The 'classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in
combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.” (quoting United States v. Fausto, 484 U.S. 439, 453, 108 S. Ct. 668, 98 L. Ed. 2d 830 (1988)).

Second, § 1157, the more specific provision, controls the more general § 1182(f). See id. ("This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand."); Radzanower v. Touche Ross & Co., 426 U.S. 148, 153, 96 S. Ct. 1989, 48 L. Ed. 2d 540 (1976). Section 1157 provides a very specific process for "appropriate consultation" that the President must follow before setting the number of refugees to be admitted to the United States that is justified by humanitarian concerns or is otherwise in the national interest. "Appropriate consultation" requires in-person discussions between cabinet-level representatives and members of Congress "to review the refugee situation or emergency refugee situation, to project the extent of possible participation of the United States therein, [and] to discuss the reasons for believing that the proposed admission of refugees is justified by humanitarian concerns or grave humanitarian concerns or is otherwise in the national interest . . . ." 8 U.S.C. § 1157(e). As part of the consultation, the Executive also must present the following information:

(1) A description of the nature of the refugee situation.

(2) A description of the number and allocation of the refugees to be admitted and an analysis of conditions within the countries from which they came.

(3) A description of the proposed plans for their movement and resettlement and the estimated cost of their movement and resettlement.

(4) An analysis of the anticipated social, economic, and demographic impact of their admission to the United States.

(5) A description of the extent to which other countries will admit and assist in the resettlement of such refugees.

(6) An analysis of the impact of the participation of the United States in the resettlement of such refugees on the foreign policy interests of the United States.

(7) Such additional information as may be appropriate or requested by such members. Id. According to the statute, this information would ideally be provided at least two weeks in advance of the discussions. Id.

Congress prescribed specific actions the President must take before setting the number of refugees who may be admitted as justified by humanitarian concerns or as otherwise in the national interest. See generally 8 U.S.C. § 1157. The President relied on § 1182(f)—an earlier and more general provision—to conclude that admission of refugees above 50,000 is detrimental to the interest of the United States. But § 1157, a "narrow, precise, and specific" statutory provision, may not be overridden by § 1182(f), a provision "covering a more generalized spectrum" of issues. Radzanower, 426 U.S. at 153-54; see also Nitro-Lift Techs., L.L.C. v. Howard, 568 U.S. 17, 133 S. Ct. 500, 504, 184 L. Ed. 2d 328 (2012) (explaining that the interpretive principle generalia specialibus non derogant means that "the specific governs the general" and applies to conflict between "laws of equivalent dignity").

As a result, Plaintiffs have also shown a likelihood of success on the merits for their argument that Section 6(b) of EO2 conflicts with 8 U.S.C. § 1157.

4

Plaintiffs additionally argue that EO2 conflicts with 8 U.S.C. § 1182(a)(3)(B),
which sets forth detailed and "specific criteria for determining terrorism-related inadmissibility." Din, 135 S. Ct. at 2140.

EO2 attempts to eliminate the marginal risk of "erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts," 82 Fed. Reg. at 13211, by suspending entry of all nationals from the six designated countries. We need not decide the precise scope of § 1182(f) authority in relation to § 1182(a)(3)(B) because the President has not met the precondition to exercising his power under § 1182(f), that is, of making a detrimentality finding. We note, however, that executive action should not render superfluous Congress's requirement that there be a "reasonable ground to believe" that an alien "is likely to engage after entry in any [specifically defined] terrorist activity," 8 U.S.C. § 1182(a)(3)(B)(i)(II), and other specific grounds for terrorism-related admissibility. Cf. Abourezk, 785 F.2d at 1049 n.2 ("The President's sweeping proclamation power [under § 1182(f)] provides a safeguard against the danger posed by any particular case or class of cases that is not covered by one of the categories in section 1182(a).") (emphasis added)); Allende v. Shultz, 845 F.2d 1111, 1118 (1st Cir. 1988) ("Each subsection [of § 1182(a)] creates a different and distinct ground for exclusion.").

Finally, we note that in considering the President's authority, we are cognizant of Justice Jackson's tripartite framework in Youngstown Sheet & Tube Co. v. Sawyer. See 343 U.S. 579, 635-38, 72 S. Ct. 863, 96 L. Ed. 1153, 62 Ohio Law Abs. 417 (1952) (Jackson, J., concurring). Section 1182(f) ordinarily places the President's authority at its maximum. "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." Id. at 635. However, given the express will of Congress through § 1152(a)(1)(A)'s non-discrimination mandate, § 1157's procedure for refugee admissions to this country, and § 1182(a)(3)(B)'s criteria for determining terrorism-related inadmissibility, the President took measures that were incompatible with the expressed will of Congress, placing his power "at its lowest ebb." Id. at 637. In this zone, "Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." Id. at 638. We have based our decision holding the entry ban unlawful on statutory considerations, and nothing said herein precludes Congress and the President from reaching a new understanding and confirming it by statute. If there were such consensus between Congress and the President, then we would view Presidential power at its maximum, and not in the weakened state based on conflict with statutory law. See id. at 635-38.

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In sum, we conclude that Plaintiffs have shown a likelihood of success on the merits at least as to their arguments that EO2 contravenes the INA by exceeding the President's authority under § 1182(f), discriminating on the basis of nationality, and disregarding the procedures for setting annual admissions of refugees.

C

The current record is sufficient to permit the court's evaluation of the irreparable harms threatening Plaintiffs. Plaintiffs identify harms, such as prolonged separation from family members, constraints to recruiting and attracting students and faculty members to
the University of Hawai‘i, decreased tuition revenue, and the State's inability to assist in refugee resettlement. Many of these harms are not compensable with monetary damages and therefore weigh in favor of finding irreparable harm. See, e.g., Washington, 847 F.3d at 1169 (identifying harms such as harms to States' university employees and students, separated families, and stranded States' residents abroad); Regents of Univ. of Cal. v. Am. Broad. Cos., Inc., 747 F.2d 511, 520 (9th Cir. 1984) (crediting intangible harms such as the "impairment of their ongoing recruitment programs [and] the dissipation of alumni and community goodwill and support garnered over the years"); cf. Moore v. City of E. Cleveland, Ohio, 431 U.S. 494, 503-04, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977) (explaining that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition").

We conclude Plaintiffs are likely to suffer irreparable harm in the absence of preliminary relief.

D

In considering the equities of a preliminary injunction, we next "balance the competing claims of injury" and "consider the effect on each party of the granting or withholding of the requested relief." Winter, 555 U.S. at 24. The district court did not abuse its discretion in finding that the balance of hardships tipped in Plaintiffs' favor. The Government argues that the injunction causes direct, irreparable injury by constraining the Executive's authority in "protect[ing] national security on behalf of the entire United States." "[T]he Government's interest in combating terrorism is an urgent objective of the highest order." Humanitarian Law Project, 561 U.S. at 28. Nonetheless, the President must exercise his authority under § 1182(f) lawfully by making sufficient findings justifying that entry of certain classes of aliens would be detrimental to the national interest and ensuring that such exercise does not conflict with other INA provisions. Because the President has not done so, we cannot conclude that national security interests outweigh the harms to Plaintiffs. See Int'l Refugee Assistance Project, 2017 U.S. App. LEXIS 9109, 2017 WL 2273306, at *32 (Keenan, J., concurring in part and concurring in the judgment).

Further, the Government has not put forth evidence of injuries resulting from the preliminary injunction, or how the screening and vetting procedures in place before the Order was enjoined were inadequate such that the Order should take immediate effect. Continuing to enjoin portions of EO2 restores immigration procedures and programs to the position they were in prior to its issuance. See Washington, 847 F.3d at 1168; see also Brief of Former National Security Officials as Amici Curiae, Dkt. No. 108 at 9 (explaining that a number of amici officials, in office on January 20, 2017 and current on active intelligence, knew of no "credible terrorist threat streams directed against the United States" at that time).

In weighing the harms, the equities tip in Plaintiffs' favor.

E

Plaintiffs must finally show that preliminary injunctive relief is in the public interest. National security is undoubtedly a paramount public interest. See Haig v. Agee, 453 U.S. 280, 307, 101 S. Ct. 2766, 69 L. Ed. 2d 640 (1981) ("[N]o governmental interest is more compelling than the security of the Nation."). Although we recognize that "sensitive and weighty interests of national security and foreign affairs" are implicated, Humanitarian Law Project, 561 U.S. at 33-34, the President must nonetheless exercise his executive power under § 1182(f) lawfully. The public
interest is served by "curtailing unlawful executive action." *Texas*, 809 F.3d at 187.

The public interests in uniting families and supporting humanitarian efforts in refugee resettlement support the conclusion that the public interest is served by preliminarily enjoining EO2 and maintaining the status quo. *Cf. Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1094 (9th Cir. 2005) ("Public policy supports recognition and maintenance of a family unit. The [INA] was intended to keep families together. It should be construed in favor of family units and the acceptance of responsibility by family members."); *Kaliski v. Dist. Dir. of INS*, 620 F.2d 214, 217 (9th Cir. 1980) (explaining that "the humane purpose" of the INA is to reunite families).

Amici also have identified specific harms that will result if EO2 takes effect, bolstering the conclusion that the injunction is in the public interest. They explain that EO2 would, *inter alia*: curtail children's ability to travel to the United States to obtain life-saving medical care, *see* Brief of the Foundation for the Children of Iran and Iranian Alliances Across Borders as Amici Curiae, Dkt. No. 77; undermine the efforts of religious organizations in the United States rendering humanitarian aid, *see* Brief of Episcopal Bishops as Amici Curiae, Dkt. No. 87; compromise the diversity interests that are central to universities, *see* Brief of New York University as Amicus Curiae, Dkt. No. 95; deter international students, faculty, and scholars from studying at American universities and harm the research mission of universities, *see* Brief of Colleges and Universities as Amici Curiae, Dkt. No. 97; impose additional hardship for child refugees already facing violence and trauma, *see* Brief of Professional Society on the Abuse of Children as Amicus Curiae, Dkt. No. 107; immediately harm refugees who will be denied entry and risk the vitality of entire refugee assistance programs and resettlement efforts, *see* Brief of Interfaith Group of Religions and Interreligious Organizations as Amici Curiae, Dkt. No. 121, Brief of Oxfam America as Amicus Curiae, Dkt. No. 149, Brief of HIAS, IRC, and USCRI as Amici Curiae, Dkt. No. 155, Brief of *Doe* Plaintiffs as Amici Curiae, Dkt. No. 276; uniquely exclude Muslim family members, scholars, religious leaders, and professionals from entry, *see* Brief of Muslim Rights, Professional, and Public Health Organizations as Amici Curiae, Dkt. No. 124, Brief of Muslim Justice League et al. as Amici Curiae, Dkt. No. 207; inflict proprietary harms on the states by harming state colleges, disrupting staffing and research at state medical institutions, and reducing tax revenues and reinvestment of refugee funding into local economies, *see* Brief of Illinois et al. as Amici Curiae, Dkt. No. 125; undermine trust between law enforcement and immigrant communities and inflict financial and social costs, such as loss of tourism dollars, *see* Brief of Chicago et al. as Amici Curiae, Dkt. No. 137; interfere with union members' ability to do their work and serve the American public, *see* Brief of Service Employees International Union et al. as Amici Curiae, Dkt. No. 166; harm American competitiveness by disrupting ongoing business operations and inhibiting technology companies' abilities to attract talent, business, and investment to the United States, *see* Brief of Technology Companies as Amici Curiae, Dkt. No. 180, Brief of Massachusetts Technology Leadership Council as Amicus Curiae, Dkt. No. 194; place victims of gender-based violence at particular risk, *see* Tahirih Justice Center et al. as Amici Curiae, Dkt. No. 185; interrupt foreign artists' exhibitions and performances in the United States, *see* Brief of the Association of Art Museum Directors et al. as...
Amici Curiae, Dkt. No. 204; and prevent U.S. citizens and lawful permanent residents from receiving visits from or reuniting with family members, see Brief of Human Rights First et al. as Amici Curiae, Dkt. No. 222. The public interest favors affirming the preliminary injunction. See Winter, 555 U.S. at 24 ("In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.").

***

Plaintiffs have satisfied all four factors to warrant entry of the preliminary injunction. See id. at 20. The district court did not abuse its discretion in granting an injunction.

V

With respect to the injunction's scope, the Government contends that the district court erred by enjoining internal government procedures, giving nationwide relief, and entering an order against the President.

We review the scope of a preliminary injunction for abuse of discretion. McCormack v. Hiedeman, 694 F.3d 1004, 1010 (9th Cir. 2012). Although the district court has "considerable discretion in fashioning suitable relief and defining the terms of an injunction," Lamb-Weston, Inc. v. McCain Foods, Ltd., 941 F.2d 970, 974 (9th Cir. 1991), there are limitations on this discretion. Injunctive relief must be tailored to remedy the specific harms shown by the plaintiffs. See id. ("Injunctive relief . . . must be tailored to remedy the specific harm alleged."); Califano v. Yamasaki, 442 U.S. 682, 702, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979) ("[T]he scope of injunctive relief is dictated by the extent of the violation established . . . ."). "An overbroad injunction is an abuse of discretion." Stormans, 586 F.3d at 1140.

A

The Government first argues that the injunction improperly enjoins enforcement of parts of Sections 2 and 6 that are unrelated to any alleged harm to Plaintiffs—specifically, the provisions that pertain to internal government operations and procedures. Portions of Section 2 require various agencies to conduct a review of worldwide vetting procedures to determine what additional information, if any, is needed from each foreign country to adjudicate a visa application, prepare a report on the results of the worldwide review, submit a list of countries that do not provide requested information to the President, and recommend other lawful restrictions or limitations deemed necessary for the security of the United States. 82 Fed. Reg. at 13212-13. Likewise, during the interim period when refugee admissions is suspended, Section 6 directs the Secretary of State, in conjunction with the Secretary of Homeland Security and the Director of National Intelligence, to conduct an internal review and implement additional procedures identified by the review. Id. at 13215. Section 6 also requires the Secretary of State to review the "existing law" to determine how State and local jurisdictions could have greater involvement in the process of determining refugee placement. Id. at 13216.

Although other unenjoined sections of EO2 permit interagency coordination to review vetting procedures, the district court nonetheless abused its discretion in enjoining the inward-facing tasks of Sections 2 and 6. Enjoining the entirety of Sections 2 and 6 was not narrowly tailored to addressing only the harms alleged. For example, internal determinations regarding the necessary
information for visa application adjudications do not have an obvious relationship to the constitutional rights at stake or statutory conflicts at issue here. Plaintiffs have not shown how the Government's internal review of its vetting procedures will harm them. We vacate the preliminary injunction to the extent it enjoins internal review procedures that do not burden individuals outside of the executive branch of the federal government. See Bresgal v. Brock, 843 F.2d 1163, 1171 (9th Cir. 1987) ("An injunction against a government agency must be structured to take into account 'the well-established rule that the government has traditionally been granted the widest latitude in the "dispatch of its own internal affairs."") (quoting Rizzo v. Goode, 423 U.S. 362, 378-79, 96 S. Ct. 598, 46 L. Ed. 2d 561 (1976)); cf. Bowen v. Roy, 476 U.S. 693, 700, 106 S. Ct. 2147, 90 L. Ed. 2d 735 (1986) (explaining that the Free Exercise Clause "affords an individual protection from certain forms of governmental compulsion [but] does not afford an individual a right to dictate the conduct of the Government's internal procedures").

B

The Government next argues that the district court erred in enjoining Section 6's refugee provisions, specifically the suspension of refugees and adoption of the 50,000 refugee cap.

The State alleges that Section 6 will force it to abandon the refugee program that embodies the State's traditions of openness and diversity. The State has several policies that aid and resettle refugees, and has a "long history of welcoming refugees impacted by war and oppression." As discussed earlier, OCS, a division of the Department of Labor and Industrial Relations, is directed to "[a]ssist and coordinate the efforts of all public and private agencies providing services which affect the disadvantaged, refugees, and immigrants." Haw. Rev. Stat. § 371K-4(5). OCS also operates the Refugee Social Services Program and the Refugee Cash and Medical Assistance Program. See Department of Labor and Industrial Relations, Office of Community Services, 2017 Hawaii State Plan for Refugee Assistance and Services (2016); https://labor.hawaii.gov/ocs/files/2013/02/FY17-State-Plan-for-Hawaii.pdf (last visited June 6, 2017). The State further highlights that aiding refugees is central to the mission of private organizations, like Catholic Charities Hawai'i and Pacific Gateway Center.

Since fiscal year 2010, at least twenty refugees have arrived and resettled in Hawai'i, and in fiscal year 2017 to date, three have resettled there. While this is a small number of refugees, it does not diminish Hawai'i's interest in effectuating its refugee programs and investments. Enjoining the suspension and cap would protect the State's programs and efforts in resettling refugees.

Although the Government is correct in pointing out that most of Plaintiffs' alleged injuries center on the implementation of Section 2(c), at this preliminary stage of litigation, the district court did not abuse its discretion by enjoining Section 6's operative provisions suspending refugee admission on the basis of the current record. We therefore reject the Government's challenge on this point.

C

The Government next contends that the district court erred by enjoining Section 2(c) as to all persons everywhere, rather than redressing only Plaintiffs' injuries. The Government requests that the nationwide injunction be limited to Plaintiffs only.
The district court identified two reasons to support a nationwide injunction. First, the district court emphasized that in certain circumstances, it is appropriate for courts to issue nationwide injunctions. *Hawaii PI*, 2017 U.S. Dist. LEXIS 47042, 2017 WL 1167383, at *8. As the Fifth Circuit observed in *Texas v. United States*, nationwide injunctions are particularly appropriate in the immigration context because "immigration laws of the United States should be enforced vigorously and uniformly." 809 F.3d at 187-88; see U.S. Const. art. I, § 8, cl. 4 ("The Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization . . . .") (emphasis added). Enjoining the conduct as to Plaintiffs may result in "fragmented immigration policy [that] would run afoul of the constitutional and statutory requirement for uniform immigration law and policy." *Washington*, 847 F.3d at 1166-67 (citing to *Texas*, 809 F.3d at 187-88).

Second, the district court made clear that the Government did not provide a workable framework for narrowing the geographic scope of the injunction. *See id.* at 1167 ("[E]ven if limiting the geographic scope of the injunction would be desirable, the Government has not proposed a workable alternative form of the TRO that accounts for the nation's multiple ports of entry and interconnected transit system and that would protect the proprietary interests of the States at issue here while nevertheless applying only within the States' borders."). On appeal, the Government has not offered any new workable method of limiting the geographic scope of the injunction.

An "injunction is not necessarily made overbroad by extending benefit or protection to persons other than prevailing parties in the lawsuit—even if it is not a class action—if such breadth is necessary to give prevailing parties the relief to which they are entitled." *Bresgal*, 843 F.2d at 1170-71. Narrowing the injunction to apply only to Plaintiffs would not cure the statutory violations identified, which in all applications would violate provisions of the INA. *See Int'l Refugee Assistance Project*, 2017 U.S. App. LEXIS 9109, 2017 WL 2273306, at *27 (affirming the nationwide injunction because Section 2(c) of EO2 likely violates the Establishment Clause, and its constitutional deficiency "would endure" in all applications); *cf. Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409, 330 U.S. App. D.C. 329 (D.C. Cir. 1998) ("[W]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21, 278 U.S. App. D.C. 382 (D.C. Cir. 1989))). The district court did not abuse its discretion in entering a nationwide preliminary injunction.

D

Finally, the Government argues that the district court erred by issuing an injunction that runs against the President himself. This position of the Government is well taken. Generally, we lack "jurisdiction of a bill to enjoin the President in the performance of his official duties." *Franklin v. Massachusetts*, 505 U.S. 788, 802-03, 112 S. Ct. 2767, 120 L. Ed. 2d 636 (1992) (quoting *Mississippi v. Johnson*, 71 U.S. 475, 501, 18 L. Ed. 437 (1866)); *see id.* at 802 ("[I]njunctive relief against the President himself is extraordinary, and should . . . raise[] judicial eyebrows."). Injunctive relief, however, may run against executive officials, including the Secretary of Homeland Security and the Secretary of State. *See, e.g., Youngstown Sheet & Tube Co.*, 343 U.S. at 588-89 (holding that President Truman did not act
within his constitutional power in seizing steel mills and affirming the district court's decision enjoining the Secretary of Commerce from carrying out the order); *Franklin*, 505 U.S. at 802-03. We conclude that Plaintiffs' injuries can be redressed fully by injunctive relief against the remaining Defendants, and that the extraordinary remedy of enjoining the President is not appropriate here. *See Franklin*, 505 U.S. at 803. We therefore vacate the district court's injunction to the extent the order runs against the President, but affirm to the extent that it runs against the remaining "Defendants and all their respective officers, agents, servants, employees, and attorneys, and persons in active concert or participation with them." 

E

The district court did err in enjoining the entirety of Sections 2 and 6, particularly the portions that pertain to interagency review, despite the Government's requests for clarification and requests to narrow the injunction to enjoin conduct that actually harms Plaintiffs. The district court abused its discretion in enjoining inward-facing agency conduct because enjoining this conduct would not remedy the harms asserted by Plaintiffs. Further, the district court abused its discretion in enjoining the President. We would not be able to affirm in full the preliminary injunction even if Plaintiffs were also likely to succeed on their constitutional claims, for reasons that enjoining internal review procedures does not remedy harms to Plaintiffs and because it is improper to enjoin the President without necessity. As we have affirmed the injunction in part on statutory grounds, and vacated certain parts on the basis of considerations governing the proper scope of an injunction, we need not consider the constitutional claims here.

VI

We affirm in part and vacate in part the district court's preliminary injunction order. As to the remaining Defendants, we affirm the injunction as to Section 2(c), suspending entry of nationals from the six designated countries for 90 days; Section 6(a), suspending USRAP for 120 days; and Section 6(b), capping the entry of refugees to 50,000 in the fiscal year 2017. We vacate the portions of the injunction that prevent the Government from conducting internal reviews, as otherwise directed in Sections 2 and 6, and the injunction to the extent that it runs against the President. We remand the case to the district court with instructions to re-issue a preliminary injunction consistent with this opinion.

AFFIRMED in part; VACATED in part; and REMANDED with instructions. Each party shall bear its own costs on appeal.
Trump v. International Refugee Assistance Project

16-436


President Trump issued Executive Order 13780, section 2(c) of which suspends entry of foreign nationals from six countries. Six individuals challenge Executive Order 13780; four of these individuals claim that the Order will prolong their separation from loved ones, and two claim that the Order spreads anti-Muslim sentiment that harms them.

The District Court enjoined enforcement of Section 2(c). The government appealed. The Circuit Court of Appeals affirmed.

Question Presented: Whether respondents' challenge to the temporary suspension of entry of aliens abroad under Section 2(c) of Executive Order No. 13,780 is justiciable?

Whether Section 2(c)'s temporary suspension of entry violates the Establishment Clause?

Whether the global injunction, which rests on alleged injury to a single individual plaintiff, is impermissibly overbroad?

Whether the challenges to Section 2(c) became moot on June 14, 2017?

International Refugee Assistance Project, v.
Donald J. Trump.

United States Court of Appeals for the Fourth Circuit

May 25, 2017

[Excerpt; some citations and footnotes omitted]

GREGORY, Chief Judge:

The question for this Court, distilled to its essential form, is whether the Constitution, as the Supreme Court declared in Ex parte Milligan, remains “a law for rulers and people, equally in war and in peace.” And if so, whether it protects Plaintiffs’ right to challenge an Executive Order that in text speaks with vague words of national security, but in context drips with religious intolerance, animus, and discrimination. Surely the Establishment Clause of the First Amendment yet stands as an untiring sentinel for the protection of one of our most cherished founding principles—that government shall not establish any religious orthodoxy, or favor or disfavor one religion over another. Congress granted the President broad power to deny entry to aliens, but that power is not absolute. It cannot go unchecked when, as here, the President wields it through an executive edict that stands to cause irreparable harm to individuals across this nation. Therefore, for
the reasons that follow, we affirm in substantial part the district court’s issuance of a nationwide preliminary injunction as to Section 2(c) of the challenged Executive Order.

I.

A.

In the early evening of January 27, 2017—seven days after taking the oath of office—President Donald J. Trump signed Executive Order 13769, “Protecting the Nation From Foreign Terrorist Entry Into the United States” (“EO-1” or “First Executive Order”). Referencing the past and present failings of the visa-issuance process, the First Executive Order had the stated purpose of “protect[ing] the American people from terrorist attacks by foreign nationals.” EO-1, Preamble. To protect Americans, EO-1 explained, the United States must ensure that it does not admit foreign nationals who “bear hostile attitudes” toward our nation and our Constitution, who would “place violent ideologies over American law,” or who “engage in acts of bigotry or hatred” (such as “‘honor’ killings”). Id. § 1.

To that end, the President invoked his authority under 8 U.S.C. § 1182(f) and immediately suspended for ninety days the immigrant and nonimmigrant entry of foreign aliens from seven predominantly Muslim countries: Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen. See EO-1, § 3(c). During the ninety-day period, the Secretary of Homeland Security, Secretary of State, and Director of National Intelligence were to “immediately conduct a review to determine the information needed from any country” to assess whether individuals seeking entry from those countries posed a national security threat. Those cabinet officers were to deliver a series of reports updating the President as to that review and the implementation of EO-1.

The First Executive Order also placed several constraints on the admission of refugees into the country. It reduced the number of refugees to be admitted in fiscal year 2017 from 110,000 to 50,000 and barred indefinitely the admission of Syrian refugees. It further ordered the Secretary of State to suspend for 120 days the United States Refugee Admissions Program (“USRAP”). Upon resumption of USRAP, EO-1 directed the Secretary of State to “prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual’s country of nationality.”

Individuals, organizations, and states across the nation challenged the First Executive Order in federal court. A judge in the Western District of Washington granted a Temporary Restraining Order (“TRO”), enjoining enforcement nationwide of Sections 3(c), 5(a)–(c), and 5(e). The Ninth Circuit subsequently denied the Government’s request to stay the TRO pending appeal and declined to “rewrite” EO-1 by narrowing the TRO’s scope, noting that the “political branches are far better equipped” for that task. At the Ninth Circuit’s invitation, and in an effort to avoid further litigation concerning the First Executive Order, the President enacted a second order (“EO-2” or “Second Executive Order”) on March 6, 2017. The Second Executive Order revoked and replaced the First Executive Order.

Section 2(c) of EO-2—“Temporary Suspension of Entry for Nationals of Countries of Particular Concern During Review Period”—is at the heart of the dispute in this case. This section reinstated the ninety-day suspension of entry for nationals from six countries, eliminating Iraq from the list, but retaining Iran, Libya, Somalia, Sudan, Syria, and Yemen (the “Designated Countries”). EO-2, § 2(c). The President,
again invoking 8 U.S.C. § 1182(f) and also citing 8 U.S.C. § 1185(a), declared that the “unrestricted entry” of nationals from these countries “would be detrimental to the interests of the United States.”

The Second Executive Order, unlike its predecessor, states that nationals from the Designated Countries warrant “additional scrutiny” because “the conditions in these countries present heightened threats.” In justifying the selection of the Designated Countries, EO-2 explains, “Each of these countries is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones.” The Second Executive Order states that “until the assessment of current screening and vetting procedures required by section 2 of this order is completed, the risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harm the national security of the United States is unacceptably high.”

The Second Executive Order also provides brief descriptions of the conditions in each of the Designated Countries. It notes, for instance, that “Sudan has been designated as a state sponsor of terrorism since 1993 because of its support for international terrorist groups, including Hizballah and Hamas[, and] . . . elements of core al-Qa’ida and ISIS-linked terrorist groups remain active in the country.” The Second Executive Order further states that “[s]ince 2001, hundreds of persons born abroad have been convicted of terrorism-related crimes in the United States.” It provides the following examples: two Iraqi refugees who were convicted of terrorism-related offenses in January 2013, and a naturalized citizen who came to this country as a child refugee from Somalia and who was sentenced for terrorism-related offenses in October 2014. The Second Executive Order does not include any examples of individuals from Iran, Libya, Sudan, Syria, or Yemen committing terrorism-related offenses in the United States.

The Second Executive Order clarifies that the suspension of entry applies to foreign nationals who (1) are outside the United States on its effective date of March 16, 2017, (2) do not have a valid visa on that date, and (3) did not have a valid visa on the effective date of EO-1—January 27, 2017. Section 2(c) does not bar entry of lawful permanent residents, dual citizens traveling under a passport issued by a nonbanned country, asylees, or refugees already admitted to the United States. The Second Executive Order also includes a provision that permits consular officers, in their discretion, to issue waivers on a case-by-case basis to individuals barred from entering the United States.

The Second Executive Order retains some—but not all—of the First Executive Order’s refugee provisions. It again suspends USRAP for 120 days and decreases the number of refugee admissions for fiscal year 2017 by more than half, but it does not include the indefinite ban on Syrian refugees. The Second Executive Order also eliminates the provision contained in EO-1 that mandated preferential treatment of religious minorities seeking refugee status. It explains that this provision “applied to refugees from every nation, including those in which Islam is a minority religion, and it applied to minority sects within a religion.” It further explains that EO-1 was “not motivated by animus toward any religion,” but rather was designed to protect religious minorities.

Shortly before the President signed EO-2, an unclassified, internal report from the Department of Homeland Security (“DHS”) Office of Intelligence and Analysis dated March 2017 was released to the public. The report found that most foreign-born, U.S.-
based violent extremists became radicalized many years after entering the United States, and concluded that increased screening and vetting was therefore unlikely to significantly reduce terrorism-related activity in the United States. According to a news article, a separate DHS report indicated that citizenship in any country is likely an unreliable indicator of whether a particular individual poses a terrorist threat. In a declaration considered by the district court, ten former national security, foreign policy, and intelligence officials who previously served in the White House, State Department, DHS, and Central Intelligence Agency—four of whom were aware of intelligence related to terrorist threats as of January 20, 2017—advised that “[t]here is no national security purpose for a total ban on entry for aliens from the [Designated Countries].” J.A. 91.

B.

The First and Second Executive Orders were issued against a backdrop of public statements by the President and his advisors and representatives at different points in time, both before and after the election and President Trump’s assumption of office. We now recount certain of those statements.

On December 7, 2015, then-candidate Trump published a “Statement on Preventing Muslim Immigration” on his campaign website, which proposed “a total and complete shutdown of Muslims entering the United States until our country’s representatives can figure out what is going on.” J.A. 346. That same day, he highlighted the statement on Twitter, “Just put out a very important policy statement on the extraordinary influx of hatred & danger coming into our country. We must be vigilant!” And Trump read from the statement at a campaign rally in Mount Pleasant, South Carolina, that evening, where he remarked, “I have friends that are Muslims. They are great people—but they know we have a problem.”

In an interview with CNN on March 9, 2016, Trump professed, “I think Islam hates us,” J.A. 516, and “[W]e can’t allow people coming into the country who have this hatred,” J.A. 517. Katrina Pierson, a Trump spokeswoman, told CNN that “[w]e’ve allowed this propaganda to spread all through the country that [Islam] is a religion of peace.” J.A. 518. In a March 22, 2016 interview with Fox Business television, Trump reiterated his call for a ban on Muslim immigration, claiming that this proposed ban had received “tremendous support” and stating, “we’re having problems with the Muslims, and we’re having problems with Muslims coming into the country.” J.A. 522. “You need surveillance,” Trump explained, and “you have to deal with the mosques whether you like it or not.” J.A. 522.

Candidate Trump later recharacterized his call to ban Muslims as a ban on nationals from certain countries or territories. On July 17, 2016, when asked about a tweet that said, “Calls to ban Muslims from entering the U.S. are offensive and unconstitutional,” then-candidate Trump responded, “So you call it territories. OK? We’re gonna do territories.” J.A. 798. He echoed this statement a week later in an interview with NBC’s Meet the Press. When asked whether he had “pulled back” on his “Muslim ban,” Trump replied, “We must immediately suspend immigration from any nation that has been compromised by terrorism until such time as proven vetting mechanisms have been put in place.” J.A. 480. Trump added, “I actually don’t think it’s a rollback. In fact, you could say it’s an expansion. I’m looking now at territories. People were so upset when I used the word Muslim. Oh, you can’t use the word Muslim. Remember this. And I’m okay with that, because I’m talking territory instead of Muslim.” Trump continued, “Our
Constitution is great. . . . Now, we have a religious, you know, everybody wants to be protected. And that’s great. And that’s the wonderful part of our Constitution. I view it differently.”

On December 19, 2016, following a terrorist attack in Germany, President-Elect Trump lamented the attack on people who were “prepared to celebrate the Christmas holiday” by “ISIS and other Islamic terrorists [who] continually slaughter Christians in their communities and places of worship as part of their global jihad.” Two days later, when asked whether recent violence in Europe had affected his plans to bar Muslims from immigrating to the United States, President-Elect Trump commented, “You know my plans. All along, I’ve been proven to be right. 100% correct. What’s happening is disgraceful.”

The President gave an interview to the Christian Broadcasting News on January 27, 2017, the same day he issued the First Executive Order. In that interview, the President explained that EO-1 would give preference to Christian refugees: “They’ve been horribly treated. Do you know if you were a Christian in Syria it was impossible, at least very tough to get into the United States? If you were a Muslim you could come in, but if you were a Christian, it was almost impossible . . . .” He found that situation “very, very unfair.” Just before signing EO-1, President Trump stated, “This is the ‘Protection of the Nation from Foreign Terrorist Entry into the United States.’ We all know what that means.” The following day, former New York City Mayor and presidential advisor Rudolph Giuliani appeared on Fox News and was asked, “How did the President decide the seven countries?” Giuliani answered, “I’ll tell you the whole history of it. So when [the President] first announced it, he said ‘Muslim ban.’ He called me up. He said, ‘Put a commission together. Show me the right way to do it legally.’” J.A. 508. Giuliani said he assembled a group of “expert lawyers” that “focused on, instead of religion, danger—the areas of the world that create danger for us. . . . It’s based on places where there [is] substantial evidence that people are sending terrorists into our country.”

In response to the Ninth Circuit’s decision not to stay enforcement of the nationwide injunction, the President stated at a news conference on February 16, 2017, that he intended to issue a new executive order tailored to that court’s decision—despite his belief that the First Executive Order was lawful. In discussing the Ninth Circuit’s decision and his “[e]xtreme vetting” proposal, the President stated, “I got elected on defense of our country. I keep my campaign promises, and our citizens will be very happy when they see the result.” A few days later Stephen Miller, Senior Policy Advisor to the President, explained that the new order would reflect “mostly minor technical differences,” emphasizing that it would produce the “same basic policy outcome for the country.” J.A. 339. White House Press Secretary Sean Spicer stated, “The principles of the executive order remain the same.” J.A. 379. And President Trump, in a speech at a rally in Nashville, Tennessee, described EO-2 as “a watered down version of the first order.”

At the March 6, 2017 press conference announcing the Second Executive Order, Secretary of State Rex Tillerson said, “This executive order is a vital measure for strengthening our national security.” That same day, Attorney General Jefferson Sessions and Secretary of Homeland Security John Kelly submitted a letter to the President detailing how weaknesses in our immigration system compromise our nation’s security and recommending a temporary pause on entry of nationals from the Designated Countries. In a
CNN interview the next day, Secretary Kelly specified that there are probably “13 or 14 countries” that have “questionable vetting procedures,” not all of which are Muslim countries or in the Middle East. He noted that there are “51 overwhelmingly Muslim countries” and rejected the characterization of EO-2 as a “Muslim ban.”

C.

This action was brought by six individuals, all American citizens or lawful permanent residents who have at least one family member seeking entry into the United States from one of the Designated Countries, and three organizations that serve or represent Muslim clients or members.

Four of the individual Plaintiffs—John Doe #1, Jane Doe #2, John Doe #3, and Paul Harrison—allege that EO-2 would impact their immediate family members' ability to obtain visas. Collectively, they claim that Section 2(c) of EO-2, the provision that suspends entry for certain foreign nationals for ninety days, will prolong their separation from their loved ones. John Doe #1 has applied for a spousal immigration visa so that his wife, an Iranian national, can join him in the United States; the application was approved, and she is currently awaiting her visa interview. J.A. 305. Jane Doe #2, a college student in the United States, has a pending I-130 visa application on behalf of her sister, a Syrian refugee living in Saudi Arabia. Since the filing of the operative Complaint on March 10, 2017, two of Plaintiffs’ family members have obtained immigrant visas. The Government informed the district court that Paul Harrison’s fiancé secured and collected a visa on March 15, 2017, the day before EO-2 was to take effect. Doe #3’s wife secured an immigrant visa on May 1, 2017, and Plaintiffs anticipate that she will arrive in the United States within the next eight weeks. The remaining two individual Plaintiffs—Muhammed Meteab and Ibrahim Ahmed Mohomed—allege that EO-2 would delay or deny the admission of their family members as refugees.

Beyond claiming injury to their family relationships, several of the individual Plaintiffs allege that the anti-Muslim message animating EO-2 has caused them feelings of disparagement and exclusion. Doe #1, a scientist who obtained permanent resident status through the National Interest Waiver program for people with extraordinary abilities, references these "anti-Muslim views," worries about his safety in this country, and contemplates whether he should return to Iran to be with his wife. Plaintiff Meteab relays that the "anti-Muslim sentiment" motivating EO-2 had led him to feel "isolated and disparaged in [his] community." He explains that when he is in public with his wife, who wears a hijab, he "sense[s] a lot of hostility from people" and recounts that his nieces, who both wear a hijab, "say that people make mean comments and stare at them for being Muslim." A classmate "pulled the hijab off" one of his nieces in class.

Two of the organizational Plaintiffs, the International Refugee Assistance Project and the Hebrew Immigrant Aid Society, primarily assist refugees with the resettlement process. These organizations claim that they have already diverted significant resources to dealing with EO-2's fallout, and that they will suffer direct financial injury from the anticipated reduction in refugee cases. They further claim that their clients, who are located in the United States and the Middle East, will be injured by the delayed reunification with their loved ones. The final Plaintiff, the Middle East Studies Association, an umbrella organization dedicated to fostering awareness of the Middle East, asserts that EO-2 will, among other injuries, reduce attendance at its annual conference and cause
the organization to lose $18,000 in registration fees.

D.

Plaintiffs initiated this suit on February 7, 2017, seeking declaratory and injunctive relief against enforcement of the First Executive Order. Plaintiffs claimed that EO-1 violated the Establishment Clause of the First Amendment; the equal protection component of the Due Process Clause of the Fifth Amendment; the Immigration and Nationality Act ("INA"); the Religious Freedom Restoration Act; the Refugee Act; and the Administrative Procedure Act. They named as Defendants the President, DHS, the Department of State, the Office of the Director of National Intelligence, the Secretary of Homeland Security, the Secretary of State, and the Director of National Intelligence.

On March 10, 2017, four days after the President issued EO-2, Plaintiffs filed the operative Complaint, along with a motion for a TRO and/or preliminary injunction. Plaintiffs sought to enjoin implementation of EO-2 in its entirety, prior to its effective date. In quick succession, the Government responded to the motion, Plaintiffs filed a reply, and the parties appeared for a hearing.

The district court construed the motion as a request for a preliminary injunction, and on March 16, 2017, it granted in part and denied in part that motion. The court found that three individual Plaintiffs (Doe #1, Doe #2, and Doe #3) had standing to bring the claim that Section 2(c) violates the INA's provision prohibiting discrimination on the basis of nationality in the issuance of immigrant visas. The court also determined that at least three individual Plaintiffs (Meteab, Doe #1, and Doe #3) had standing to pursue the claim that EO-2 violates the Establishment Clause.

After finding Plaintiffs' claims justiciable, the district court turned to the merits of their claims. The court determined that Plaintiffs are likely to succeed only in part on the merits of their INA claim. It found that Section 2(c) likely violates § 1152(a)(1)(A), but only as to its effective bar on the issuance of immigrant visas, because § 1152(a)(1)(A) explicitly applies solely to immigrant visas. To the extent that Section 2(c) prohibits the issuance of nonimmigrant visas and bars entry on the basis of nationality, the court found that it was not likely to violate § 1152(a)(1)(A). The court did not discuss this claim in addressing the remaining preliminary injunction factors.

The district court next found that Plaintiffs are likely to succeed on the merits of their Establishment Clause claim. It then considered the remaining preliminary injunction requirements, but only as to the Establishment Clause claim: it found that Plaintiffs would suffer irreparable injury if EO-2 were to take effect, that the balance of the equities weighed in Plaintiffs' favor, and that a preliminary injunction was in the public interest. The district court concluded that a preliminary injunction was therefore proper as to Section 2(c) of EO-2 because Plaintiffs' claims centered primarily on that provision's suspension of entry. The court accordingly issued a nationwide injunction barring enforcement of Section 2(c).

Defendants timely noted this appeal, and we possess jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

II.

Because the district court enjoined Section 2(c) in its entirety based solely on Plaintiffs' Establishment Clause claim, we need not reach the merits of Plaintiffs' statutory claim under the INA.

In Section 2(c) of EO-2, the President suspended the entry of nationals from the six
Designated Countries, pursuant to his power to exclude aliens under Section 212(f) of the INA, codified at 8 U.S.C. § 1182(f), and Section 215(a)(1) of the INA, codified at 8 U.S.C. § 1185(a)(1). The Government contends that Section 2(c)'s suspension of entry falls squarely within the "expansive authority" granted to the President by § 1182(f) and § 1185(a)(1). Appellants' Br. 28. Plaintiffs, on the other hand, argue that Section 2(c) violates a separate provision of the INA, Section 202(a)(1)(A), codified at 8 U.S.C. § 1152(a)(1)(A), prohibiting discrimination on the basis of nationality "in the issuance of immigrant visas."

The district court determined that Plaintiffs are likely to succeed on their claim under § 1152(a)(1)(A) only in limited part. Because Section 2(c) has the practical effect of halting the issuance of immigrant visas on the basis of nationality, the court reasoned, it is inconsistent with § 1152(a)(1)(A). To that extent—and contrary to the Government's position—the court found that Presidential authority under § 1182(f) and § 1185(a)(1) is cabined by the INA's prohibition on nationality-based discrimination in visa issuance. But the district court's ruling was limited in two important respects. First, because § 1152(a)(1)(A) applies only to the issuance of immigrant visas, the district court discerned no conflict between that provision and the application of Section 2(c) to persons seeking non-immigrant visas. And second, the district court found that because § 1152(a)(1)(A) governs the issuance of visas rather than actual entry into the United States, it poses no obstacle to enforcement of Section 2(c)'s nationality-based entry bar. The district court summarized as follows:

Plaintiffs have shown a likelihood of success on the merits of their claim that the Second Executive Order violates § 1152(a), but only as to the issuance of immigrant visas . . . . They have not shown a likelihood of success on the merits of the claim that § 1152(a) prevents the President from barring entry to the United States pursuant to § 1182(f), or the issuance of non-immigrant visas, on the basis of nationality.

This narrow statutory ruling is not the basis for the district court's broad preliminary injunction enjoining Section 2(c) of EO-2 in all of its applications. Rather, Plaintiffs' constitutional claim, the district court determined, was what justified a nationwide preliminary injunction against any enforcement of Section 2(c). If we were to disagree with the district court that § 1152(a)(1)(A) partially restrains the President's authority under § 1182(f) and § 1185(a)(1), then we would be obliged to consider Plaintiffs' alternative Establishment Clause claim. And, importantly, even if we were to agree with the district court's statutory analysis, we still would be faced with the question of whether the scope of the preliminary injunction, which goes beyond the issuance of immigrant visas governed by § 1152(a)(1)(A) to enjoin Section 2(c) in its entirety, can be sustained on the basis of Plaintiffs' Establishment Clause claim.

In light of this posture, we need not address the merits of the district court's statutory ruling. We recognize, of course, the doctrine of constitutional avoidance, which counsels against the issuance of "unnecessary constitutional rulings." But as we have explained, the district court's constitutional ruling was necessary to its decision, and review of that ruling is necessary to ours. Accordingly, we decline to reach the merits of Plaintiffs' claim under § 1152(a)(1)(A). The breadth of the preliminary injunction issued by the district court may be justified if and only if Plaintiffs can satisfy the requirements for a preliminary injunction based on their Establishment
Clause claim. We therefore turn to consider that claim.

III.

The Government first asks us to reverse the preliminary injunction on the grounds that Plaintiffs' Establishment Clause claim is non-justiciable. In its view, Plaintiffs have not satisfied the foundational Article III requirements of standing and ripeness, and in any event, the doctrine of consular nonreviewability bars judicial review of their claim. We consider these threshold challenges in turn.

A.

The district court found that at least three individual Plaintiffs—Muhammed Meteab, Doe #1, and Doe #3—have standing to assert the claim that EO-2 violates the Establishment Clause. We review this legal determination de novo.

The Constitution's gatekeeping requirement that federal courts may only adjudicate "Cases" or "Controversies," U.S. Const. art. III, § 2, obligates courts to determine whether litigants have standing to bring suit. To demonstrate standing and thus invoke federal jurisdiction, a party must establish that "(1) it has suffered an injury in fact, (2) the injury is fairly traceable to the defendants' actions, and (3) it is likely, and not merely speculative, that the injury will be redressed by a favorable decision." The parties' core dispute is whether Plaintiffs have suffered a cognizable injury. To establish a cognizable injury, "a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'"

In evaluating standing, "the court must be careful not to decide the question on the merits for or against the plaintiff, and must therefore assume that on the merits the plaintiffs would be successful in their claims." This means, for purposes of standing, we must assume that Section 2(c) violates the First Amendment's prohibition against governmental "establishment of religion."

"Standing in Establishment Clause cases may be shown in various ways," though as oft-repeated, "the concept of injury for standing purposes is particularly elusive" in this context. Nevertheless, the Supreme Court and this Circuit have developed a set of rules that guide our review.

To establish standing for an Establishment Clause claim, a plaintiff must have "personal contact with the alleged establishment of religion." A "mere abstract objection to unconstitutional conduct is not sufficient to confer standing." The Supreme Court has reinforced this principle in recent years: "plaintiffs may demonstrate standing based on the direct harm of what is claimed to be an establishment of religion." This "direct harm" can resemble injuries in other contexts. Merchants who suffered economic injury, for instance, had standing to challenge Sunday closing laws as violative of the Establishment Clause. But because Establishment Clause violations seldom lead to "physical injury or pecuniary loss," the standing inquiry has been adapted to also include "the kind of injuries Establishment Clause plaintiffs" are more "likely to suffer." As such, "noneconomic or intangible injury may suffice to make an Establishment Clause claim justiciable." "Feelings of marginalization and exclusion are cognizable forms of injury," we recently explained, "particularly in the Establishment Clause context, because one of the core objectives of modern Establishment Clause jurisprudence has been to prevent the State from sending a message to non-adherents of a particular religion 'that they
are outsiders, not full members of the political community."

Doe #1—who is a lawful permanent resident of the United States, Muslim, and originally from Iran—filed a visa application on behalf of his wife, an Iranian national. Her application has been approved, and she is currently awaiting her consular interview. If it took effect, EO-2 would bar the entry of Doe #1's wife. Doe #1 explains that because EO-2 bars his wife's entry, it "forces [him] to choose between [his] career and being with [his] wife," and he is unsure "whether to keep working here" as a scientist or to return to Iran. Doe #1 adds that EO-2 has "created significant fear, anxiety, and insecurity" for him and his wife. He highlights the "statements that have been made about banning Muslims from entering, and the broader context," and states, "I worry that I may not be safe in this country." J.A. 306; see also J.A. 314 (Plaintiff Meteab describing how the "anti-Muslim sentiment motivating" EO-2 has led him to feel "isolated and disparaged in [his] community").

Doe #1 has therefore asserted two distinct injuries stemming from his "personal contact" with the alleged establishment of religion—EO-2. First, EO-2 will bar his wife's entry into the United States and prolong their separation. And second, EO-2 sends a state-sanctioned message condemning his religion and causing him to feel excluded and marginalized in his community.

We begin with Doe #1's allegation that EO-2 will prolong his separation from his wife. This Court has found that standing can be premised on a "threatened rather than actual injury," as long as this "threat of injury [is] both real and immediate." The purpose of the longstanding "imminence" requirement, which is admittedly "a somewhat elastic concept," is "to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is 'certainly impending.'"

The Government does not contest that, in some circumstances, the prolonged separation of family members can constitute an injury-in-fact. The Government instead argues that Doe #1's claimed injury is speculative and non-imminent, Appellants' Br. 19, such that it is not "legally and judicially cognizable." According to the Government, Doe #1 has failed to show that his threatened injury—prolonged separation from his wife—is imminent. It asserts that Doe #1 has offered no reason to believe that Section 2(c)'s "short pause" on entry "will delay the issuance of [his wife's] visa."

But this ignores that Section 2(c) appears to operate by design to delay the issuance of visas to foreign nationals. Section 2(c)'s "short pause" on entry effectively halts the issuance of visas for ninety days—as the Government acknowledges, it "would be pointless to issue a visa to an alien who the consular officer already knows is barred from entering the country." The Government also cites 8 U.S.C. § 1201(g), which provides in relevant part that "[n]o visa or other documentation shall be issued to an alien if [i]t appears to the consular officer . . . that such alien is ineligible to receive a visa or other documentation under section 1182 of this title." A ninety-day pause on issuing visas would seem to necessarily inject at least some delay into any pending application's timeline. And in fact, the Government suggests that pending visa applications might not be delayed, but denied. A denial on such grounds would mean that once the entry suspension period concludes, an alien would have to restart from the beginning the lengthy visa application process. What is more, Section 2(c) is designed to "reduce investigative burdens on relevant agencies" to facilitate worldwide review of the current procedures for "screening and vetting of
foreign nationals." Logically, dedicating time and resources to a global review process will further slow the adjudication of pending applications.

Here, Doe #1 has a pending visa application on behalf of his wife, seeking her admission to the United States from one of the Designated Countries. Prior to EO-2's issuance, Doe #1 and his wife were nearing the end of the lengthy immigrant visa process, as they were waiting for her consular interview to be scheduled. J.A. 305. They had already submitted a petition, received approval of that petition, begun National Visa Center ("NVC") Processing, submitted the visa application form, collected and submitted the requisite financial and supporting documentation to NVC, and paid the appropriate fees. If Section 2(c) were in force—restricting the issuance of visas to nationals in the Designated Countries for ninety days and initiating the worldwide review of existing visa standards—we find a "real and immediate" threat that it would prolong Doe #1's separation from his wife, either by delaying the issuance of her visa or denying her visa and forcing her to restart the application process.

This prolonged family separation is not, as the Government asserts, a remote or speculative possibility. Unlike threatened injuries that rest on hypothetical actions a plaintiff may take "some day," or on a "highly attenuated chain of possibilities," the threatened injury here is imminent, sufficiently "real" and concrete, and would harm Doe #1 in a personal and "particularized" way. The progression of Doe #3’s wife's visa application illustrates this. Doe #3’s wife received a visa on May 1, 2017, while Section 2(c) was enjoined. If Section 2(c) had been in effect, she would have been ineligible to receive a visa until after the expiration of the ninety-day period. Put simply, Section 2(c) would have delayed the issuance of Doe #3’s wife's visa. This cuts directly against the Government's assertion that it is uncertain whether or how Section 2(c) would affect visa applicants. Clearly Section 2(c) will delay and disrupt pending visa applications.

Even more, flowing from EO-2 is the alleged state-sanctioned message that foreign-born Muslims, a group to which Doe #1 belongs, are "outsiders, not full members of the political community." Doe #1 explains how the Second Executive Order has caused him to fear for his personal safety in this country and wonder whether he should give up his career in the United States and return to Iran to be with his wife. This harm is consistent with the "feeling of marginalization and exclusion" injury we recognized in Moss.

In light of these two injuries, we find that Doe #1 has had "personal contact with the alleged establishment of religion." Regardless of whether EO-2 actually violates the Establishment Clause's command not to disfavor a particular religion, a merits inquiry explored in Section IV.A, his injuries are on par with, if not greater than, injuries we previously deemed sufficient in this context.

The Government attempts to undercut these injuries in several ways. It first frames Plaintiffs' injuries as "stress." That minimizes the psychological harm that flows from confronting official action preferring or disfavoring a particular religion and, in any event, does not account for the impact on families. The Government next argues that because the Second Executive Order "directly applies only to aliens abroad from the specified countries," it is "not directly targeted at plaintiffs," who are based in the United States, "in the way that local- or state-government messages are." An executive order is of course different than a local Sunday closing law or a Ten Commandments display in a state courthouse, but that does not mean its impact is any less direct. Indeed,
because it emanates from the highest elected office in the nation, its impact is arguably felt even more directly by the individuals it affects. From Doe #1’s perspective, the Second Executive Order does not apply to arbitrary or anonymous "aliens abroad." It applies to his wife.

More than abstractly disagreeing with the wisdom or legality of the President's policy decision, Plaintiffs show how EO-2 impacted (and continues to impact) them personally. Doe #1 is not simply "roam[ing] the country in search of governmental wrongdoing." Rather, he is feeling the direct, painful effects of the Second Executive Order—both its alleged message of religious condemnation and the prolonged separation it causes between him and his wife—in his everyday life. This case thus bears little resemblance to Valley Forge.

We likewise reject the Government's suggestion that Plaintiffs are seeking to vindicate the legal rights of third parties. The prudential standing doctrine includes a "general prohibition on a litigant's raising another person's legal rights." This "general prohibition" is not implicated here, however, as Doe #1 has shown that he himself suffered injuries as a result of the challenged Order.

For all of these reasons, we find that Doe #1 has met his burden to establish an Article III injury. We further find that Doe #1 has made the requisite showing that his claimed injuries are causally related to the challenged conduct—the Second Executive Order as opposed to "the independent action of some third party not before the court." Enjoining enforcement of Section 2(c) therefore will likely redress those injuries. Doe #1 has thus met the constitutional standing requirements with respect to the Establishment Clause claim.

Lastly, the Government asserts that Plaintiffs' Establishment Clause claim is unripe. It argues that under EO-2, Plaintiffs' relatives can apply for a waiver, and unless and until those waiver requests are denied, Plaintiffs' claims are dependent on future uncertainties. When evaluating ripeness, we consider "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." An action is fit for resolution "when the issues are purely legal and when the action in controversy is final and not dependent on future uncertainties." The "hardship prong is measured by the immediacy of the threat and the burden imposed on the [plaintiff]."

Our ripeness doctrine is clearly not implicated here. Plaintiffs have brought a facial challenge, alleging that EO-2 violates the Establishment Clause regardless of whether their relatives secure waivers. This legal question is squarely presented for our review and is not dependent on the factual uncertainties of the waiver process. What is more, Plaintiffs will suffer undue hardship, as explained above, were we to require their family members to attempt to secure a waiver before permitting Plaintiffs to challenge Section 2(c). We accordingly find the claim ripe for judicial decision.

B.

In one final justiciability challenge, the Government asserts that consular nonreviewability bars any review of Plaintiffs' claim. This Court has scarcely discussed the doctrine, so the Government turns to the District of Columbia Circuit, which has stated that "a consular official's decision to issue or withhold a visa is not subject to judicial review, at least unless Congress says otherwise." But in the same opinion, the court explained that judicial
review was proper in cases involving "claims by United States citizens rather than by aliens . . . and statutory claims that are accompanied by constitutional ones." This is precisely such a case. More fundamentally, the doctrine of consular nonreviewability does not bar judicial review of constitutional claims. The Government's reliance on the doctrine is therefore misplaced.

Behind the casual assertion of consular nonreviewability lies a dangerous idea—that this Court lacks the authority to review high-level government policy of the sort here. Although the Supreme Court has certainly encouraged deference in our review of immigration matters that implicate national security interests, see infra Section IV.A, it has not countenanced judicial abdication, especially where constitutional rights, values, and principles are at stake. To the contrary, the Supreme Court has affirmed time and again that "it is emphatically the province and duty of the judicial department to say what the law is." This "duty will sometimes involve the resolution of litigation challenging the constitutional authority of one of the three branches, but courts cannot avoid their responsibility." In light of this duty, and having determined that the present case is justiciable, we now proceed to consider whether the district court properly enjoined Section 2(c) of the Second Executive Order.

IV.

A preliminary injunction is an "extraordinary remedy involving the exercise of very far-reaching power" and is "to be granted only sparingly and in limited circumstances." For a district court to grant a preliminary injunction, "a plaintiff must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." The district court found that Plaintiffs satisfied all four requirements as to their Establishment Clause claim, and it enjoined Section 2(c) of EO-2. We evaluate the court's findings for abuse of discretion, reviewing its factual findings for clear error and its legal conclusions de novo.

A.

The district court determined that Plaintiffs are likely to succeed on the merits of their claim that EO-2 violates the Establishment Clause. It found that because EO-2 is "facially neutral in terms of religion," the test outlined in Lemon v. Kurtzman, governs the constitutional inquiry. And applying the Lemon test, the court found that EO-2 likely violates the Establishment Clause. The Government argues that the court erroneously applied the Lemon test instead of the more deferential test set forth in Kleindienst v. Mandel. And under Mandel, the Government contends, Plaintiffs' claim fails.

1.

We begin by addressing the Government's argument that the district court applied the wrong test in evaluating Plaintiffs' constitutional claim. The Government contends that Mandel sets forth the appropriate test because it recognizes the limited scope of judicial review of executive action in the immigration context. We agree that Mandel is the starting point for our analysis, but for the reasons that follow, we find that its test contemplates the application of settled Establishment Clause doctrine in this case.

In Mandel, American university professors had invited Mandel, a Belgian citizen and revolutionary Marxist and professional journalist, to speak at a number of conferences in the United States. But
Mandel's application for a nonimmigrant visa was denied under a then-existing INA provision that barred the entry of aliens "who advocate the economic, international, and governmental doctrines of world communism." The Attorney General had discretion to waive § 1182(a)(28)(D)'s bar and grant Mandel an individual exception, but declined to do so on the grounds that Mandel had violated the terms of his visas during prior visits to the United States. The American professors sued, alleging, among other things, that the denial of Mandel's visa violated their First Amendment rights to "hear his views and engage him in a free and open academic exchange."

The Supreme Court, citing "Congress' plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden," found that the longstanding principle of deference to the political branches in the immigration context limited its review of plaintiffs' challenge. The Court held that "when the Executive exercises this power [to exclude an alien] on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the [plaintiffs'] First Amendment interests." The Court concluded that the Attorney General's stated reason for denying Mandel's visa—that he had violated the terms of prior visas—satisfied this test. It therefore did not review plaintiffs' First Amendment claim.

Courts have continuously applied Mandel's "facially legitimate and bona fide" test to challenges to individual visa denials. Subsequently, in Fiallo v. Bell, the Supreme Court applied Mandel's test to a facial challenge to an immigration law, finding "no reason to review the broad congressional policy choice at issue here under a more exacting standard than was applied in Kleindienst v. Mandel, a First Amendment case." And in a case where plaintiffs brought a constitutional challenge to an immigration law, this Court has found that "we must apply the same standard as the Fiallo court and uphold the statute if a 'facially legitimate and bona fide reason' supports [it]." Mandel is therefore the starting point for our review.

But in another more recent line of cases, the Supreme Court has made clear that despite the political branches' plenary power over immigration, that power is still "subject to important constitutional limitations," and that it is the judiciary's responsibility to uphold those limitations. These cases instruct that the political branches' power over immigration is not tantamount to a constitutional blank check, and that vigorous judicial review is required when an immigration action's constitutionality is in question.

We are bound to give effect to both lines of cases, meaning that we must enforce constitutional limitations on immigration actions while also applying Mandel's deferential test to those actions as the Supreme Court has instructed. For the reasons that follow, however, we find that these tasks are not mutually exclusive, and that Mandel's test still contemplates meaningful judicial review of constitutional challenges in certain, narrow circumstances, as we have here.

To begin, Mandel's test undoubtedly imposes a heavy burden on plaintiffs, consistent with the significant deference we afford the political branches in the immigration context. The government need only show that the challenged action is "facially legitimate and bona fide" to defeat a constitutional challenge. These are separate and quite distinct requirements. To be "facially legitimate," there must be a valid reason for the challenged action stated on the face of the action.
And as the name suggests, the "bona fide" requirement concerns whether the government issued the challenged action in good faith. In *Kerry v. Din*, Justice Kennedy, joined by Justice Alito, elaborated on this requirement. Here, the burden is on the plaintiff. Justice Kennedy explained that where a plaintiff makes "an affirmative showing of bad faith" that is "plausibly alleged with sufficient particularity," courts may "look behind" the challenged action to assess its "facially legitimate" justification. In the typical case, it will be difficult for a plaintiff to make an affirmative showing of bad faith with plausibility and particularity. And absent this affirmative showing, courts must defer to the government's "facially legitimate" reason for the action.

*Mandel* therefore clearly sets a high bar for plaintiffs seeking judicial review of a constitutional challenge to an immigration action. But although *Mandel's* "facially legitimate and bona fide" test affords significant deference to the political branches' decisions in this area, it does not completely insulate those decisions from any meaningful review. Where plaintiffs have seriously called into question whether the stated reason for the challenged action was provided in good faith, we understand *Mandel*, as construed by Justice Kennedy in his controlling concurrence in *Din*, to require that we step away from our deferential posture and look behind the stated reason for the challenged action. In other words, *Mandel's* requirement that an immigration action be "bona fide" may in some instances compel more searching judicial review. Plaintiffs ask this Court to engage in such searching review here under the traditional Establishment Clause test, and we therefore turn to consider whether such a test is warranted.

We start with *Mandel's* requirement that the challenged government action be "facially legitimate." EO-2's stated purpose is "to protect the Nation from terrorist activities by foreign nationals admitted to the United States." EO-2, Preamble. We find that this stated national security interest is, on its face, a valid reason for Section 2(c)'s suspension of entry. EO-2 therefore satisfies *Mandel's* first requirement. Absent allegations of bad faith, our analysis would end here in favor of the Government. But in this case, Plaintiffs have alleged that EO-2's stated purpose was given in bad faith. We therefore must consider whether they have made the requisite showing of bad faith.

As noted, Plaintiffs must "plausibly allege[] with sufficient particularity" that the reason for the government action was provided in bad faith. Plaintiffs here claim that EO-2 invokes national security in bad faith, as a pretext for what really is an anti-Muslim religious purpose. Plaintiffs point to ample evidence that national security is not the true reason for EO-2, including, among other things, then-candidate Trump's numerous campaign statements expressing animus towards the Islamic faith; his proposal to ban Muslims from entering the United States; his subsequent explanation that he would effectuate this ban by targeting "territories" instead of Muslims directly; the issuance of EO-1, which targeted certain majority-Muslim nations and included a preference for religious minorities; an advisor's statement that the President had asked him to find a way to ban Muslims in a legal way; and the issuance of EO-2, which resembles EO-1 and which President Trump and his advisors described as having the same policy goals as EO-1. Plaintiffs also point to the comparably weak evidence that EO-2 is meant to address national security interests, including the exclusion of national security agencies from the decisionmaking process, the post hoc nature of the national security
rationale, and evidence from DHS that EO-2 would not operate to diminish the threat of potential terrorist activity.

Based on this evidence, we find that Plaintiffs have more than plausibly alleged that EO-2's stated national security interest was provided in bad faith, as a pretext for its religious purpose. And having concluded that the "facially legitimate" reason proffered by the government is not "bona fide," we no longer defer to that reason and instead may "look behind" EO-2.

Since Justice Kennedy's concurrence in Din, no court has confronted a scenario where, as here, plaintiffs have plausibly alleged with particularity that an immigration action was taken in bad faith. We therefore have minimal guidance on what "look[ing] behind" a challenged immigration action entails. See id. In addressing this issue of first impression, the Government does not propose a framework for this inquiry. Rather, the Government summarily asserts that because EO-2 states that it is motivated by national security interests, it therefore satisfies Mandel's test. But this only responds to Mandel's "facially legitimate" requirement—it reads out Mandel's "bona fide" test altogether. Plaintiffs, for their part, suggest that we review their claim using our normal constitutional tools. And in the Establishment Clause context, our normal constitutional tool for reviewing facially neutral government actions is the test in Lemon v. Kurtzman.

We find for several reasons that because Plaintiffs have made an affirmative showing of bad faith, applying the Lemon test to analyze EO-2's constitutionality is appropriate. First, as detailed above, the Supreme Court has unequivocally stated that the political branches' immigration actions are still "subject to important constitutional limitations." The constitutional limitation in this case is the Establishment Clause, and this Court's duty to uphold the Constitution even in the context of a presidential immigration action counsels in favor of applying our standard constitutional tool. Second, that Plaintiffs have satisfied Mandel's heavy burden to plausibly show that the reason for the challenged action was proffered in bad faith further supports the application of our established constitutional doctrine. The deferential framework set forth in Mandel is based in part on general respect for the political branches' power in the immigration realm. Once plaintiffs credibly call into question the political branches' motives for exercising that power, our reason for deferring is severely undermined. In the rare case where plaintiffs plausibly allege bad faith with particularity, more meaningful review—in the form of constitutional scrutiny—is proper. And third, in the context of this case, there is an obvious symmetry between Mandel's "bona fide" prong and the constitutional inquiry established in Lemon. Both tests ask courts to evaluate the government's purpose for acting.

Because Plaintiffs have made a substantial and affirmative showing that the government's national security purpose was proffered in bad faith, we find it appropriate to apply our longstanding Establishment Clause doctrine. Applying this doctrine harmonizes our duty to engage in the substantial deference required by Mandel and its progeny with our responsibility to ensure that the political branches choose constitutionally permissible means of exercising their immigration power. We therefore proceed to "look behind" EO-2 using the framework developed in Lemon to determine if EO-2 was motivated by a primarily religious purpose, rather than its stated reason of promoting national security.

2.

To prevail under the Lemon test, the Government must show that the challenged
action (1) "ha[s] a secular legislative purpose," (2) that "its principal or primary effect [is] one that neither advances nor inhibits religion," and (3) that it does "not foster 'an excessive government entanglement with religion.'" The Government must satisfy all three prongs of Lemon to defeat an Establishment Clause challenge. The dispute here centers on Lemon's first prong.

In the Establishment Clause context, "purpose matters." Under the Lemon test's first prong, the Government must show that the challenged action "ha[s] a secular legislative purpose." Accordingly, the Government must show that the challenged action has a secular purpose that is "genuine, not a sham, and not merely secondary to a religious objective." The government cannot meet this requirement by identifying any secular purpose for the challenged action. Rather, the government must show that the challenged action's primary purpose is secular.

When a court considers whether a challenged government action's primary purpose is secular, it attempts to discern the "official objective . . . from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts." The court acts as a reasonable, "objective observer," taking into account "the traditional external signs that show up in the text, legislative history, and implementation of the statute,' or comparable official act." It also considers the action's "historical context" and "the specific sequence of events leading to [its] passage." And as a reasonable observer, a court has a "reasonable memor[y]," and it cannot "'turn a blind eye to the context in which [the action] arose.'"

The evidence in the record, viewed from the standpoint of the reasonable observer, creates a compelling case that EO-2's primary purpose is religious. Then-candidate Trump's campaign statements reveal that on numerous occasions, he expressed anti-Muslim sentiment, as well as his intent, if elected, to ban Muslims from the United States. For instance, on December 7, 2015, Trump posted on his campaign website a "Statement on Preventing Muslim Immigration," in which he "call[ed] for a total and complete shutdown of Muslims entering the United States until our representatives can figure out what is going on" and remarked, "[I]t is obvious to anybody that the hatred is beyond comprehension. . . . [O]ur country cannot be the victims of horrendous attacks by people that believe only in Jihad, and have no sense of reason or respect for human life." In a March 9, 2016 interview, Trump stated that "Islam hates us," and that "'[w]e can't allow people coming into this country who have this hatred." Less than two weeks later, in a March 22 interview, Trump again called for excluding Muslims, because "we're having problems with the Muslims, and we're having problems with Muslims coming into the country." And on December 21, 2016, when asked whether recent attacks in Europe affected his proposed Muslim ban, President-Elect Trump replied, "You know my plans. All along, I've proven to be right. 100% correct."

As a candidate, Trump also suggested that he would attempt to circumvent scrutiny of the Muslim ban by formulating it in terms of nationality, rather than religion. On July 17, 2016, in response to a tweet stating, "Calls to ban Muslims from entering the U.S. are offensive and unconstitutional," Trump said, "So you call it territories. OK? We're gonna do territories." One week later, Trump asserted that entry should be "immediately suspended[ed] . . . from any nation that has been compromised by terrorism." When asked whether this meant he was "roll[ing] back" his call for a Muslim ban, he said his plan was an "expansion" and explained that "[p]eople were so upset when
I used the word Muslim," so he was instead "talking territory instead of Muslim."

Significantly, the First Executive Order appeared to take this exact form, barring citizens of seven predominantly Muslim countries from entering the United States. And just before President Trump signed EO-1 on January 27, 2017, he stated, "This is the 'Protection of the Nation from Foreign Terrorist Entry into the United States.' We all know what that means." The next day, presidential advisor and former New York City Mayor Giuliani appeared on Fox News and asserted that "when [Trump] first announced it, he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'"

Shortly after courts enjoined the First Executive Order, President Trump issued EO-2, which the President and members of his team characterized as being substantially similar to EO-1. EO-2 has the same name and basic structure as EO-1, but it does not include a preference for religious-minority refugees and excludes Iraq from its list of Designated Countries. EO-2, § 1(e). It also exempts certain categories of nationals from the Designated Countries and institutes a waiver process for qualifying individuals. EO-2, § 3(b), (c). Senior Policy Advisor Miller described the changes to EO-2 as "mostly minor technical differences," and said that there would be "the same basic policy outcomes for the country." White House Press Secretary Spicer stated that "[t]he principles of the [second] executive order remain the same." And President Trump, in a speech at a rally, described EO-2 as "a watered down version of the first order." These statements suggest that like EO-1, EO-2's purpose is to effectuate the promised Muslim ban, and that its changes from EO-1 reflect an effort to help it survive judicial scrutiny, rather than to avoid targeting Muslims for exclusion from the United States.

These statements, taken together, provide direct, specific evidence of what motivated both EO-1 and EO-2: President Trump's desire to exclude Muslims from the United States. The statements also reveal President Trump's intended means of effectuating the ban: by targeting majority-Muslim nations instead of Muslims explicitly. And after courts enjoined EO-1, the statements show how President Trump attempted to preserve its core mission: by issuing EO-2a "watered down" version with "the same basic policy outcomes." These statements are the exact type of "readily discoverable fact[s]" that we use in determining a government action's primary purpose. They are explicit statements of purpose and are attributable either to President Trump directly or to his advisors. We need not probe anyone's heart of hearts to discover the purpose of EO-2, for President Trump and his aides have explained it on numerous occasions and in no uncertain terms. EO-2 cannot be read in isolation from the statements of planning and purpose that accompanied it, particularly in light of the sheer number of statements, their nearly singular source, and the close connection they draw between the proposed Muslim ban and EO-2 itself. The reasonable observer could easily connect these statements to EO-2 and understand that its primary purpose appears to be religious, rather than secular.

The Government argues, without meaningfully addressing Plaintiffs' proffered evidence, that EO-2's primary purpose is in fact secular because it is facially neutral and operates to address the risks of potential terrorism without targeting any particular religious group. That EO-2's stated objective is religiously neutral is not dispositive; the entire premise of our review under Lemon is that even facially neutral government actions
can violate the Establishment Clause. We therefore reject the Government's suggestion that EO-2's facial neutrality might somehow fully answer the question of EO-2's primary purpose.

The Government's argument that EO-2's primary purpose is related to national security, is belied by evidence in the record that President Trump issued the First Executive Order without consulting the relevant national security agencies, and that those agencies only offered a national security rationale after EO-1 was enjoined. Furthermore, internal reports from DHS contradict this national security rationale, with one report stating that "most foreign-born, US-based violent extremists likely radicalized several years after their entry to the United States, limiting the ability of screening and vetting officials to prevent their entry because of national security concerns." According to former National Security Officials, Section 2(c) serves "no legitimate national security purpose," given that "not a single American has died in a terrorist attack on U.S. soil at the hands of citizens of these six nations in the last forty years" and that there is no evidence of any new security risks emanating from these countries. Like the district court, we think this strong evidence that any national security justification for EO-2 was secondary to its primary religious purpose and was offered as more of a "litigating position" than as the actual purpose of EO-2. And EO-2's text does little to bolster any national security rationale: the only examples it provides of immigrants born abroad and convicted of terrorism-related crimes in the United States include two Iraqis—Iraq is not a designated country in EO-2—and a Somali refugee who entered the United States as a child and was radicalized here as an adult. EO-2, § 1(h). The Government's asserted national security purpose is therefore no more convincing as applied to EO-2 than it was to EO-1.

Relatedly, the Government argues that EO-2's operation "confirms its stated purpose." "[I]t applies to six countries based on risk, not religion; and in those six countries, the suspension applies irrespective of any alien's religion." In support of its argument that EO-2 does not single out Muslims, the Government notes that these six countries are either places where ISIS has a heavy presence (Syria), state sponsors of terrorism (Iran, Sudan, and Syria), or safe havens for terrorists (Libya, Somalia, and Yemen). The Government also points out that the six Designated Countries represent only a small proportion of the world's majority-Muslim nations, and EO-2 applies to everyone in those countries, even non-Muslims. This shows, the Government argues, that EO-2's primary purpose is secular. The trouble with this argument is that EO-2's practical operation is not severable from the myriad statements explaining its operation as intended to bar Muslims from the United States. And that EO-2 is underinclusive by targeting only a small percentage of the world's majority-Muslim nations and overinclusive for targeting all citizens, even non-Muslims, in the Designated Countries, is not responsive to the purpose inquiry. This evidence might be relevant to our analysis under Lemon's second prong, which asks whether a government act has the primary effect of endorsing or disapproving of religion, but it does not answer whether the government acted with a primarily religious purpose to begin with. If we limited our purpose inquiry to review of the operation of a facially neutral order, we would be caught in an analytical loop, where the order would always survive scrutiny. It is for this precise reason that when we attempt to discern purpose, we look to more than just the challenged action itself. And here, when we consider the full context of EO-2, it is evident
that it is likely motivated primarily by
religion. We do not discount that there may
be a national security concern
motivating EO-2; we merely find it likely that
any such purpose is secondary to EO-2's
religious purpose.

The Government separately contends that our
purpose inquiry should not extend to
"extrinsic evidence" that is beyond EO-2's
relevant context. The Government first
argues that we should not look beyond EO-
2's "text and operation." But this is clearly
incorrect, as the Supreme Court has explicitly
stated that we review more than just the face
of a challenged action.

The Government next argues that even if we
do look beyond EO-2 itself, under McCreary,
we are limited to considering only "the
operative terms of governmental action and
official pronouncements," Appellants' Br. 46,
which we understand to mean only EO-2
itself and a letter signed by the Attorney
General and the Secretary of State that
largely echoes EO-2's text. We find no
support for this view in McCreary. The McCreary Court
considered "the traditional external signs that
show up in the 'text, legislative history, and
implementation of the [challenged action]," but it did not limit other courts' review to those particular terms. Id. Nor did it make such an artificial distinction between
"official" and "unofficial" context. Rather, it
relied on principles of "common sense" and the
"reasonable observer[']s . . . reasonable mem[ory]" to cull the relevant
context surrounding the challenged action. The Government would have us
abandon this approach in favor of an
unworkable standard that is contrary to the
well-established framework for considering
the context of a challenged government
action.

And finally, the Government argues that even
if we could consider unofficial acts and
statements, we should not rely on campaign
statements. Those statements predate
President Trump's constitutionally
significant "transition from private life to the
Nation's highest public office," and as such,
they are less probative than official
statements, the Government contends. We
recognize that in many cases, campaign
statements may not reveal all that much about
a government actor's purpose. But we decline
to impose a bright-line rule against
considering campaign statements, because as
with any evidence, we must make an
individualized determination as to a
statement's relevancy and probative value in
light of all the circumstances. The campaign
statements here are probative of purpose
because they are closely related in time,
attributable to the primary decisionmaker,
and specific and easily connected to the
challenged action.

Just as the reasonable observer's "world is not
made brand new every morning," nor are we
able to awake without the vivid memory of
these statements. We cannot shut our eyes to
such evidence when it stares us in the face,
for "there's none so blind as they that won't
see." If and when future courts are confronted
with campaign or other statements proffered
as evidence of governmental purpose, those
courts must similarly determine, on a case-
by-case basis, whether such statements are
probative evidence of governmental
purpose. Our holding today neither limits nor
expands their review.

The Government argues that reviewing
campaign statements here would encourage
scrutiny of all religious statements ever made
by elected officials, even remarks from
before they assumed office. Appellants' Br.
49-50. But our review creates no such
sweeping implications, because as the
Supreme Court has counseled, our purpose
analysis "demands a sensitive inquiry into
such circumstantial and direct evidence of
intent as may be available." Just as a reasonable observer would not understand general statements of religious conviction to inform later government action, nor would we look to such statements as evidence of purpose. A person's particular religious beliefs, her college essay on religious freedom, a speech she gave on the Free Exercise Clause—rarely, if ever, will such evidence reveal anything about that person's actions once in office. For a past statement to be relevant to the government's purpose, there must be a substantial, specific connection between it and the challenged government action. And here, in this highly unique set of circumstances, there is a direct link between the President's numerous campaign statements promising a Muslim ban that targets territories, the discrete action he took only one week into office executing that exact plan, and EO-2, the "watered down" version of that plan that "get[s] just about everything," and "in some ways, more."

For similar reasons, we reject the Government's argument that our review of these campaign statements will "inevitably 'chill political debate during campaigns.'" Not all—not even most—political debate will have any relevance to a challenged government action. Indeed, this case is unique not because we are considering campaign statements, but because we have such directly relevant and probative statements of government purpose at all. To the extent that our review chills campaign promises to condemn and exclude entire religious groups, we think that a welcome restraint.

Lastly, the Government contends that we are ill-equipped to "attempt[] to assess what campaign statements reveal about the motivation for later action." The Government argues that to do so would "mire [us] in a swamp of unworkable litigation," and "force us] to wrestle with intractable questions," such as "the level of generality at which a statement must be made, by whom, and how long after its utterance the statement remains probative." But discerning the motives behind a challenged government action is a well-established part of our purpose inquiry. As part of this inquiry, courts regularly evaluate decisionmakers' statements that show their purpose for acting. And the purpose inquiry is not limited to Establishment Clause challenges; we conduct this analysis in a variety of contexts. We therefore see nothing "intractable" about evaluating a statement's probative value based on the identity of the speaker and how specifically the statement relates to the challenged government action, for this is surely a routine part of constitutional analysis. And this analysis is even more straightforward here, because we are not attempting to discern motive from many legislators' statements, as in Brown, but rather are looking primarily to one person's statements to discern that person's motive for taking a particular action once in office.

The Government has repeatedly asked this Court to ignore evidence, circumscribe our own review, and blindly defer to executive action, all in the name of the Constitution's separation of powers. We decline to do so, not only because it is the particular province of the judicial branch to say what the law is, but also because we would do a disservice to our constitutional structure were we to let its mere invocation silence the call for meaningful judicial review. The deference we give the coordinate branches is surely powerful, but even it must yield in certain circumstances, lest we abdicate our own duties to uphold the Constitution.

EO-2 cannot be divorced from the cohesive narrative linking it to the animus that inspired it. In light of this, we find that the reasonable observer would likely conclude that EO-2's
primary purpose is to exclude persons from the United States on the basis of their religious beliefs. We therefore find that EO-2 likely fails Lemon's purpose prong in violation of the Establishment Clause. Accordingly, we hold that the district court did not err in concluding that Plaintiffs are likely to succeed on the merits of their Establishment Clause claim.

B.

Because we uphold the district court's conclusion that Plaintiffs are likely to succeed on the merits of their Establishment Clause claim, we next consider whether Plaintiffs have demonstrated that they are likely to suffer irreparable harm in the absence of a preliminary injunction. As we have previously recognized, "in the context of an alleged violation of First Amendment rights, a plaintiff's claimed irreparable harm is inseparably linked to the likelihood of success on the merits." Accordingly, our finding that Plaintiffs are likely to succeed on the merits of their constitutional claim counsels in favor of finding that in the absence of an injunction, they will suffer irreparable harm.

Indeed, the Supreme Court has stated in no uncertain terms that "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Though the Elrod Court was addressing freedom of speech and association, our sister circuits have interpreted it to apply equally to Establishment Clause violations. We agree with these courts that because of "the inchoate, one-way nature of Establishment Clause violations," they create the same type of immediate, irreparable injury as do other types of First Amendment violations. We therefore find that Plaintiffs are likely to suffer irreparable harm if Section 2(c) of EO-2 takes effect.

C.

Even if Plaintiffs are likely to suffer irreparable harm in the absence of a preliminary injunction, we still must determine that the balance of the equities tips in their favor, "pay[ing] particular regard for the public consequences in employing the extraordinary remedy of injunction." This is because "courts of equity may go to greater lengths to give 'relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.'" As the district court did, we consider the balance of the equities and the public interest factors together.

The Government first contends that "the injunction causes [it] direct, irreparable injury" that outweighs the irreparable harm to Plaintiffs because "no governmental interest is more compelling than the security of the Nation." When it comes to national security, the Government argues, the judicial branch "should not second-guess" the President's "[p]redictive judgment[s]." The Government further argues that the injunction causes institutional injury, because according to two single-Justice opinions, "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." The Government contends that this principle applies here because the President "represents the people of all 50 states."

At the outset, we reject the notion that the President, because he or she represents the entire nation, suffers irreparable harm whenever an executive action is enjoined. This Court has held that the Government is "in no way harmed by issuance of a preliminary injunction which prevents [it] from enforcing restrictions likely to be found unconstitutional." "If anything," we said, "the system is improved by such an injunction." Because Section 2(c) of EO-2 is likely
unconstitutional, allowing it to take effect would therefore inflict the greater institutional injury. And we are not persuaded that the general deference we afford the political branches ought to nevertheless tip the equities in the Government's favor, for even the President's actions are not above judicial scrutiny, and especially not where those actions are likely unconstitutional.

We are likewise unmoved by the Government's rote invocation of harm to "national security interests" as the silver bullet that defeats all other asserted injuries. National security may be the most compelling of government interests, but this does not mean it will always tip the balance of the equities in favor of the government. A claim of harm to national security must still outweigh the competing claim of injury. Here and elsewhere, the Government would have us end our inquiry without scrutinizing either Section 2(c)'s stated purpose or the Government's asserted interests, but "unconditional deference to a government agent's invocation of 'emergency' . . . has a lamentable place in our history," and is incompatible with our duty to evaluate the evidence before us.

As we previously determined, the Government's asserted national security interest in enforcing Section 2(c) appears to be a post hoc, secondary justification for an executive action rooted in religious animus and intended to bar Muslims from this country. We remain unconvinced that Section 2(c) has more to do with national security than it does with effectuating the President's promised Muslim ban. We do not discount that EO-2 may have some national security purpose, nor do we disclaim that the injunction may have some impact on the Government. But our inquiry, whether for determining Section 2(c)'s primary purpose or for weighing the harm to the parties, is one of balance, and on balance, we cannot say that the Government's asserted national security interest outweighs the competing harm to Plaintiffs of the likely Establishment Clause violation.

For similar reasons, we find that the public interest counsels in favor of upholding the preliminary injunction. As this and other courts have recognized, upholding the Constitution undeniably promotes the public interest. These cases recognize that when we protect the constitutional rights of the few, it inures to the benefit of all. And even more so here, where the constitutional violation injures Plaintiffs and in the process permeates and ripples across entire religious groups, communities, and society at large.

When the government chooses sides on religious issues, the "inevitable result" is "hatred, disrespect and even contempt" towards those who fall on the wrong side of the line. Improper government involvement with religion "tends to destroy government and to degrade religion," encourage persecution of religious minorities and nonbelievers, and foster hostility and division in our pluralistic society. The risk of these harms is particularly acute here, where from the highest elected office in the nation has come an Executive Order steeped in animus and directed at a single religious group. "The fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief." We therefore conclude that enjoining Section 2(c) promotes the public interest of the highest order. And because Plaintiffs have satisfied all the requirements for securing a preliminary injunction, we find that the district court did not abuse its discretion in enjoining Section 2(c) of EO-2.

V.
Lastly, having concluded that Plaintiffs are entitled to a preliminary injunction, we address the scope of that injunction. The Government first argues that the district court erred by enjoining Section 2(c) nationwide, and that any injunctive relief should be limited solely to Plaintiffs.

It is well-established that "district courts have broad discretion when fashioning injunctive relief." Nevertheless, "their powers are not boundless." The district court's choice of relief "should be carefully addressed to the circumstances of the case," and "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." Courts may issue nationwide injunctions consistent with these principles.

The district court here found that a number of factors weighed in favor of a nationwide injunction, and we see no error. First, Plaintiffs are dispersed throughout the United States. Second, nationwide injunctions are especially appropriate in the immigration context, as Congress has made clear that "the immigration laws of the United States should be enforced vigorously and uniformly." And third, because Section 2(c) likely violates the Establishment Clause, enjoining it only as to Plaintiffs would not cure the constitutional deficiency, which would endure in all Section 2(c)'s applications. Its continued enforcement against similarly situated individuals would only serve to reinforce the "message" that Plaintiffs "are outsiders, not full members of the political community." For these reasons, we find that the district court did not abuse its discretion in concluding that a nationwide injunction was "necessary to provide complete relief."

Finally, the Government argues that the district court erred by issuing the injunction against the President himself. We recognize that "in general, this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties," and that a "grant of injunctive relief against the President himself is extraordinary, and should . . . raise[] judicial eyebrows." In light of the Supreme Court's clear warning that such relief should be ordered only in the rarest of circumstances we find that the district court erred in issuing an injunction against the President himself. We therefore lift the injunction as to the President only. The court's preliminary injunction shall otherwise remain fully intact.

To be clear, our conclusion does not "in any way suggest[] that Presidential action is unreviewable. Review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive." Even though the President is not "directly bound" by the injunction, we "assume it is substantially likely that the President . . . would abide by an authoritative interpretation" of Section 2(c) of the Second Executive Order.

VI.

For all of these reasons, we affirm in part and vacate in part the preliminary injunction awarded by the district court. We also deny as moot Defendants' motion for a stay pending appeal.

AFFIRMED IN PART, VACATED IN PART
The Supreme Court on Monday took a pragmatic approach to resolving the dispute over President Trump’s foreign travel ban with a middle-ground ruling that may defuse the controversy — for now.

The decision, the first from the high court to review Trump’s exercise of presidential power, allowed much of the ban to take effect, but it also applied significant restrictions that will narrow the order’s impact.

In a short, unsigned but unanimous opinion, the justices avoided taking a stance on the larger constitutional questions concerning religious discrimination or presidential authority. Instead, they agreed to hear those arguments in the fall.

But they also largely rejected the lower court rulings that had blocked Trump’s order as unconstitutional, handing a partial victory to the president and his lawyers after a string of rebukes in federal courts from Hawaii to Maryland.

The ruling clears the way for Trump’s 90-day ban on foreign arrivals from six Muslim-majority countries to take effect, but it also carved out exemptions for those with “bona fide relationships” with Americans or U.S. entities, including spouses, other close family members, employers and universities.

The justices also strongly hinted that they may never need to settle the larger constitutional issues because the case could be moot by the time they hear it in the fall.

The administration argued it needed the 90-day pause to review and revise its vetting procedures for travelers from Iran, Somalia, Sudan, Syria, Libya and Yemen. Assuming the order takes effect now, the ban will have expired by October when the court reconvenes.

Trump had long voiced confidence he would prevail when the travel ban case reached the high court and on Monday he called the decision a “clear victory” for his administration.

“Today’s ruling allows me to use an important tool for protecting our nation’s homeland,” the president said.

The administration did not provide immediate specifics on how the decision would change existing policy, leaving attorneys at the Justice Department to review the court’s language before working with other federal agencies to draft temporary rules.

Trump officials also acknowledged that their optimism may be subject to change, depending on how far the government’s
lawyers are willing to push the ruling and how lower courts interpret the high court’s language.

That caution contrasted with the administration’s earlier handling of the issue, when Trump signed a hastily drafted travel ban just days after taking office. The result was a chaotic execution, with uncertainty at airports around the world over who would be allowed to enter the country.

Immigrant rights lawyers who sued to block Trump’s order were disappointed with Monday’s ruling, but downplayed its impact. The order “will take effect in a very limited way,” said Karen Tumlin, legal director for the National Immigration Law Center in Los Angeles. The ban will apply “only to a small subset of people who lack any relationship” with a person in this country or an institution such as a school or a hospital.

Some welcomed what they described as an implicit rebuke of the White House’s assertion that Trump has unfettered powers to exclude arrivals based on purported national security concerns.

But others worried about the message it may send. It “ignores the anti-Muslim bigotry that is at the heart of the travel ban executive orders and will inevitably embolden Islamphobes in the administration,” said Nihad Awad, executive director of the Council on American-Islamic Relations. David Miliband, president of the International Rescue Committee, said the partial reinstatement of the ban particularly threatens “vulnerable people waiting to come to the U.S.,” including those with urgent medical conditions.

All nine justices apparently agreed with the outcome Monday. Three of the court’s conservatives — Justices Clarence Thomas, Samuel A. Alito Jr. and Neil M. Gorsuch — said they would have gone further and allowed the entire order to take effect immediately.

Under the compromise crafted by the court, “foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States” are exempted from the ban.

"The students from the designated countries who have been admitted to the University of Hawaii have such a relationship with an American entity," the court said. "So too would a worker who accepted an offer of employment from an American company or a lecturer invited to address an American audience."

Since many visitors from the six affected countries have such a relationship, the impact of the order may be narrow.

But in his dissent, Thomas predicted the court’s approach would fail and lead to a “flood of litigation” to determine which visitors are exempt.

“I fear that the court’s remedy will prove unworkable,” Thomas said. “Today’s compromise will burden executive officials with the task of deciding — on peril of contempt — whether individuals from the six affected countries who wish to enter the United States have a sufficient connection to a person or entity in this country.”
Last month, the 4th Circuit Court of Appeals in Virginia upheld a district judge’s ruling in Maryland blocking Trump’s order. The appeals court, in a 10-3 decision, said the executive order reflected an unconstitutional discrimination based on religion. Its opinion cited Trump’s campaign pledge to enact a “Muslim ban.”

Shortly afterward, the 9th Circuit Court in California upheld a district judge’s ruling in Hawaii and ruled Trump’s order was illegal because the president did not demonstrate a threat to national security.

Trump’s lawyers argued both decisions were fundamentally mistaken. They said the Constitution and immigration laws give the president the power to temporarily “suspend” the entry of foreigners, either individuals or groups. And they argued that the high court has made clear judges have no authority to “second-guess” the president’s determination that national security was in danger.

Without hearing arguments in the two cases, the justices agreed the lower courts had gone too far. The outcome suggests that many of the justices were as troubled by the bold intervention of the judges who blocked Trump’s order as they were by the bold action of the new president.

The court’s opinion noted the government is free to work on the new vetting procedures for immigrants from the six countries. This was the ostensible purpose of the order in the first place.

"We fully expect that the relief we grant today will permit the executive to conclude its internal work and provide adequate notice to foreign governments within the 90-day life of Sec. 2c," the court said, referring to the key clause in the travel ban order.

The case decided Monday was named Trump vs. International Refugee Assistance Project and Trump vs. Hawaii.
The Supreme Court on Wednesday temporarily upheld broad restrictions against refugees entering the United States but allowed grandparents and other relatives of American residents to come while legal challenges to the Trump administration’s travel ban move forward.

The justices, in a brief unsigned order, let stand part of a ruling from a federal judge in Hawaii that had narrowed the administration’s efforts to limit travel from six predominantly Muslim countries, an effort that has prompted confusion at the nation’s airports, a global outcry and much litigation since President Trump announced it a week into his presidency.

But the justices suspended a second part of the lower court’s ruling, standing firm for now against allowing an estimated 24,000 refugees from across the world to resettle in the United States.

In the terse order, Justices Clarence Thomas, Samuel A. Alito Jr. and Neil M. Gorsuch said they would have blocked the judge’s entire order while the case proceeds — including the part that allowed American residents’ grandparents and other relatives to travel to the United States from the six countries: Iran, Libya, Syria, Somalia, Sudan and Yemen.

Last month, the Supreme Court agreed to decide whether the travel ban was lawful, and it scheduled arguments for October. In the meantime, the justices temporarily reinstated the travel ban — but only for people without “a credible claim of a bona fide relationship with a person or entity in the United States.” The court did not specify who qualified as a close relative, though it did say that spouses and mothers-in-law “clearly” counted.

The Trump administration interpreted the Supreme Court’s decision as excluding most refugees and entry only of American residents’ parents, children, spouses, parents-in-law, sons- and daughters-in-law, people engaged to be married and siblings.

Last week, Judge Derrick K. Watson of Federal District Court in Honolulu ruled that the administration’s approach had disregarded the language and logic of the Supreme Court’s ruling, fairness and the conventional understanding of who counts as a close family member.

“Common sense, for instance, dictates that close family members be defined to include grandparents,” Judge Watson wrote. “Indeed, grandparents are the epitome of close family members. The government’s definition excludes them. That simply cannot be.”
The next day, Attorney General Jeff Sessions criticized the ruling as undermining national security, creating confusion and violating respect for separation of powers.

“The district court has improperly substituted its policy preferences for the national security judgments of the executive branch in a time of grave threats, defying both the lawful prerogatives of the executive branch and the directive of the Supreme Court,” Mr. Sessions said in a statement.

Later that day, the administration filed a motion asking the Supreme Court to clarify its decision. It said the justices should act immediately, without waiting for a ruling from the appeals court.

The administration said it was entitled to exclude refugees whom resettlement agencies had planned to help move to the United States. Judge Watson disagreed, writing that the Supreme Court had meant to allow such people to enter the country.

“An assurance from a United States refugee resettlement agency, in fact, meets each of the Supreme Court’s touchstones,” he wrote. “It is formal, it is a documented contract, it is binding, it triggers responsibilities and obligations, including compensation, it is issued specific to an individual refugee only when that refugee has been approved for entry by the Department of Homeland Security.”

In its Supreme Court brief, the Justice Department said that Judge Watson’s ruling “would render the refugee portion of this court’s decision effectively meaningless.”

Lawyers for Hawaii who are challenging the travel ban disputed that assertion. They said about 24,000 refugees had a formal assurance of help from a settlement agency, while another 175,000 in the pipeline did not.

“Many of those refugees — as well as countless visa applicants from the targeted nations — will be unable to demonstrate any other form of bona fide relationship with an American party, meaning that they will be absolutely barred from entering the country in the next several months,” the Hawaii lawyers wrote.

They also said Judge Watson’s order did nothing to stop the administration from enforcing its travel ban against an estimated 85 percent of refugees, or to exclude extended family members “who indisputably lack close relationships with American individuals and entities.”

On Wednesday, the Supreme Court rejected the administration’s request for clarity on the scope of last month’s decision. The justices said that the appeal in the case should follow the ordinary course and that the United States Court of Appeals for the Ninth Circuit, in San Francisco, should first address the question.

In temporarily blocking the part of Judge Watson’s order concerning refugees, the Supreme Court indicated that the government’s arguments had weight. In declining to disturb the part of the order that allowed relatives to enter, the Supreme Court suggested that the administration might have overreached.

Challenges to Mr. Trump’s travel bans have been ricocheting around the federal courts for almost as long as he has been president.
His first ban, issued in January, caused chaos at the nation’s airports until it was blocked by the courts. Rather than appealing to the Supreme Court, the administration issued a revised executive order in March. But that order, too, was blocked by federal appeals courts, which ruled that it violated the Constitution by discriminating based on religion and that it exceeded Mr. Trump’s authority.

The Supreme Court is scheduled to hear arguments on October 10.

In a partial dissent from the Supreme Court’s decision last month, Justice Thomas said the line the court had drawn, allowing those with “bona fide relationships” to enter the country, was unworkable. He predicted — accurately — that the court’s compromise would “invite a flood of litigation until this case is finally resolved on the merits, as parties and courts struggle to determine what exactly constitutes a ‘bona fide relationship.’”
The state of Hawaii has filed a court challenge to the Trump administration’s definition of a close U.S. relationship needed to avoid the new travel ban.

Hawaii Attorney General Doug Chin says he’s concerned the administration may be violating the U.S. Supreme Court’s travel ban ruling.

The travel ban temporarily barring some citizens of six majority-Muslim countries from coming into the United States went into effect Thursday. The new rules stop people from Syria, Sudan, Somalia, Yemen, Iran and Libya from getting a visa to the United States unless they have a “bona fide” relationship with a close relative, school or business in the U.S.

Based on a schedule set by U.S. District Judge Derrick Watson, the administration has until Monday to respond to Hawaii’s motion, Chin said at a Friday press conference. The state will then have until Thursday to respond to the federal government, he said.

Watson will issue a decision after that, Chin said, adding there are no plans for a hearing at this time.

The U.S. Supreme Court on Monday exempted people from the ban if they can prove a “bone fide” relationship with a U.S. citizen or entity. The Trump administration had said the exemption would apply to citizens with a parent, spouse, child, adult son or daughter, son-in-law, daughter-in-law or sibling already in the U.S.

Chin says many of the people that the federal government decided to exclude are considered “close family” in Hawaii.

At a press conference Monday, Chin said he welcomed the Supreme Court’s announcement that it will hear challenges to the travel ban this fall, even though it allowed part of the ban to temporarily take effect.

Hawaii has been on the front line of the battle against Trump’s travel ban and other policies.

Oral arguments in the case are scheduled for October. Chin said he would attend, but that he expected Neal Katyal, the lead attorney for the state in Hawaii v. Trump, would conduct arguments before the court.

Hawaii filed its lawsuit Feb. 3, one week after the president issued the original travel ban. It called for suspending the U.S. refugee program for 120 days, banned Syrian refugees indefinitely and barred citizens of seven Muslim-majority countries from entering the United States for 90 days.

That suit was suspended by Judge Watson in Honolulu after a federal judge in Seattle
issued a nationwide injunction against the plan.

In March, Trump modified his ban, removing Iraq from the list of seven banned nations (Iran, Libya, Somalia, Sudan, Syria and Yemen) and not singling Syrian refugees for an indefinite ban or giving preferential treatment to the refugee claims of religious minorities.

Watson then allowed Hawaii to modify its suit to challenge the second ban, and ultimately issued a nationwide injunction against it.
President Donald Trump’s administration took the dispute over his temporary travel ban to the Supreme Court again, asking the justices to let the government bar entry into the U.S. by people with grandparents and cousins in the country.

The administration filed papers late Friday asking the court to clarify a June 26 decision that said the government had to admit at least some close relatives, including spouses and parents-in-law. A federal trial judge in Hawaii this week said the government couldn’t exclude several other types of family members either, and the administration is seeking to free itself from that ruling.

That ruling “distorts this court’s decision and upends the equitable balance this court struck,” acting U.S. Solicitor General Jeffrey Wall said in court papers.

The Supreme Court told the challengers to the ban to file a response by noon Washington time on July 18.

The Supreme Court already has agreed to hear arguments in the fall on Trump’s 90-day ban, which applies to people entering the U.S. from six mostly Muslim countries. The June 26 ruling said a limited form of the ban could take effect in the meantime, allowing only people with a “credible claim of a bona fide relationship with a person or entity in the United States” to enter.

The limited travel ban took effect June 30. The Trump administration announced it would let people enter the U.S. who had a parent, spouse, fiance, child, sibling, son- or daughter-in-law, or a parent-in-law in the country. The standard excluded those whose closest connections were grandparents, grandchildren, aunts, uncles, nieces, nephews, cousins, and brothers- or sisters-in-law.

U.S. District Judge Derrick Watson ruled Thursday that the government’s exemption from the ban was too narrow. “Common sense, for instance, dictates that close family members be defined to include grandparents,” Watson wrote.

The Supreme Court had said people with a “bona fide relationship” included those visiting a close family member, students who have been admitted to a university, or workers who have accepted an employment offer.

In announcing the administration would immediately take the matter to the Supreme Court, Attorney General Jeff Sessions said in a statement Friday, “Once again, we are faced with a situation in which a single federal district court has undertaken by a nationwide
injunction to micromanage decisions of the co-equal executive branch related to our national security."

Trump’s March 6 executive order said the 90-day travel ban would give officials time to assess U.S. vetting procedures and would address an “unacceptably high” risk that terrorists could slip into the country. Lower courts blocked the ban, saying Trump overstepped his authority and unconstitutionally targeted Muslims.

When the Supreme Court partially revived the travel ban in June, Justices Clarence Thomas, Samuel Alito and Neil Gorsuch said they would have let the entire ban take effect immediately. Thomas warned that the definition of bona fide relationships would open the door to a “flood of litigation” as U.S. customs and border officials wrestle with whether travelers from the six countries have sufficient ties.

In its new court filing, the Trump administration asked the court to block Watson’s order temporarily while the justices consider the motion to clarify.

The administration also said Watson was wrong to permit more refugees to be admitted under a separate provision in Trump’s executive order. Watson said the government couldn’t exclude refugees once a resettlement agency has provided a formal assurance that it will provide basic services for the person.

In a separate filing Saturday, the Trump administration also asked a San Francisco-based federal appeals court to put Watson’s decision on hold. The two filings overlap, and the appeals court could defer action until it sees what the Supreme Court does.
It was a busy day for litigation in the challenges to President Donald Trump’s March 6 executive order, often known as the “travel ban.” Citing national security concerns, the order imposed a temporary hold on new visas for travelers from six Muslim-majority countries (Iran, Libya, Somalia, Sudan, Syria and Yemen) and suspended travel by refugees into the United States. The order was the second of its kind; an earlier version, issued in late January, was blocked by the U.S. Court of Appeals for the 9th Circuit. The March order didn’t fare much better in the lower courts, and on June 1 the Trump administration asked the Supreme Court to enter the fray. Today the challengers submitted their responses to the government’s filings in the Supreme Court. However, those briefs were partly overshadowed by another development: a 9th Circuit decision that largely upheld a Hawaii district court’s ruling barring the government from enforcing the ban.

There are two different sets of challenges to the travel ban involved in today’s Supreme Court filings. The first comes via the U.S. Court of Appeals for the 4th Circuit, which in late May rejected the federal government’s plea to set aside an order by a Maryland judge prohibiting the implementation of the travel ban. In that case, the appeals court relied heavily on the Constitution’s bar against favoring one religion over another, known as the establishment clause: Although the executive order indicates that it was intended to protect the United States from foreign terrorists, the court concluded, statements by the president reveal that the order was actually intended to exclude Muslims from the country.

The government’s June 1 filings asked the justices both to review the 4th Circuit’s ruling and to freeze the Maryland court’s order barring the government from putting the ban into effect. But it also asked the government to step into a second challenge, which hails from Hawaii. Like the Maryland judge, a federal district court in Hawaii also blocked the government from implementing the travel ban, but the 9th Circuit had not yet issued its decision in that case when the government went to the Supreme Court at the beginning of this month.

The 9th Circuit’s ruling came today. Like the 4th Circuit, the Hawaii district court had ruled that the challengers had shown that they were likely to win (part of the legal test for
obtaining temporary relief) on their claim that the travel ban violated the establishment clause, and it entered a nationwide order barring the government from enforcing the ban.

The 9th Circuit also ruled for the challengers, but on a different ground. In an unsigned and apparently unanimous opinion, it explained that courts should try whenever possible not to reach constitutional questions if they can decide the case on another ground. In this case, the court continued, it did not need to rule on whether the ban violates the establishment clause because the ban also exceeds the power that Congress has given to the president to regulate immigration.

The 9th Circuit acknowledged that the Immigration and Nationality Act “gives the President broad powers to control the entry of” immigrants into the country, and it also allows him to “take actions to protect the American public.” But, the court of appeals explained, the president cannot simply invoke “national security” as a “talismanic incantation” to justify an exercise of executive power. Rather, the INA allows the president to act only after he finds that allowing an immigrant or group of immigrants to enter the country “would be detrimental” to U.S. interests, and the government has not made that showing.

For example, the court stressed, the government did not find that allowing refugees or any citizens from the six covered Muslim-majority countries would harm the national interest. And the court perceived a disconnect between the government’s announced desire to protect national security and the way that it wanted to accomplish that goal. The 9th Circuit observed that the ban would bar “more than 180 million people from entry based on their national origin, including nationals who may have never been physically present in those countries.” But at the same time, the court added, it would allow nationals of other countries who do have ties to the six covered countries to come to the United States. As the Hawaii district court put it, the ban “could have the paradoxical effect of barring entry by a Syrian national who has lived in Switzerland for decades, but not a Swiss national who has immigrated to Syria during its civil war.”

The president also did not find that current standards for vetting visa applicants or refugees are inadequate before issuing the executive order, nor did he find that the United States would be harmed if the current standards weren’t changed. Indeed, the court of appeals pointed out, the government already can deny a visa application if the individual seeking the visa cannot show that he is eligible. This case-by-case tool allows the government to screen visa applicants and deny applications from individuals who might pose a threat to the United States, and the executive order does not explain why the individual visa process is so “flawed” that the government must instead exclude “an entire class of nationals” from the country.

The 9th Circuit did hand the Trump administration one minor victory: It agreed that the Hawaii district court should not have blocked the government from carrying out some internal government procedures – for example, reviewing the vetting process to determine what information foreign
governments need to provide – that don’t affect anyone outside the executive branch.

The 9th Circuit issued its opinion just a few hours before the deadline for the challengers to file their briefs in the Supreme Court. Several themes emerged in the three filings. The American Civil Liberties Union (which represents the challengers in the Maryland case) told the justices that it would be “pointless” for them to grant review because the executive order specifically provides that nationals of the six Muslim-majority countries may not enter the United States for 90 days after the order became effective. The challengers maintain that the 90-day period ends in two days, on Wednesday, June 14 – at which point, they argue, the government’s appeal will no longer matter.

In a separate filing opposing the government’s request to allow the ban to go into effect until the Supreme Court can weigh in, the ACLU contended that if the travel ban doesn’t expire on Wednesday, allowing it to go into effect would effectively enable the government to run out the clock, because the Justice Department has asked the court to review the case next fall, “more than 90 days from now.” Moreover, the ACLU tells the justices, if the ban is implemented it will create “enormous confusion” while causing “immediate and widespread harm to” the challengers and “others like them.”

Hawaii adds that despite the government’s protests that time is of the essence, the government itself is responsible for the slow pace of litigation over the travel ban. For example, although the 9th Circuit put the first ban on hold on February 9, the Trump administration did not issue the second, revised order for nearly a month – “with some of that delay,” Hawaii suggests, “motivated by a desire to take advantage of a favorable news cycle.” And when the Hawaii district court blocked the second order, the state notes, the government spent “weeks litigating the issues” in the district court before it went to the court of appeals. “These are not the actions,” Hawaii contends, “of a Government that believes the immediate implementation of its order is necessary to avoid irreparable harm.”

But in any event, the challengers add, the Supreme Court should not grant review of the 4th Circuit’s decision because the court of appeals “carefully and correctly applied this Court’s precedents to this unique situation.” Accepting the government’s argument, the challengers maintain, would allow “the executive branch to act in open bad faith, even though there is plenty of evidence that the order was intended “to disfavor Muslims.”

Today’s ruling by the 9th Circuit could add a procedural wrinkle to the proceedings in the Supreme Court. The justices may, for example, want additional briefing on the effect of the 9th Circuit’s ruling, or the government could ask the court to weigh in on the 9th Circuit’s ruling as well. But with the end of the court’s term less than three weeks away, the next steps – whatever they may be – are likely to come quickly.
President Trump signed an executive order on Monday blocking citizens of six predominantly Muslim countries from entering the United States, the most significant hardening of immigration policy in generations, even with changes intended to blunt legal and political opposition.

The order was revised to avoid the tumult and protests that engulfed the nation’s airports after Mr. Trump signed his first immigration directive on Jan. 27. That order was ultimately blocked by a federal appeals court.

The new order continued to impose a 90-day ban on travelers, but it removed Iraq, a redaction requested by Defense Secretary Jim Mattis, who feared it would hamper coordination to defeat the Islamic State, according to administration officials.

It also exempts permanent residents and current visa holders, and drops language offering preferential status to persecuted religious minorities, a provision widely interpreted as favoring other religious groups over Muslims. In addition, it reversed an indefinite ban on refugees from Syria, replacing it with a 120-day freeze that requires review and renewal.

But the heart of the sweeping executive action is still intact, reflecting Mr. Trump’s “America first” pledge to safeguard against what he has portrayed as a hidden influx of terrorists and criminals — a hard-line campaign promise that resonated deeply with white working-class voters.

The new order retains central elements of the old one, cutting the number of refugees admitted to the United States each year to 50,000 from about 110,000. Mr. Trump is also leaving open the possibility of expanding the ban to other countries, or even putting Iraq back on the banned list if the country’s leaders fail to comply with a requirement that they increase intelligence sharing, officials said.

“Unregulated, unvetted travel is not a universal privilege, especially when national security is at stake,” said John F. Kelly, the homeland security secretary, appearing alongside Secretary of State Rex W. Tillerson and Attorney General Jeff Sessions at the Ronald Reagan Federal Building in Washington on Monday.

Mr. Kelly said the order was now “prospective” and applied “only to foreign nationals outside of the United States” who...
do not have a valid visa. None of the men took questions.

The Trump administration quickly tried to break the legal logjam, filing papers in United States District Court in Washington late on Monday seeking to lift an order blocking the fulfillment of the initial ban.

But the president’s revisions did little to halt criticism from Democrats and immigrant rights advocates, who predicted a renewed fight in the courts.

The Senate Democratic leader, Chuck Schumer of New York, described the new order as a “watered-down ban” that was still “mean spirited and un-American.”

Margaret Huang, the executive director of Amnesty International USA, said in a statement that the new order would “cause extreme fear and uncertainty for thousands of families by, once again, putting anti-Muslim hatred into policy.”

The new measure will be phased in over the next two weeks to avoid the frenetic, same-day execution of the order in January, which prompted protests across the country and left tearful families stranded at airports abroad and in the United States.

The redrafted order, delayed by a week so it would not overshadow Mr. Trump’s address to a joint session of Congress last Tuesday, represented a recognition that the rushed first attempt at the ban did not pass muster legally or politically.

Administration officials privately conceded that the initial version of the order was a political debacle that damaged Mr. Trump’s nascent presidency. But they were much more sanguine about the second order, arguing that the new, multiagency review process could be used in the future to bend Mr. Trump’s uncompromising messages toward Washington’s bureaucratic realities.

Mr. Trump signed the first ban with great fanfare, in front of reporters, at the Pentagon. “We don’t want them here,” Mr. Trump said of Islamist terrorists. “We want to ensure that we are not admitting into our country the very threats our soldiers are fighting overseas. We only want to admit those into our country who will support our country, and love deeply our people.”

This time, the White House issued a photograph of the president signing the order alone at his desk in the Oval Office.

Justice Department lawyers said the revisions rendered moot legal cases against the original travel ban. But opponents said the removal of a section that had granted preferential treatment to victims of religious persecution was a cosmetic change that did nothing to alter the order’s prejudicial purpose. Immigrant rights lawyers had argued that the provision was intended to discriminate against Muslims, pointing to recent statements by Mr. Trump.

“This is a retreat, but let’s be clear — it’s just another run at a Muslim ban,” said Omar Jadwat, the director of the Immigrants’ Rights Project at the American Civil Liberties Union, one of the groups that sued to stop the first order. “They can’t unring the bell.”

Eric T. Schneiderman, the attorney general of New York and a plaintiff in a suit seeking to block the first order, said his office was
reviewing the new ban, adding, “I stand ready
to litigate — again — in order to protect New
York’s families, institutions and economy.”

Congressional Republicans, who were split
over the first travel ban, had a more muted
reaction. But Speaker Paul D. Ryan, who
backed the first order, issued a statement
saying the revised order “advances our
shared goal of protecting the homeland.”

Citizens of Iran, Somalia, Sudan, Yemen,
Syria and Libya will face a 90-day
suspension of visa processing as the
administration analyzes how to strengthen
vetting procedures, according to a homeland
security summary of the order.

The removal of Iraq from the list came after
talks with security officials in Baghdad and at
the urging of Mr. Mattis and State
Department officials, who have been in
communication with Iraqi officials alarmed
that the ban will turn public sentiment in their
country against the United States.

“On the basis of negotiations that have taken
place between the government of Iraq and the
U.S. Department of State in the last month,
Iraq will increase cooperation with the U.S.
government on the vetting of its citizens
applying for a visa to travel to the United
States,” homeland security officials wrote in
a fact sheet given to reporters.

The timing of the ban seemed intended to
reset the White House political narrative,
after a turbulent week that began with Mr.
Trump’s well-received address to Congress.
That success was quickly overshadowed by
the controversies over Mr. Sessions’s failure
to inform the Senate of his contacts with the
Russian ambassador and Mr. Trump’s
unsupported accusation that President Barack
Obama tapped Mr. Trump’s phones during
the 2016 campaign.

Critics say that Mr. Trump’s vow to impose
“extreme vetting” on migrants, especially
those fleeing the war in Syria, disregards
already stringent screening measures, and the
fact that none of the recent terrorist attacks or
mass shootings on American soil were
perpetrated by people from the nations listed
in the ban.

Last week, The Associated Press reported
that it had obtained a draft homeland security
assessment concluding that citizenship was
an “unlikely indicator” of a threat.

Homeland security officials, speaking to
reporters by telephone on Monday, pushed
back against that news report, arguing that it
was culled from public sources and excluded
classified information that paints a more
dangerous picture.

An official speaking on the call said the
Justice Department had identified 300
“refugees” who were being investigated for
their links to Islamist terrorist groups or for
holding pro-Islamic State positions. Some of
those people already have permanent resident
status, the official said.

But homeland security and Justice
Department officials declined to provide
further details, and would not say how many
of the 300 people being investigated came
from the countries covered by the revised
travel ban.
The Trump administration told a federal appeals court Thursday it would rewrite its controversial travel ban targeting several Muslim-majority countries, effectively conceding defeat for now in the new president’s first major confrontation with the federal judiciary.

In a 61-page filing in the Ninth Circuit Court of Appeals, Justice Department lawyers strongly disagreed with a three-judge appellate panel’s decision to keep blocking the order’s enforcement while proceedings continue in a federal district court in Seattle. But the lawyers declined to ask the Ninth Circuit to convene a broader panel to reconsider the three judges’ decision.

“Rather than continuing this litigation, the President intends in the near future to rescind the Order and replace it with a new, substantially revised Executive Order to eliminate what the panel erroneously thought were constitutional concerns,” the Justice Department told the court. “In so doing, the President will clear the way for immediately protecting the country rather than pursuing further, potentially time-consuming litigation.”

It was a sterile, formalistic admission of defeat—at least for now—in a separation-of-powers standoff that had consumed most of the new president’s first month in office. The order’s sudden, haphazard rollout on January 27, one week after President Trump’s inauguration, stranded travelers in airports and sparked protests at major U.S. airports as demonstrators and lawyers demanded their release from custody. Federal judges in multiple states eventually intervened at the request of the ACLU and immigrant-rights groups, blunting the order’s impact in a patchwork archipelago of temporary restraining orders.

The setback came despite sustained criticism from the Trump administration of the rulings; of federal district court judge James Robart, who issued the broadest nationwide injunction against the ruling; of the three-judge panel that upheld Robart’s injunction; of the Ninth Circuit as a whole; and of the federal judiciary. Those critiques ranged from challenges to the courts’ legitimacy to insinuations the judiciary would bear responsibility for future terrorist attacks.

“Just cannot believe a judge would put our country in such peril,” Trump tweeted at one point. “If something bad happens blame him and court system.”

The president echoed those themes during his lengthy Thursday press conference, in which he insisted his presidency was operating like
a “fine-tuned machine” and instead claimed it was the Ninth Circuit that was actually adrift. “That circuit is in chaos, and frankly that circuit is in turmoil,” Trump told reporters. He said he had heard the circuit was overturned 80 percent of the time by the Supreme Court—a highly misleading way to measure a court’s performance. (The Supreme Court, by design, reviews lower-court decisions for error or incongruity, not general quality; it also accepts only a handful of the thousands of cases decided by the Ninth Circuit each year.)

The White House did not reveal its plans until its filing Thursday, as it spent a week weighing whether it should continue to defend the order in the courts or start anew. Neither of its options for appeal seemed likely to succeed. The Trump administration could have asked a broader panel of the Ninth Circuit to reconsider the ruling, but two-thirds of the court’s judges were nominated by Democratic presidents—not a definitive measure of a court’s ideology, but not a heartening one for a Republican president, either. And if the administration asked the U.S. Supreme Court to intervene, five votes from the eight justices would be needed to overturn the panel’s decision. Even if the four justices on the Court’s conservative wing sided with the administration, a fifth vote from its liberal wing could have been difficult to find.

The Ninth Circuit case, Washington v. Trump, is one of more than a dozen lawsuits challenging the ban’s legality across the country. But it quickly became the highest profile case after federal district judge James Robart issued a broad nationwide injunction on February 3 that temporarily barred the federal government from enforcing the order pending further hearings.

Justice Department lawyers quickly sought an emergency stay of Robart’s order from a three-judge appeals panel in the Ninth Circuit. The panel unanimously rejected that request on February 9, ruling that the states of Washington and Minnesota, which filed the lawsuit, had standing to challenge the order on behalf of students and faculty in their public-university systems.

The three judges also indicated the states’ contention that the order violated the Constitution’s due-process protections had a chance of success in the lower courts, although it declined to rule on the merits of those arguments itself. The panel also declined to consider whether the order violated the First Amendment’s religious-freedom protections by targeting Muslim-majority countries.

The federal government, for its part, strongly defended the order’s legality and constitutionality since it was issued on January 27. Administration officials and Justice Department lawyers pointed to the executive branch’s traditionally broad discretion in immigration and national-security matters, as well as a federal statute authorizing the president to suspend the entry of visa holders from certain countries. They also rejected the states’ claims of religious discrimination by noting the order didn’t mention explicitly mention Muslims.

But those arguments made little headway among the federal judiciary. Making the president’s executive order unreviewable by
federal courts, the Ninth Circuit panel said, “runs contrary to the fundamental structure of our constitutional democracy.” And in an order-related lawsuit in Virginia, federal judge Leonie Brinkema extensively cited Trump’s previous comments on Muslim immigration when issuing a preliminary injunction against the ban’s enforcement.

The administration hasn’t offered details yet on its next executive order, which President Trump said would be released sometime next week. But the Justice Department did reiterate some arguments in its Thursday filing that will likely resurface in the next generation of legal battles over it.

Central to their brief was the president’s statutory power to exclude classes of foreign nationals from entry, which they cautioned against limiting. “Among other things, it would disable the President from suspending the entry of immigrants from a country with which the United States is on the verge of war,” That provision’s scope went unaddressed by the Ninth Circuit panel’s ruling, even in passing.

But the most interesting portion of the filing dealt with something beyond the order itself. President Trump’s campaign comments on Muslim immigration shaped the public debate of the travel ban, even as he publicly downsized his call for a “total and complete shutdown of Muslims entering the United States” to the opaquer term “extreme vetting” and other euphemisms. The order makes no specific reference to Muslims, of course, but its genealogy is unmistakeable.

The Justice Department, however, urged the Ninth Circuit to look away from those comments. The states’ invocation of them was “profoundly misguided” because it could impose additional judicial constraints on presidents for statements made as private citizens. “That approach, under which the powers of the Presidency would vary based on the identity of the individual duly elected by the people to hold that Office, has no sound basis in precedent and would raise significant separation-of-powers concerns,” they wrote.

But their warnings could be too late. As Vox’s Dara Lind noted last week, those comments could haunt the travel ban’s constitutionality in any iteration. The states cited Supreme Court religious-freedom precedents in which government officials’ statements could be used as evidence of discrimination when reviewing ostensibly neutral laws. And at least one federal judge has shown a willingness to use those precedents against the Trump administration.

Many of the executive order’s flaws can be ironed out with more thorough review by the Justice Department. The president’s own words, however, could be a stain that may be impossible to wash away.
“Travel ban 2.0 in effect, court challenges begin”

CNN
Laura Jarrett, Elise Labott
June 30, 2017

After months of winding through the courts, the so-called "watered-down," revised version of President Donald Trump's fiercely litigated travel ban finally went into effect at 8 p.m. ET Thursday.

Less than an hour before the ban was slated to begin, an emergency motion was filed in federal court by the state of Hawaii, which contests the Trump administration's plan to exclude certain categories of foreign nationals that the state believes are allowed to enter the country under existing court rulings.

Here's what to expect for the implementation of version 2.0 of the travel ban:

**Who can't enter the US?**

The test for foreign nationals under the Supreme Court's ruling is whether one has a "credible claim of bona fide relationship" with either an entity (like a school or a job) or a person living in the US (such as a spouse).

A hotel reservation, for example, will not constitute a bona fide relationship under the executive order, but an academic lecturer invited to speak in the US will be exempt from the travel ban.

If you can't sufficiently establish such a close relationship, you are banned for 90 days if you are from Libya, Syria, Iran, Somalia, Yemen and Sudan, and 120 days if you are a refugee from any country.

The new guidelines provide that applicants must prove a relationship with a parent, spouse, fiancee, child, adult son or daughter, son-in-law, daughter-in-law or sibling in the US in order to enter the country.

Other family members -- including grandparents, grandchildren, aunts, uncles, nieces, nephews, cousins, brothers-in-law, sisters-in-law, and any other "extended" family members will not be considered "close family" under the executive order.

For several hours on Thursday -- prior to the executive order going into effect -- administration officials had provided guidance that fiancees would not be considered "bona fide" relationships, but later reversed course, and fiancees are now exempt just like spouses.

The State Department criteria applies not only to visa applicants, but also to all refugees currently awaiting approval for admission to the US.

Senior administration officials further confirmed despite any ambiguity in the Supreme Court's decision, a refugee resettlement organization's "assurance" or relationship to a prospective refugee will not
be considered sufficiently close or bona fide for protection under the administration's interpretation of the revised executive order.

Advocacy groups such as Amnesty International plan to send researchers to US airports, such as Dulles International Airport and John F. Kennedy Airport on Thursday, to monitor developments and observe implementation of the ban in case any disputes arise.

**Who is exempt from the ban?**

The following categories of travelers are excluded from the travel ban:

- US citizens
- Legal permanent residents (aka green card holders)
- Current visa holders
- Any visa applicant who was in the US as of June 26
- Dual nationals
- Anyone granted asylum
- Any refugee already admitted to the US (or cleared for travel by the State Department through July 6)
- Foreign nationals with "bona fide" family, educational or business tie to the US.

**What about visa holders?**

Importantly, visas that have already been approved will not be revoked, and senior administration officials confirmed on Thursday that previously scheduled visa application appointments will not be canceled.

The executive order also permits the issuance of a visa to anyone who would otherwise be excluded on a case-by-case basis at the discretion of DHS and the State Department.

Senior administration officials expressed confidence to reporters Thursday that the pandemonium seen at airports would not occur this time around and that consular officers and border agents are "well-versed" in how the process works.

"We expect business as usual," said one official. "We expect things to run smoothly - - our people are well-prepared for this."

**Why is this happening?**

The intent behind the executive order was hotly debated for the past several months.

On the campaign trail, then-candidate Trump called for a "total and complete shutdown of Muslims" entering the US.

But the text of the executive order states that "additional scrutiny" is required for foreign nationals traveling from the six identified nations because "the conditions in these countries present heightened threats. Each of these countries is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones."

**More lawsuits on the way?**

The Trump administration's narrow reading of what constitutes a "bona fide" relationship has already elicited at least one challenge in court.

Late Thursday, Hawaii filed an emergency motion asking the federal district court judge who originally blocked implementation of
the travel ban in March to "clarify as soon as possible that the Supreme Court meant what it said," and issue an order confirming that the court orders do not allow the Trump administration to exclude grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews and cousins of persons in the United States.

Experts say more legal battles are on the way, given the way the Trump administration has decided to interpret the Supreme Court's ruling.

"I predict more litigation as people challenge visa denials under these new instructions," said Cornell Law School Professor Stephen Yale-Loehr. "Why can a stepsister visit the United States but not a grandmother?"
Winning in politics is as much about beating expectations as anything else. Democrats' loss in the special election in a conservative Georgia district wasn't particularly devastating in and of itself, but the fact that they really went for it made it look like a massive failure, with nothing but doom and gloom ahead.

With that in mind, I present the White House's gloating after the Supreme Court partially reinstated its travel ban on Monday.

“It’s a huge win for the president and the executive order,” Trump's lawyer, Jay Sekulow, said on Fox Business Network shortly after the ruling.


This is what you might call the soft bigotry of low expectations. Yes, the Supreme Court allowed for part of the White House's travel ban to go into effect after some judges had put the whole thing on hold. But if this is what passes for a big Trump win, it's going to be a long four years for him.

For a few reasons:

1) This wouldn't really be seen as a “win” unless other judges hadn't halted the ban in the first place. If the lower courts had upheld the ban and this had been appealed to the Supreme Court by the other side, the narrative today would be that the Supreme Court just put part of Trump's travel ban on hold. It's also not altogether surprising that the more left-leaning 9th Circuit Court of Appeals would go further in halting the ban than the Supreme Court would. And the sum total is still that part of Trump's ban remains blocked, with no ruling on the overall constitutionality and the possibility that it gets partially struck down for good.

2) We are simply talking about whether Trump overstepped his constitutional bounds with the travel ban executive order — a very low bar — and not whether the broader policy is successful or popular. And in fact, a recent poll showed Americans oppose the ban 52-43.

3) The degree to which the ban is being reinstated is in the eye of the beholder. Basically, the court says the ban “may not be enforced against foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States.” This is who actually sued over the ban in the first place, and they remain exempt from it, for now.
4) This is the revised, scaled-back version of Trump's initial travel ban, which was also halted by the courts. And just a few weeks ago, Trump didn't seem to be a big fan of Version 2.0, tweeting, “The Justice Dept. should have stayed with the original Travel Ban, not the watered down, politically correct version they submitted to S.C.” We are now to believe that a ban Trump suggested was inadequate and “watered down” is some big victory for his agenda?

5) As The Fix's Amber Phillips notes, the whole purpose of the ban is now in doubt. The White House initially pitched this as temporary travel ban needed to address an urgent national security concern while it developed more foolproof vetting procedures. It said it needed 90 days to do that (120 days for refugees); it's now been 150 days since the first attempt at a travel ban and 102 since the second (with no attacks by immigrants or refugees), but apparently the ban is still necessary? Even in their ruling, the judges seemed to allude to the idea that their input might be moot because that window had passed. Here's what the justices wrote:

In addition to the issues identified in the petitions, the parties are directed to address the following question: “Whether the challenges to §2(c) became moot on June 14, 2017.”

Monday's ruling is a win for Trump only insofar as it wasn't another big setback — something he's become accustomed to both legislatively and in the courts. But this is a temporary ruling that is still blocking part of a signature executive order that Trump apparently isn't a huge fan of in the first place.

For a president who said we'd grow tired of winning with him, to claim this as a big victory is pretty telling.
On the same day that it scheduled oral argument in the dispute over President Donald Trump’s March 6 executive order, the Supreme Court turned down a request by the federal government to clarify exactly what it meant when it said that individuals with a close family relationship could continue to apply for visas to enter the United States even while the freeze on new visas for travelers from six predominantly Muslim countries is in place. Today’s order left in place a ruling by a federal district judge in Hawaii that had defined the relationships more expansively than the government had wanted – to include, among others, grandparents and grandchildren. But the justices also put a portion of that lower-court ruling relating to refugees on hold while an intermediate federal appeals court reviews it.

The president’s March 6 order, often known as the “travel ban,” halted the issuance of new visas for travelers from six predominantly Muslim countries – Iran, Libya, Sudan, Syria, Somalia and Yemen – and temporarily suspended the admission of refugees into the United States. Two different lower courts blocked the government from implementing the order, but on June 26 the Supreme Court allowed the government to go ahead and enforce it, with an exception for travelers and refugees who have a “credible claim” of a genuine relationship with an individual or institution in the United States.

The Court’s June 26 order led to litigation over the scope of the exception. The Trump administration insisted that it extended to parents (and stepparents), spouses (and fiancés or fiancées), sons and daughters (as well as stepchildren and sons- and daughters-in-law), and siblings, but not to a broader group of relatives such as grandparents, grandchildren, aunts and uncles, siblings-in-law, nieces and nephews, and cousins. But U.S. District Judge Derrick Watson agreed with the state of Hawaii that the second and broader group of relatives also have the kind of “close” family relationship that should allow them to apply for visas even while the travel ban is in effect. The justices today denied the federal government’s motion to clarify which relatives can apply for a visa, leaving Judge Watson’s more expansive definition in place.

However, the justices did grant the government’s request to put another portion of Judge Watson’s ruling on hold while the government goes to the U.S. Court of Appeals for the 9th Circuit. Judge Watson had ruled that, for purposes of the June 26
order, the freeze on the admission of refugees would not apply to refugees for whom the federal government had already entered into an agreement with an agency to help the refugees with resettlement after they enter the United States. The government had argued that the judge’s ruling went too far, because a resettlement agency does not actually have a relationship with the refugees it is assisting until they arrive in the United States, and that the ruling effectively rendered the limits imposed by the March 6 order meaningless. Now the 9th Circuit will weigh in on whether such refugees have enough of a connection to the United States to come here. Notably, three justices – Clarence Thomas, Samuel Alito and Neil Gorsuch – indicated that they would have put all of Judge Watson’s ruling (rather than simply the part involving refugees) on hold until the 9th Circuit can rule on the government’s appeal.
Jennings v. Rodriguez
15-1204

Ruling Below: Rodriguez v. Robbins, 804 F.3d 1060 (9th Cir. 2015)

Rodriguez sought relief on behalf of himself and others detained for more than six months without bond hearing during immigration proceedings. The requested relief constituted individualized bond hearings with burden on government. The district court denied the petition. Rodriguez appealed. The Court of Appeals reversed and remanded. On remand, the district court, entered preliminary injunction. The government appealed. The Court of Appeals affirmed. The District Court granted summary judgment to class and entered permanent injunction. Parties appealed. The Court of Appeals for the Ninth Circuit affirmed in part and reversed in part.

Question Presented: Whether aliens subject to mandatory detention under 8 U.S.C. § 1225(b) must be afforded bond hearings if detention lasts six months;

Whether aliens who fall under the mandatory detention provisions of Section 1226(c) must be afforded the same;

Whether the government must demonstrate that the alien is a flight risk or a danger to the community in order to deny release on bond;

Whether the length of detention must be weighed in the decision to release on bond;

Whether new bond hearings must be afforded every six months.

Alejandro RODRIGUEZ; Abdirizak Aden Farah; Jose Farias Cornejo; Yussuf Abdikadir; Abel Perez Ruelas, for themselves and on behalf of a class of similarly situated individuals, Petitioners–Appellees/Cross–Appellants,

and

Efren Orozco, Petitioner,
v.

Timothy ROBBINS, Field Office Director, Los Angeles District, Immigration and Customs Enforcement; Jeh Johnson, Secretary, Homeland Security; Loretta E. Lynch, Attorney General; Wesley Lee, Assistant Field Office Director, Immigration and Customs Enforcement; Rodney Penner, Captain, Mira Loma Detention Center; Sandra Hutchens, Sheriff of Orange County; Nguyen, Officer, Officer–in–Charge, Theo Lacy Facility; Davis Nighswonger, Captain, Commander, Theo Lacy Facility; Mike Kreuger, Captain, Operations Manager, James A. Musick Facility; Arthur Edwards, Officer–in–Charge, Santa Ana City Jail; Russell Davis, Jail Administrator, Santa Ana City Jail; Juan P. Osuna,* Director, Executive Office for Immigration Review, Respondents–Appellants/Cross–Appellees.

United States Court of Appeals, Ninth Circuit

Decided on October 28, 2015

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Duane WARDLAW, Circuit Judge:

This is the latest decision in our decade-long examination of civil, i.e. non-punitive and merely preventative, detention in the immigration context. As we noted in our prior decision in this case, Rodriguez v. Robbins, thousands of immigrants to the United States are locked up at any given time, awaiting the conclusion of administrative and judicial proceedings that will determine whether they may remain in this country. In 2014, U.S. Immigration and Customs Enforcement (“ICE”) removed 315,943 individuals, many of whom were detained during the removal process. According to the most recently available statistics, ICE detains more than 429,000 individuals over the course of a year, with roughly 33,000 individuals in detention on any given day.

Alejandro Rodriguez, Abdirizak Aden Farah, Jose Farias Cornejo, Yussuf Abdikadir, Abel Perez Ruelas, and Efren Orozco (“petitioners”) represent a certified class of noncitizens who challenge their prolonged detention pursuant to 8 U.S.C. §§ 1225(b), 1226(a), 1226(c), and 1231(a) without individualized bond hearings and determinations to justify their continued detention. Their case is now on appeal for the third time. After a three-judge panel of our court reversed the district court's order denying class certification. We held that the proposed class satisfied each requirement of Federal Rule of Civil Procedure 23: The government conceded that the class was sufficiently numerous; each class member's claim turned on the common question of whether detention for more than six months without a bond hearing raises serious constitutional concerns; Rodriguez's claims were sufficiently typical of the class's because “the determination of whether [he] is entitled to a bond hearing will rest largely on interpretation of the statute authorizing his detention”; and Rodriguez, through his counsel, adequately represented the class. The panel also noted that “any concern that the differing statutes authorizing detention of the various class members will render class adjudication of class members' claims impractical or undermine effective representation of the class” could be addressed through “the formation of subclasses.”

Under the permanent injunction, the government must provide any class member who is subject to “prolonged detention”—six months or more—with a bond hearing before an Immigration Judge (“IJ”). At that hearing, the government must prove by clear and convincing evidence that the detainee is a flight risk or a danger to the community to justify the denial of bond. We affirm in part and reverse in part.

I. Background

On May 16, 2007, Alejandro Garcia commenced this case by filing a petition for a writ of habeas corpus in the Central District of California. Garcia's case was consolidated with a similar case filed by Alejandro Rodriguez, and the petitioners moved for class certification. The motion was denied on March 21, 2008.

A three-judge panel of our court reversed the district court's order denying class certification. We held that the proposed class satisfied each requirement of Federal Rule of Civil Procedure 23: The government conceded that the class was sufficiently numerous; each class member's claim turned on the common question of whether detention for more than six months without a bond hearing raises serious constitutional concerns; Rodriguez's claims were sufficiently typical of the class's because “the determination of whether [he] is entitled to a bond hearing will rest largely on interpretation of the statute authorizing his detention”; and Rodriguez, through his counsel, adequately represented the class. The panel also noted that “any concern that the differing statutes authorizing detention of the various class members will render class adjudication of class members' claims impractical or undermine effective representation of the class” could be addressed through “the formation of subclasses.”
The government petitioned our court for panel rehearing or rehearing en banc. In response, the panel amended the opinion to expand its explanation of why the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) does not bar certification of the class and, with that amendment, unanimously voted to deny the government's petition. The full court was advised of the suggestion for rehearing en banc, and no judge requested a vote on whether to rehear the matter. The government did not file a petition for certiorari in the United States Supreme Court.

On remand, the district court certified a class defined as:

“…all non-citizens within the Central District of California who: (1) are or were detained for longer than six months pursuant to one of the general immigration detention statutes pending completion of removal proceedings, including judicial review, (2) are not and have not been detained pursuant to a national security detention statute, and (3) have not been afforded a hearing to determine whether their detention is justified.”

The district court also approved the proposed subclasses, which correspond to the four statutes under which the class members are detained—8 U.S.C. §§ 1225(b), 1226(a), 1226(c), and 1231(a). The class does not include suspected terrorists, who are detained pursuant to 8 U.S.C. § 1537. Additionally, because the class is defined as non-citizens who are detained “pending completion of removal proceedings,” it excludes any detainee subject to a final order of removal.

On September 13, 2012, the district court entered a preliminary injunction that applied to class members detained pursuant to two of these four “general immigration detention statutes”— §§ 1225(b) and 1226(c). Under the preliminary injunction, the government was required to “provide each [detainee] with a bond hearing” before an IJ and to “release each Subclass member on reasonable conditions of supervision ... unless the government shows by clear and convincing evidence that continued detention is justified based on his or her danger to the community or risk of flight.”

The government appealed, and on April 16, 2013, we affirmed. We applied the Court's preliminary injunction standard set forth in Winter v. Natural Resources Defense Council, Inc., which requires the petitioner to “establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”

Evaluating petitioners' likelihood of success on the merits, we began with the premise that “[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects.” “Thus, the Supreme Court has held that the indefinite detention of a once-admitted alien ‘would raise serious constitutional concerns.’ ”

Addressing those concerns, we recognized that we were not writing on a clean slate: “[I]n a series of decisions since 2001, ‘the Supreme Court and this court have grappled in piece-meal fashion with whether the various immigration detention statutes may authorize indefinite or prolonged detention of detainees and, if so, may do so without providing a bond hearing.’ ” First, in Zadvydas v. Davis, the Supreme Court resolved statutory and due process challenges to indefinite detention under 8 U.S.C. § 1231(a)(6), which governs detention beyond
the ninety-day removal period, where removal was not practicable—for one petitioner because he was stateless, and for another because his home country had no repatriation treaty with the United States.

Drawing on civil commitment jurisprudence, the Court reasoned:

A statute permitting indefinite detention of an alien would raise a serious constitutional problem. The Fifth Amendment's Due Process Clause forbids the Government to "depriv[e]" any "person ... of ... liberty ... without due process of law." Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects. And this Court has said that government detention violates that Clause unless the detention is ordered in a criminal proceeding with adequate procedural protections, or, in certain special and "narrow" nonpunitive "circumstances," where a special justification, such as harm-threatening mental illness, outweighs the "individual's constitutionally protected interest in avoiding physical restraint." To avoid those "serious constitutional concerns," the Court held that § 1231(a)(6) does not authorize indefinite detention without a bond hearing. Noting that the "proceedings at issue here are civil, not criminal," the Court "construe[d] the statute to contain an implicit 'reasonable time' limitation," and recognized six months as a "presumptively reasonable period of detention."

Although in dissent, Justice Kennedy, joined by Chief Justice Rehnquist, disagreed with the majority's application of the canon of constitutional avoidance and argued that the holding would improperly interfere with international repatriation negotiations, Justice Kennedy recognized that "both removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious." Justice Kennedy further noted that although the government may detain non-citizens "when necessary to avoid the risk of flight or danger to the community," due process requires "adequate procedures to review their cases, allowing persons once subject to detention to show that through rehabilitation, new appreciation of their responsibilities, or under *1068 other standards, they no longer present special risks or danger if put at large."

Second, in Demore v. Kim, the Court addressed a due process challenge to mandatory detention under 8 U.S.C. § 1226(c), which applies to non-citizens convicted of certain crimes. After discussing Congress's reasons for establishing mandatory detention, namely, high rates of crime and flight by removable non-citizens, the Court affirmed its "longstanding view that the Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings." Distinguishing Zadvydas, the Court in Demore stressed that detention under § 1226(c) has "a definite termination point" and typically "lasts for less than the 90 days we considered presumptively valid in Zadvydas." Although the Court therefore upheld mandatory detention under § 1226(c), Justice Kennedy's concurring opinion, which created the majority, reasoned that "a lawful permanent resident alien such as respondent could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified."

After Zadvydas and Demore, our court decided several cases that provided further guidance for our analysis in Rodriguez II. In Tijani v. Willis, we held that the constitutionality of detaining a lawful
permanent resident under § 1226(c) for over 32 months was “doubtful.” “To avoid deciding the constitutional issue, we interpret[ed] the authority conferred by § 1226(c) as applying to expedited removal of criminal aliens” and held that “[t]wo years and eight months of process is not expeditious.” We therefore remanded Tijani’s habeas petition to the district court with directions to grant the writ unless the government provided a bond hearing before an IJ within sixty days.

We next considered civil detention in the immigration context in Casas–Castrillon v. Department of Homeland Security (Casas ). There, a lawful permanent resident who had been detained for nearly seven years under § 1226(c) and then § 1226(a) sought habeas relief while his petition for review of his removal order was pending before our court. Applying Demore, we reasoned that § 1226(c) “authorize[s] mandatory detention only for the ‘limited period of [the non-citizen's] removal proceedings,’ which the Court estimated ‘lasts roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal’ his removal order to the [Board of Immigration Appeals (“BIA") ].” We therefore concluded that § 1226(c)'s mandatory detention provision applies only during administrative removal proceedings—i.e. until the BIA affirms a removal order. From that point until the circuit court has “rejected [the applicant's] final petition for review or his time to seek such review expires,” the government has discretionary authority to detain the non-citizen pursuant to § 1226(a). We noted, however, that “[t]here is a difference between detention being authorized and being necessary as to any particular person.”

Because the Court’s holding in Demore turned on the brevity of mandatory detention under § 1226(c), we concluded that “the government may not detain a legal permanent resident such as Casas for a prolonged period without providing him a neutral forum in which to contest the necessity of his continued detention.”

Soon after, in Singh v. Holder, we clarified the procedural requirements for bond hearings held pursuant to our decision in Casas (“Casas hearings”). In light of “the substantial liberty interest at stake,” we held that “due process requires a contemporaneous record of Casas hearings,” and that the government bears the burden of proving “by clear and convincing evidence that an alien is a flight risk or a danger to the community to justify denial of bond.” To evaluate whether the government has met its burden, we instructed IJs to consider the factors set forth in In re Guerra, in particular “the alien's criminal record, including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses.”

Finally, in Diouf v. Napolitano, we extended the procedural protections established in Casas to individuals detained under § 1231(a)(6). We held that “prolonged detention under § 1231(a)(6), without adequate procedural protections,” like prolonged detention under § 1226(a), “would raise ‘serious constitutional concerns.’ ” To address those concerns, we held that “an alien facing prolonged detention under § 1231(a)(6) is entitled to a bond hearing before an immigration judge and is entitled to be released from detention unless the government establishes that the alien poses a risk of flight or a danger to the community.”

In Diouf II, we also adopted a definition of “prolonged” detention—detention that “has lasted six months and is expected to continue more than minimally beyond six months”—
for purposes of administering the Casas bond hearing requirement. We reasoned that:

“When detention crosses the six-month threshold and release or removal is not imminent, the private interests at stake are profound. Furthermore, the risk of an erroneous deprivation of liberty in the absence of a hearing before a neutral decisionmaker is substantial. The burden imposed on the government by requiring hearings before an immigration judge at this stage of the proceedings is therefore a reasonable one.”

Applying these precedents to Rodriguez class members detained under § 1226(c), which requires civil detention of non-citizens previously convicted of certain crimes who have already served their state or federal periods of incarceration, we have concluded that “the prolonged detention of an alien without an individualized determination of his dangerousness or flight risk would be constitutionally doubtful.” To avoid these constitutional concerns, we held that “§ 1226(c)'s mandatory language must be construed ‘to contain an implicit reasonable time limitation, the application of which is subject to federal-court review.’ ” “[W]hen detention becomes prolonged,” i.e., at the six-month mark, “§ 1226(c) becomes inapplicable”; the government's authority to detain the non-citizen shifts to § 1226(a), which provides for discretionary detention; and detainees are then entitled to bond hearings.

In so holding, we rejected the government's attempt to distinguish Casas on the basis that “Casas concerned an alien who had received an administratively final removal order, sought judicial review, and obtained a remand to the BIA,” whereas this case involves “aliens awaiting the conclusion of their initial administrative proceedings.” We found that this argument reflected “a distinction without a difference”: “‘Regardless of the stage of the proceedings, the same important interest is at stake—freedom from prolonged detention.’ ”

We also noted that our conclusion was consistent with the decisions of the two other circuits that have directly addressed this issue. In Diop v. ICE/Homeland Security, the Third Circuit, applying the canon of constitutional avoidance, construed § 1226(c) to “authorize [] detention for a reasonable amount of time, after which the authorities must make an individualized inquiry into whether detention is still necessary to fulfill the statute's purposes of ensuring that an alien attends removal proceedings and that his release will not pose a danger to the community.” Applying that holding to the facts of the case, the Third Circuit held that the petitioner's detention, which had lasted nearly three years, “was unconstitutionally unreasonable and, therefore, a violation of the Due Process Clause.” Although the court declined to adopt a categorical definition of a “reasonable amount of time” to detain a non-citizen without a bond hearing, it read Demore as we do—to connect the constitutionality of detention to its length and to authorize detention only for a “limited time.”

Likewise, in Ly v. Hansen, the Sixth Circuit held that, to avoid a constitutional problem, removable non-citizens may be detained under § 1226(c) only “for a reasonable period of time required to initiate and conclude removal proceedings promptly.” Finding that the petitioner's 500-day—long detention was “unreasonable,” the Sixth Circuit affirmed the district court's grant of a writ of habeas corpus. While maintaining that a “bright-line time limitation, as imposed in Zadvydas, would not be appropriate for the pre-removal period,” the court recognized that Demore’s
holding “rel[ies] on the fact that Kim, and persons like him, will normally have their proceedings completed within a short period of time and will actually be deported, or will be released.”

As to the Rodriguez subclass detained under § 1225(b), we found “no basis for distinguishing between” non-citizens detained under that section and under § 1226(c). The cases relied upon by the government for the proposition that arriving aliens are entitled to lesser due process protections—namely, Shaughnessy v. United States ex rel. Mezei and Barrera–Echavarria v. Rison—were decided under pre-IIRIRA law and, as such, were inapposite. We therefore held that “to the extent detention under § 1225(b) is mandatory, it is implicitly time-limited.” As we had with § 1226(c), we explained that “the government's detention authority does not completely dissipate at six months; rather, the mandatory provisions of § 1225(b) simply expire at six months, at which point the government's authority to detain the non-citizen would shift to § 1226(a), which is discretionary and which we have already held requires a bond hearing.”

After establishing that class members detained under § 1226(c) and § 1225(b) are entitled to bond hearings after six months of detention, we clarified that the procedural requirements set forth in Singh apply to those hearings. These requirements include proceedings before “a neutral IJ” at which “the government bear[s] the burden of proof by clear and convincing evidence,” a lower burden of proof than that required to sustain a criminal charge.

Having found that the class was likely to succeed on the merits, we turned to the other preliminary injunction factors. We found that the class members “clearly face irreparable harm in the absence of the preliminary injunction” because “the deprivation of constitutional rights unquestionably constitutes irreparable injury.” The preliminary injunction safeguards constitutional rights by ensuring that “individuals whom the government cannot prove constitute a flight risk or a danger to public safety, and sometimes will not succeed in removing at all, are not needlessly detained.” Similarly, we found that the balance of equities favored the class members because “needless prolonged detention” imposes “major hardship,” whereas the government “cannot suffer harm from an injunction that merely ends an unlawful practice or reads a statute as required to avoid constitutional concerns.” Finally, we held that the preliminary injunction was consistent with the public interest, which is “implicated when a constitutional right has been violated,” and “benefits from a preliminary injunction that ensures that federal statutes are construed and implemented in a manner that avoids serious constitutional questions.” We therefore affirmed the district court’s order.

During the pendency of Rodriguez II, the parties conducted discovery, and class counsel adduced extensive evidence detailing the circumstances under which class members are detained. The parties then filed cross-motions for summary judgment, and the petitioners moved for a permanent injunction to extend and expand the preliminary injunction.

On August 6, 2013, after we issued our decision in Rodriguez II, the district court granted summary judgment to the class members and entered a permanent injunction. The permanent injunction applies to class members detained under any of the four civil “general immigration detention statutes”—§§ 1225(b), 1226(a), 1226(c), and 1231(a)—and requires the government to provide each
The government now appeals from the entry of the permanent injunction, arguing that the district court—and we—erred in applying the canon of constitutional avoidance to each of the statutes at issue. Relying on the Supreme Court's decisions in Zadvydas and Demore, the government argues that none of the subclasses are categorically entitled to bond hearings after six months of detention. Accordingly, the government contends that we should decertify the class and instead permit as-applied challenges to individual instances of prolonged detention, which could occur only through habeas proceedings. Petitioners counter that Rodriguez II is the law of the case and law of the circuit, requiring us to affirm the permanent injunction as to the § 1225(b) and § 1226(c) subclasses, and that non-citizens detained pursuant to § 1226(a) and § 1231(a) are entitled to bond hearings for reasons similar to those discussed in Rodriguez II. Petitioners cross-appeal the district court's order as to the procedural requirements for bond hearings; they argue that the district court erred in declining to require that IJs consider the likelihood of removal and the total length of detention, and in declining to require that non-citizens detained for twelve or more months receive periodic bond hearings every six months.

II. Nature of Civil Immigration Detention

Class members spend, on average, 404 days in immigration detention. Nearly half are detained for more than one year, one in five for more than eighteen months, and one in ten for more than two years. In some cases, detention has lasted much longer: As of April 28, 2012, when the government generated data to produce to the petitioners, one class member had been detained for 1,585 days, approaching four and a half years of civil confinement.

Non-citizens who vigorously pursue claims for relief from removal face substantially longer detention periods than those who concede removability. Requesting relief from an IJ increases the duration of class members' detention by an average of two months; appealing a claim to the BIA adds, on average, another four months; and appealing a BIA decision to the Ninth Circuit typically leads to an additional eleven months of confinement. Class members who persevere through this lengthy process are often successful: About 71% of class members have sought relief from removal, and roughly one-third of those individuals prevailed. However, many detainees choose to give up meritorious claims and voluntarily leave the country instead of enduring years of immigration detention awaiting a judicial finding of their lawful status.

Class members frequently have strong ties to this country: Many immigrated to the United States as children, obtained legal permanent resident status, and lived in this country for as long as twenty years before ICE initiated removal proceedings. As a result, hundreds of class members are married to U.S. citizens or lawful permanent residents, and have
children who were born in this country. Further, many class members hold steady jobs—including as electricians, auto mechanics, and roofers—to provide for themselves and their families. At home, they are caregivers for young children, aging parents, and sick or disabled relatives. To the extent class members have any criminal record—and many have no criminal history whatsoever—it is often limited to minor controlled substances offenses. Accordingly, when class members do receive bond hearings, they often produce glowing letters of support from relatives, friends, employers, and clergy attesting to their character and contributions to their communities.

Prolonged detention imposes severe hardship on class members and their families. Civil immigration detainees are treated much like criminals serving time: They are typically housed in shared jail cells with no privacy and limited access to larger spaces or the outdoors. Confinement makes it more difficult to retain or meet with legal counsel, and the resources in detention facility law libraries are minimal at best, thereby compounding the challenges of navigating the complexities of immigration law and proceedings. In addition, visitation is restricted and is often no-contact, dramatically disrupting family relationships. While in detention, class members have missed their children's births and their parents' funerals. After losing a vital source of income, class members' spouses have sought government assistance, and their children have dropped out of college.

Lead petitioner Alejandro Rodriguez's story is illustrative. Rodriguez came to the United States as an infant and has lived here continuously since then. Rodriguez is a lawful permanent resident of the United States, and his entire immediate family—including his parents, siblings, and three young children—also resides in the United States as citizens or lawful permanent residents. Before his removal proceedings began, Rodriguez worked as a dental assistant. In 2003, however, Rodriguez was convicted of possession of a controlled substance and sentenced to five years of probation and no jail time. He had one previous conviction, for “joyriding.”

In 2004, ICE commenced removal proceedings and subjected Rodriguez to civil detention. An IJ determined that Rodriguez's prior conviction for “joyriding,” i.e. driving a stolen vehicle, qualified as an “aggravated felony” that rendered him ineligible for relief in the form of cancellation of removal, and therefore ordered him removed. Rodriguez appealed the IJ's decision to the BIA, which affirmed, and then to the Ninth Circuit. In July 2005, a three-judge panel of our court granted the government's motion to hold Rodriguez's case in abeyance until the Supreme Court decided a related case, Gonzales v. Penuliar, which issued eighteen months later, in January 2007. In Penuliar, the Supreme Court vacated our court's opinion and remanded for further consideration in light of Gonzales v. Duenas–Alvarez, which held that violating a California statute prohibiting taking a vehicle without the owner's consent qualifies as a “theft offense.” Between July 2005 and January 2007, while Rodriguez's case was in abeyance, ICE conducted four custody reviews on Rodriguez and repeatedly determined that Rodriguez was required to remain in detention until our court issued a decision on the merits of his claim. In mid–2007, about a month after Rodriguez had moved for class certification, however, ICE released him. At that point, Rodriguez had been detained for 1,189 days, roughly three years and three months. In April 2008, in the related case on remand from the Supreme Court, our court held that driving a stolen
vehicle did not qualify as an aggravated felony. On motion of the parties, we then remanded Rodriguez's petition to the BIA, which granted his application for cancellation of removal, vindicating his right to lawfully remain in the United States.

III. Standard of Review

“We review a grant of summary judgment de novo.” “A permanent injunction ‘involves factual, legal, and discretionary components,’ so we ‘review a decision to grant such relief under several different standards.’” “We review legal conclusions ... de novo, factual findings for clear error, and the scope of the injunction for abuse of discretion.”

IV. Discussion

In resolving whether the district court erred in entering the permanent injunction, we consider, first, petitioners’ entitlement to bond hearings and, second, the procedural requirements for such hearings. Based on our precedents, we hold that the canon of constitutional avoidance requires us to construe the statutory scheme to provide all class members who are in prolonged detention with bond hearings at which the government bears the burden of proving by clear and convincing evidence that the class member is a danger to the community or a flight risk. However, we also conclude that individuals detained under § 1231(a) are not members of the certified class. We affirm the district court's order insofar as it requires automatic bond hearings and requires IJs to consider alternatives to detention because we presume, like the district court, that IJs are already doing so when determining whether to release a non-citizen on bond.5 Because the same constitutional concerns arise when detention approaches another prolonged period, we hold that IJs must provide bond hearings periodically at six month intervals for class members detained for more than twelve months. However, we reject the class's suggestion that we mandate additional procedural requirements.

A. Civil Detention

“In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.” Civil detention violates the Due Process Clause except “in certain special and narrow nonpunitive circumstances, where a special justification, such as harm-threatening mental illness, outweighs the individual's constitutionally protected interest in avoiding physical restraint.” Consistent with these principles, the Supreme Court has—outside of the immigration context—found civil detention constitutional without any individualized showing of need only when faced with the unique exigencies of global war or domestic insurrection. And even in those extreme circumstances, the Court's decisions have been widely criticized. In all contexts apart from immigration and military detention, the Court has found that the Constitution requires some individualized process and a judicial or administrative finding that a legitimate governmental interest justifies detention of the person in question.

For example, in numerous cases addressing the civil detention of mentally ill persons, the Court has consistently recognized that such commitment “constitutes a significant deprivation of liberty,” and so the state “must have a constitutionally adequate purpose for the confinement.” Further, the “nature and duration of commitment” must “bear some reasonable relation to the purpose for which the individual is committed.”

Accordingly, the state may detain a criminal defendant found incapable of standing trial, but only for “the reasonable period of time...
necessary to determine whether there is a substantial probability that he will attain [the] capacity [to stand trial] in the foreseeable future.” At all times, the individual’s “commitment must be justified by progress toward that goal.” Likewise, the state may detain a criminal defendant following an acquittal by reason of insanity in order to “treat the individual's mental illness and protect him and society from his potential dangerousness.” However, the detainee “is entitled to release when he has recovered his sanity or is no longer dangerous.” Further, although the state may detain sexually dangerous individuals even after they have completed their criminal sentences, such confinement must “take[ ] place pursuant to proper procedures and evidentiary standards.” To “justify indefinite involuntary commitment,” the state must prove both “dangerousness” and “some additional factor, such as a ‘mental illness’ or ‘mental abnormality.’ ”

Similarly, the Court has held that pretrial detention of individuals charged with “the most serious of crimes” is constitutional only because, under the Bail Reform Act, an “arrestee is entitled to a prompt detention hearing” to determine whether his confinement is necessary to prevent danger to the community. Further, “the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act.”

In addition, the Court has held that incarceration of individuals held in civil contempt is consistent with due process only where the contemnor receives adequate procedural protections and the court makes specific findings as to the individual's ability to comply with the court order. If compliance is impossible—for instance, if the individual lacks the financial resources to pay court-ordered child support—then contempt sanctions do not serve their purpose of coercing compliance and therefore violate the Due Process Clause.

Early cases upholding immigration detention policies were a product of their time. Yet even these cases recognized some limits on detention of non-citizens pending removal. Such detention may not be punitive—Congress may not, for example, impose sentences of “imprisonment at hard labor” on non-citizens awaiting deportation—and it must be supported by a legitimate regulatory purpose. Under these principles, the Court authorized the “detention or temporary confinement” of Chinese-born non-citizens “pending the inquiry into their true character, and while arrangements were being made for their deportation.” The Court also upheld executive detention of enemy aliens after the cessation of active hostilities because deportation is “hardly practicable” in the midst of war, and enemy aliens' “potency for mischief” continues “even when the guns are silent.” Similarly, the Court approved detention of communists to limit their “opportunities to hurt the United States during the pendency of deportation proceedings.” The Court recognized, however, that “purpose to injure could not be imputed generally to all aliens subject to deportation.” Rather, if the Attorney General wished to exercise his discretion to deny bail, he was required to do so at a hearing, the results of which were subject to judicial review.

More recently, the Supreme Court has drawn on decades of civil detention jurisprudence to hold that “[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem.” Although the state has legitimate interests in “ensuring the appearance of aliens at future immigration proceedings” and “protecting the community,” post-removal period detention
does not uniformly “‘bear[ ] [a] reasonable relation to the purpose for which the individual [was] committed.’” To avoid constitutional concerns, the Court construed 8 U.S.C. § 1231(a)(6), the statute governing post—removal period detention, to “limit[ ] an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States.” Detention beyond that point requires “strong procedural protections” and a finding that the non-citizen is “specially dangerous.”

Soon after Zadvydas, the Court rejected a due process challenge to mandatory detention under 8 U.S.C. § 1226(c), which applies to non-citizens convicted of certain crimes. While affirming its “longstanding view that the Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings,” the Court emphasized that detention under § 1226(c) was constitutionally permissible because it has “a definite termination point” and typically “lasts for less than ... 90 days.”

Since Zadvydas and Demore, our court has “grappled in piece-meal fashion with whether the various immigration detention statutes may authorize indefinite or prolonged detention of detainees and, if so, may do so without providing a bond hearing.” As we recognized in Casas, “prolonged detention without adequate procedural protections would raise serious constitutional concerns.” We have therefore held that non-citizens detained pursuant to § 1226(a) and § 1231(a)(6) are entitled to bond hearings before an IJ when detention becomes prolonged.

While the government falsely equates the bond hearing requirement to mandated release from detention or facial invalidation of a general detention statute, our precedents make clear that there is a distinction “between detention being authorized and being necessary as to any particular person.” Bond hearings do not restrict the government's legitimate authority to detain inadmissible or deportable non-citizens; rather, they merely require the government to “justify denial of bond” with clear and convincing “evidence that an alien is a flight risk or danger to the community.” And, in the end, the government is required only to establish that it has a legitimate interest reasonably related to continued detention; the discretion to release a non-citizen on bond or other conditions remains soundly in the judgment of the immigration judges the Department of Justice employs.

Prior decisions have also clarified that detention becomes “prolonged” at the six-month mark. In Zadvydas, the Supreme Court recognized six months as a “presumptively reasonable period of detention.” By way of background, the Court noted that in 1996, Congress had “shorten[ed] the removal period from six months to 90 days.” The Court then explained:

While an argument can be made for confining any presumption to 90 days, we doubt that when Congress shortened the removal period to 90 days in 1996 it believed that all reasonably foreseeable removals could be accomplished in that time. We do have reason to believe, however, that Congress previously doubted the constitutionality of detention for more than six months. Consequently, for the sake of uniform administration in the federal courts, we recognize that period.

Following Zadvydas, we have defined detention as “prolonged” when “it has lasted six months and is expected to continue more than minimally beyond six months.” At that point, we have explained, “the private interests at stake are profound,” and “the risk
of an erroneous deprivation of liberty in the absence of a hearing before a neutral decisionmaker is substantial.”

**B. Entitlement to a Bond Hearing**

With this well-established precedent of the Supreme Court and our Court in mind, we review the district court's grant of summary judgment and entry of a permanent injunction. We consider, in turn, whether individuals detained under §§ 1226(c), 1225(b), 1226(a), and 1231(a) are entitled to bond hearings after they have been detained for six months.

1. The § 1226(c) Subclass

Section 1226(c) requires that the Attorney General detain any non-citizen who is inadmissible or deportable because of his criminal history upon that person's release from imprisonment, pending proceedings to remove him from the United States. Detention under § 1226(c) is mandatory. Individuals detained under that section are not eligible for release on bond or parole; they may be released only if the Attorney General deems it “necessary” for witness protection purposes, id. § 1226(c)(2).

An individual detained under § 1226(c) may ask an IJ to reconsider whether the mandatory detention provision applies to him, but such review is limited in scope and addresses only whether the individual is properly included in a category of non-citizens subject to mandatory detention based on his criminal history. At a “Joseph hearing,” a detainee “may avoid mandatory detention by demonstrating that he is not an alien, was not convicted of the predicate crime, or that the [DHS] is otherwise substantially unlikely to establish that he is in fact subject to mandatory detention.” “A determination in favor of an alien” at a Joseph hearing “does not lead to automatic release,” because the government retains discretionary authority to detain the individual under § 1226(a). Instead, such a determination allows the IJ to consider granting bond under the § 1226(a) standards, namely, whether the detainee would pose a danger or flight risk if released.

As a result of § 1226(c)'s mandatory language and the limited review available through a Joseph hearing, individuals are often detained for years without adequate process. Members of the § 1226(c) subclass also tend to be detained for longer periods than other class members: The longest-detained class member was confined for 1,585 days and counting as of April 28, 2012, and the average subclass member faces detention for 427 days. These lengthy detention times bear no relationship to the seriousness of class members' criminal history or the lengths of their previously served criminal sentences. In several instances identified by class counsel, a class member was sentenced to one to three months in prison for a minor controlled substances offense, then endured one or two years in immigration detention. Nor do these detention durations bear any relation to the merits of the subclass members' claims: Of the § 1226(c) subclass members who apply for relief from removal, roughly 40% are granted such relief, a rate even higher than that of the overall class.

In *Rodriguez II*, we held that “the prolonged detention of an alien [under § 1226(c) ] without an individualized determination of his dangerousness or flight risk would be constitutionally doubtful.” To avoid these “constitutional concerns, § 1226(c)'s mandatory language must be construed ‘to contain an implicit reasonable time limitation.’ ” Accordingly, at the six-month mark, “when detention becomes prolonged, § 1226(c) becomes inapplicable,” and “the Attorney General's detention authority rests
with § 1226(a).” Under Casas, those detainees are then entitled to a bond hearing.

Contrary to the government's argument, this holding is consistent with the text of § 1226(c), which requires that the government detain certain non-citizens but does not mandate such detention for any particular length of time. Our holding is also consistent with the Supreme Court's decision in Demore, which turned on the brevity of the detention at issue.

Since Rodriguez II, no intervening changes in the law have affected our conclusions. Neither the Supreme Court nor our Circuit has had occasion to reexamine these issues, and the Third and Sixth Circuits have not changed the positions they adopted in Diop and Ly, respectively.

Moreover, district courts have relied on Rodriguez II in resolving numerous habeas petitions filed by immigration detainees.

Thus, Rodriguez II is law of the case and law of the circuit. As we recently explained, the “law of the case doctrine” provides that “a court will generally refuse to reconsider an issue that has already been decided by the same court or a higher court in the same case.” Likewise, pursuant to the “law of the circuit” rule,” “a published decision of this court constitutes binding authority which ‘must be followed unless and until overruled by a body competent to do so.’ ”

The “general rule” is that our decisions “at the preliminary injunction phase do not constitute the law of the case.” Because preliminary injunction decisions are often “made hastily and on less than a full record,” they “may provide little guidance as to the appropriate disposition on the merits.” However, “there is an exception to the general rule for ‘conclusions on pure issues of law.’ ”

The question resolved in Rodriguez II—whether non-citizens subject to prolonged detention under § 1226(c) are entitled to bond hearings—is a pure question of law. We interpreted the statute by applying the canon of constitutional avoidance, and were bound to do so by our prior precedent. The decision was not made “hastily”; it provided a “fully considered appellate ruling” on the legal issues.

2. The § 1225(b) Subclass

Section 1225(b) applies to “applicants for admission” who are stopped at the border or a port of entry, or who are “present in the United States” but “have not been admitted.” 8 U.S.C. § 1225(a)(1). The statute provides that asylum seekers “shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.” As to all other applicants for admission, the statute provides that “if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained” for removal proceedings.

Under DHS regulations, non-citizens detained pursuant to § 1225(b) are generally not eligible for release on bond. If there are “urgent humanitarian reasons or significant public benefit[s]” at stake, however, the Attorney General has discretion to temporarily parole such an individual into the United States, provided that the individual presents neither a danger nor a risk of flight. Because parole decisions under § 1182 are purely discretionary, they cannot be appealed to IJs or courts. This lack of review has proven especially problematic when immigration officers have denied parole
based on blatant errors: In two separate cases identified by the petitioners, for example, officers apparently denied parole because they had confused Ethiopia with Somalia. And in a third case, an officer denied parole because he had mixed up two detainees' files. As with § 1226(c), the government often cites § 1225(b)'s mandatory language to justify indefinite civil detention without an individualized determination as to whether the detainee would pose a danger or flight risk if released. Section 1225(b) subclass members have been detained for as long as 831 days, and for an average of 346 days each. These individuals apply for and receive relief from removal at very high rates: 94% apply, and of those who apply, 64% are granted relief. In illustrative cases identified by the petitioners, non-citizens fled to the United States after surviving kidnapping, torture, and murder of their family members in their home countries. Upon arrival, these individuals were detained under § 1225(b), and they remained in detention until the government granted their asylum applications hundreds of days later.

In Rodriguez II, we extended Casas and held that to avoid serious constitutional concerns, mandatory detention under § 1225(b), like mandatory detention under § 1226(c), must be construed as implicitly time-limited. Accordingly, “the mandatory provisions of § 1225(b) simply expire at six months, at which point the government’s authority to detain the alien shifts to § 1226(a), which is discretionary and which we have already held requires a bond hearing.”

In so holding, we recognized that many members of the § 1225(b) subclass are subject to the “entry fiction” doctrine, under which non-citizens seeking admission to the United States “may physically be allowed within its borders pending a determination of admissibility,” but “are legally considered to be detained at the border and hence as never having effected entry into this country.” Such non-citizens therefore “enjoy very limited protections under the United States constitution.” However, even if the majority of prolonged detentions under § 1225(b) are constitutionally permissible, “the Supreme Court has instructed that, where one possible application of a statute raises constitutional concerns, the statute as a whole should be construed through the prism of constitutional avoidance.” Section 1225(b) applies to several categories of lawful permanent residents who are not subject to the entry fiction doctrine but may be treated as seeking admission under 8 U.S.C. § 1101(a)(13)(C). Because those persons are entitled to due process protections under the Fifth Amendment, prolonged detention without bond hearings would raise serious constitutional concerns. We therefore construed the statutory scheme to require a bond hearing after six months of detention under § 1225(b).

The government now argues that “[d]espite years of discovery, petitioners have not identified any member of the Section 1225(b) subclass who is a [lawful permanent resident].” Petitioners represent that they have found lawful permanent residents who have been detained for more than six months under § 1225(b), although their submissions do not identify any specific individuals who fit that description. The question, however, is whether “one possible application of [the] statute raises constitutional concerns.” Because the government concedes that detention of lawful permanent residents under § 1225(b) is possible under § 1101(a)(13)(C), “the statute as a whole should be construed through the prism of constitutional avoidance.”

The government also argues that lawful permanent residents treated as seeking
admission are entitled to lesser due process protections than other lawful permanent residents. But the government has not provided any authority to support that proposition: The cases cited in the government’s brief address statutory and regulatory distinctions between lawful permanent residents treated as applicants for admission and other lawful permanent residents; they do not reflect any constitutional distinction between those groups.

Finally, the government argues that, instead of requiring bond hearings, we could avoid constitutional concerns by interpreting § 1225(b) not to apply to lawful permanent residents. This argument relies on an implausible construction of the statutes at issue. Section 1225(b) applies to “applicants for admission,” and § 1101 defines six categories of lawful permanent residents as “seeking an admission into the United States for purposes of the immigration laws.”

The Supreme Court’s decision in *Kwong Hai Chew v. Colding* is not to the contrary. Chew involved a pre-IIRIRA immigration regulation that applied to “excludable” non-citizens. Because the regulations were silent as to whether that category included lawful permanent residents returning from voyages abroad, the Court distinguished between the “exclusion” of newly arriving non-citizens and the “expulsion” of lawful permanent residents, thereby holding that the regulation did not authorize the Attorney General to detain arriving lawful permanent residents without hearings. Section 1101(a)(13)(C) forecloses an analogous construction of § 1225(b) because it provides that “applicants for admission” includes several groups of lawful permanent residents. In any event, the government’s alternative construction of § 1225(b) was never raised before the district court; the argument is therefore forfeited.

Accordingly, we adhere to *Rodriguez II*’s holding regarding the § 1225(b) subclass as law of the case and law of the circuit. The government’s attempts to re-litigate *Rodriguez II* are unavailing.

3. The § 1226(a) Subclass

Section 1226(a) authorizes detention “pending a decision on whether the alien is to be removed from the United States.” 8 U.S.C. § 1226(a). The statute expressly authorizes release on “bond of at least $1,500” or “conditional parole.” Following an initial custody determination by DHS, a non-citizen may apply for a review or redetermination by an IJ, and that decision may be appealed to the BIA. At these hearings, the detainee bears the burden of establishing “that he or she does not present a danger to persons or property, is not a threat to the national security, and does not pose a risk of flight.” “After an initial bond redetermination,” a request for another review “shall be considered only upon a showing that the alien’s circumstances have changed materially since the prior bond redetermination.” 8 C.F.R. § 1003.19(e). The government has taken the position that additional time spent in detention is not a “changed circumstance” that entitles a detainee to a new bond hearing.

Although § 1226(a) provides for discretionary, rather than mandatory, detention and establishes a mechanism for detainees to seek release on bond, non-citizens often face prolonged detention under that section. In an extreme case identified by the petitioners, a non-citizen with no criminal record entered the United States on a tourist visa and affirmatively applied for asylum, withholding of removal, and relief under the Convention Against Torture shortly after that visa expired. ICE detained him throughout the ensuing proceedings before the IJ, the
BIA, and the Ninth Circuit. At the time petitioners generated their report, he had been detained for 1,234 days with no definite end in sight.

The district court's decision regarding the § 1226(a) subclass was squarely controlled by our precedents. In Casas, we held that a non-citizen subjected to prolonged detention under § 1226(a) is entitled to a hearing to establish whether continued detention is necessary because he would pose a danger to the community or a flight risk upon release. Since deciding Casas, we have repeatedly affirmed its holding.

The government does not contest that Casas is the binding law of this circuit or that individuals detained under § 1226(a) are entitled to bond hearings. Instead, the government argues that § 1226(a) affords detainees the right to request bond hearings, so there is no basis for requiring the government to automatically provide bond hearings after six months of detention. This argument is foreclosed by Casas, which held that “ § 1226(c) must be construed as requiring the Attorney General to provide the alien with [a bond] hearing.” The record evinces the importance of Casas's holding on this point: Detainees, who typically have no choice but to proceed pro se, have limited access to legal resources, often lack English-language proficiency, and are sometimes illiterate. As a result, many class members are not aware of their right to a bond hearing and are poorly equipped to request one. Accordingly, we conclude that class members are entitled to automatic bond hearings after six months of detention. We address the other procedural requirements for these hearings in Section IV.B, infra.

4. The § 1231(a) Subclass

Section 1231(a) governs detention of non-citizens who have been “ordered removed.” 8 U.S.C. § 1231(a). The statute provides for mandatory detention during a ninety-day removal period. Id. § 1231(a)(2). Under the statute:

The removal period begins on the latest of the following:

(i) The date the order of removal becomes administratively final.

(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

(iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

The removal period may be extended beyond ninety days if a detainee “fails or refuses” to cooperate in his removal from the United States.

“If the alien does not leave or is not removed within the removal period,” he “shall be subject to supervision,” but detention is no longer mandatory. Rather, the Attorney General has discretion to detain certain classes of non-citizens and to impose conditions of release on others. Before releasing a detainee, the government must conclude that removal is “not practicable or not in the public interest,” that the detainee is “non-violent” and “not likely to pose a threat to the community following release,” and that the detainee “does not pose a significant flight risk” and is “not likely to violate the conditions of release.”
Here, the class is defined, in relevant part, as non-citizens who are detained “pending completion of removal proceedings, including judicial review.” The class therefore by definition excludes any detainee subject to a final order of removal.

Petitioners describe the § 1231(a) subclass as individuals detained under that section who have received a stay of removal from the BIA or a court. However, if a non-citizen has received a stay of removal from the BIA pending further administrative review, then the order of removal is not yet “administratively final.” The non-citizen has not been “ordered removed,” and the removal period has not begun, so § 1231(a) is inapplicable. Similarly, as long as a non-citizen's removal order is stayed by a court pending judicial review, that non-citizen is not subject to “the court's final order.” In such circumstances, § 1231(a) is, again, inapplicable.

Simply put, the § 1231(a) subclass does not exist. The district court's grant of summary judgment and permanent injunction are therefore reversed to the extent they pertain to individuals detained under § 1231(a).

C. Procedural Requirements

In addition to challenging the class members' entitlement to automatic bond hearings after six months of detention, the government objects to the district court's order regarding the burden and standard of proof at such hearings. The government also appeals the district court's ruling that IJs must consider alternatives to detention. Petitioners cross-appeal the district court's rulings that IJs are not required to consider the ultimate likelihood of removal, assess the total length of detention, or conduct periodic hearings at six-month intervals. We address each issue in turn.

1. Burden and Standard of Proof

The government argues that the district court erred in requiring the government to justify a non-citizen's detention by clear and convincing evidence, an intermediate burden of proof that is more than a preponderance of the evidence but less than proof beyond a reasonable doubt. As we noted in Rodriguez II, however, we are bound by our precedent in Singh, which held that “the government must prove by clear and convincing evidence that an alien is a flight risk or a danger to the community to justify denial of bond at a Casas hearing.”

In Singh, we explained that the “Supreme Court has repeatedly reaffirmed the principle that ‘due process places a heightened burden of proof on the State in civil proceedings in which the individual interests at stake ... are both particularly important and more substantial than mere loss of money.’ ” In the civil commitment context, for example, the Supreme Court has recognized “the state's interest in committing the emotionally disturbed,” but has held that “the individual's interest in not being involuntarily confined indefinitely ... is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence.” Drawing on this jurisprudence, Singh concluded that “a clear and convincing evidence standard of proof provides the appropriate level of procedural protection” in light of “the substantial liberty interest at stake.”

The government now contends that Singh was wrongly decided. However, it is well established that only a full court, sitting en banc, may overrule a three-judge panel decision. Right or wrong, we are bound to
follow Singh unless intervening Supreme Court authority is to the contrary.

2. Restrictions Short of Detention

The government also argues that the district court erred in “determin [ing] that IJs are required to consider the use of alternatives to detention in making bond determinations.” As the district court's order states, however, IJs “should already be considering restrictions short of incarceration.” Indeed, *Rodriguez II* affirmed a preliminary injunction that directed IJs to “release each Subclass member on reasonable conditions of supervision, including electronic monitoring if necessary, unless the government” satisfied its burden of justifying continued detention.

The government's objections to this requirement are unpersuasive. First, the government relies on *Demore* for the proposition that the government is not required “to employ the least burdensome means” of securing immigration detainees. But *Demore* applies only to “brief period[s]” of immigration detention. “When the period of detention becomes prolonged, ‘the private interest that will be affected by the official action’ is more substantial; greater procedural safeguards are therefore required.” Further, the injunction does not require that IJs apply the least restrictive means of supervision; it merely directs them to “consider” restrictions short of detention. The IJ ultimately must decide whether any restrictions short of detention would further the government's interest in continued detention.

Second, the government argues that IJs are not empowered to impose conditions of release. However, federal regulations authorize IJs to “detain the alien in custody, release the alien, and determine the amount of bond, if any, under which the respondent may be released” and to “ameliorat[e] the conditions” of release imposed by DHS. Accordingly, if DHS detains a non-citizen, an IJ is already empowered to “ameliorat[e] the conditions” by imposing a less restrictive means of supervision than detention.

Finally, the government argues that IJs lack the resources to engage in continuous monitoring of released individuals. However, the government fails to cite any law or evidence indicating that IJs, rather than DHS or ICE agents, would be responsible for implementing the conditions of release. Moreover, the record indicates that Congress authorized and funded an ICE alternatives-to-detention program in 2002, and DHS has operated such a program, called the Intensive Supervision and Appearance Program, since 2004. It is abundantly clear that IJs can and do consider conditions of release on bond when determining whether the government's interests can be served by detention only, and we conclude that DHS will administer any such conditions, regardless of whether they are imposed by DHS in the first instance or by an IJ upon later review.

3. Length of Detention and Likelihood of Removal

In their cross-appeal, petitioners argue that the district court erred in failing to require IJs to consider the length of a non-citizen's past and likely future detention and, relatedly, the likelihood of eventual removal from the United States. In our prior decisions, we have not directly addressed whether due process requires consideration of the length of future detention at bond hearings. We have noted, however, that “the due process analysis changes as ‘the period of ... confinement grows,’ ” and that longer detention requires more robust procedural protections. Accordingly, a non-citizen detained for one or more years is entitled to greater solicitude
than a non-citizen detained for six months. Moreover, Supreme Court precedent provides that “detention incidental to removal must bear a reasonable relation to its purpose.” At some point, the length of detention could “become[ ] so egregious that it can no longer be said to be ‘reasonably related’ to an alien’s removal.” An IJ therefore must consider the length of time for which a non-citizen has already been detained.

As to the likely duration of future detention and the likelihood of eventual removal, however, those factors are too speculative and too dependent upon the merits of the detainee's claims for us to require IJs to consider during a bond hearing. We therefore affirm the district court's ruling that consideration of those factors “would require legal and political analyses beyond what would otherwise be considered at a bond hearing” and is therefore not appropriate. We note that Zadvydas and its progeny require consideration of the likelihood of removal in particular circumstances, but we decline to require such analysis as a threshold inquiry in all bond hearings.

4. Periodic Hearings

The record shows that many class members are detained well beyond the six-month mark: Almost half remain in detention at the twelve-month mark, one in five at eighteen months, and one in ten at twenty-four months. Petitioners argue that due process requires additional bond hearings at six-month intervals for class members who are detained for more than six months after their initial bond hearings. We have not had occasion to address this issue in our previous decisions, and it has been a source of some contention in the district courts.

The district court here did not address this proposed requirement. For the same reasons the IJ must consider the length of past detention, we hold that the government must provide periodic bond hearings every six months so that noncitizens may challenge their continued detention as “the period of... confinement grows.”

V. Conclusion

This decision flows from the Supreme Court's and our own precedent bearing on the constitutional implications of our government's prolonged civil detention of individuals, many of whom have the legal right to live and work in our country. By upholding the district court's order that Immigration Judges must hold bond hearings for certain detained individuals, we are not ordering Immigration Judges to release any single individual; rather we are affirming a minimal procedural safeguard—a hearing at which the government bears only an intermediate burden of proof in demonstrating danger to the community or risk of flight—to ensure that after a lengthy period of detention, the government continues to have a legitimate interest in the further deprivation of an individual's liberty. Immigration Judges, a specialized and experienced group within the Department of Justice, are already entrusted to make these determinations, and need not release any individual they find presents a danger to the community or a flight risk after hearing and weighing the evidence. Accordingly, we affirm all aspects of the district court's permanent injunction, with three exceptions: We reverse as to the § 1231(a) subclass, and we hold that IJs must consider the length of detention and provide bond hearings every six months. We hereby remand to the district court to enter a revised injunction consistent with our instructions.
AFFIRMED IN PART; REVERSED IN PART; REMANDED.
President Donald Trump has made immigration enforcement a top priority. Two immigration-enforcement cases looked likely to have a big impact on the Trump administration’s plans. Both were argued before the confirmation of Justice Neil Gorsuch. Today, the Supreme Court, apparently deadlocked, ordered reargument of the cases.

One of the cases, Jennings v. Rodriguez, involved immigration detention. Detained immigrants ordinarily have been eligible to post bond and be allowed release from custody. In a January 25, 2017, executive order, among numerous immigration-enforcement initiatives, Trump announced an end to the “catch and release” of immigrants facing removal from the United States. Detention without bond thus became official immigration-enforcement policy.

Generally speaking, criminal and civil detention of U.S. citizens is subject to basic constitutional safeguards. Such a rights-based system, however, fits uncomfortably into the much more limited constitutional protections historically offered to noncitizens. Reflecting this tension, the Supreme Court’s immigration-detention decisions are not altogether consistent.

In a class-action challenge to immigrant detention, Jennings v. Rodriguez raised the question whether immigrants, like virtually any U.S. citizen placed in criminal or civil detention, must be guaranteed a bond hearing. The U.S. Court of Appeals for the 9th Circuit affirmed a district court injunction requiring bond hearings every six months for immigrant detainees.

Indefinite detention without a hearing and possible release is difficult to justify as a matter of constitutional law. At the same time, however, some justices at oral argument expressed concern that the 9th Circuit had acted more like a legislature than a court in mandating a bond hearing every six months. In the end, the court apparently needed a tiebreaking vote and will address immigration detention next term.

Another case that the court did not decide involved criminal removal. In the last few years, the Supreme Court has decided a steady number of criminal-removal cases. In light of the Trump administration’s stated emphasis on the removal of “criminal aliens,” we will likely see more criminal removal cases in the future. Most of the removal cases that have recently come before the court, including Esquivel-Quintana v. Sessions decided earlier this term, have raised ordinary
issues of statutory interpretation and administrative deference.

Sessions v. Dimaya instead was a constitutional challenge to a criminal-removal provision in the immigration laws, which historically have been largely immune from judicial review. The court appears to be moving toward applying ordinary constitutional norms to the immigration laws. Earlier this term, for example, the court in Sessions v. Santana-Morales held that gender distinctions favoring women over men in the derivative-citizenship provisions of the immigration laws violated the Constitution’s equal protection guarantee.

A noncitizen, including a lawful permanent resident, who is convicted of an “aggravated felony” is subject to mandatory removal. The Immigration and Nationality Act defines “aggravated felonies” expansively. That definition incorporates 18 U.S.C. §16(b), known as the “residual clause,” which defines a “crime of violence” to encompass “any … offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”

James Garcia Dimaya, who immigrated lawfully from the Philippines in 1992, has two residential burglary convictions; neither involved violence. Based on the convictions, the immigration court and the Board of Immigration Appeals ordered Dimaya removed from the United States. The U.S. Court of Appeals for the 9th Circuit found that Section 16(b) was unconstitutionally vague and vacated the order. To reach that conclusion, the 9th Circuit relied on the Supreme Court’s 2015 opinion in Johnson v. United States, in which court found the Armed Career Criminal Act’s similarly worded definition of “violent felony” was so vague as to violate due process.

The application of the void-for-vagueness doctrine to the immigration laws apparently divided the court. At oral argument, the justices seemed to agree that the court should review immigration-removal provisions under the standard due process test for vagueness. However, they appeared to be divided as to whether the case at hand was distinguishable from Johnson and thus whether Section 16(b) is unconstitutionally vague.

For the last decade, immigration cases have been a bread-and-butter part of the Supreme Court’s docket. The Supreme Court has slowly but surely moved immigration law toward the constitutional mainstream. We will have to wait until the next term to see if the court continues that trend with respect to immigrant detention and criminal removal.
The Supreme Court on Monday agreed to hear a Justice Department appeal of a 2015 lower-court decision requiring bail hearings for immigrants who have been in detention for at least six months awaiting deportation proceedings.

However, the American Civil Liberties Union—which won a lower-court ruling requiring bail hearings after six months—said recently disclosed hearing records show a 2003 high-court precedent the Justice Department cited to bolster its case was partly based on government-supplied information that understated the length of immigration detentions.

It isn’t clear whether a difference in the timeframe would have affected the outcome of the 2003 case. But critics of the government’s immigration policies say that prehearing detention with no chance for bail becomes less reasonable the longer it lasts.

The 2003 case, Demore v. Kim, upheld by a 5-4 vote the government’s practice of holding without bail immigrants—even those who are permanent U.S. residents with “green cards”—who became eligible for deportation because they committed a crime.

The majority opinion in that case stressed the “very limited” length of no-bail detentions at issue, relying on figures showing the average detention in 2001 was 47 days, while the 15% of immigrants who appeal a deportation order were in detention for about 4½ months. The figures were provided by the Executive Office for Immigration Review, which conducts the hearings.

The ACLU, which worked on the 2003 case, said the actual average detention time in 2001 was 2½ half weeks longer. “The real number is 65 days,” said Michael Tan, an ACLU attorney. The group learned of issues with statistics in the earlier case through a Freedom of Information Act request filed during the current litigation.

Mr. Tan said the government reached the lower number by factoring in categories of aliens that an immigration judge was required to deport—cases that are resolved quickly because there are no issues for the hearing to resolve. Mr. Tan also said the government counted as completed cases that weren’t over but only transferred— with the immigrant still in detention—to another immigration court.

Justice Department spokesman Patrick Rodenbush said officials were re-examining the numbers provided in the Kim case, but
after an initial review, “we feel our information to the court was appropriate.”

A 2012 Justice Department inspector general report criticized the Executive Office for Immigration Review for reporting its performance in ways that are “incomplete and overstate the actual accomplishments” of its courts.

Theodore Olson, who as solicitor general argued the government’s position in 2003, said he had little recollection of the case and didn’t remember any internal dispute over the length of detentions. “Statistics like that would presumably have come from the agency or agencies responsible,” Mr. Olson said. It would be “highly unlikely” for lawyers in his office to delve “into such statistics at a granular level.”

David Strauss, a law professor at the University of Chicago, said the possibility of error in a solicitor general brief was troubling because unlike other litigants, the office often introduces new information at the Supreme Court level.

“What the (solicitor general) says in its brief is not subject to the usual testing the legal system provides for its claims,” Mr. Strauss said. “The court is really counting on them to get it right because there’s no other check.”

The court will hear the case on bail hearings in its next term, which begins in October.

The Kim case marks the second time in recent years that a records disclosure suggested the Justice Department provided incorrect information to the Supreme Court regarding immigration practices.

In 2012, the department told the court it had incorrectly stated in 2009 that it “facilitated” the return to the U.S. of deported aliens who later win their immigration appeals. The government then altered its practice to conform to what it told the court it already had been doing, government and immigration lawyers say.

Last year, the Ninth U.S. Circuit Court of Appeals in San Francisco held the Constitution’s due-process guarantee requires a bail hearing where detained immigrants can argue they will show up later for their date in immigration court and pose no risk to public safety. The Obama administration appealed that decision to the Supreme Court.

In deciding the class-action suit, the Ninth Circuit relied on both the Kim precedent and an earlier case holding that immigrants detained indefinitely are entitled to a bail hearing after six months. The appeals court observed that affected immigrants “spend, on average, 404 days in immigration detention,” which is considered an administrative matter rather than a form of punishment.
The U.S. Supreme Court on Monday decided to hear a case over whether certain immigrants are entitled to automatic bond hearings following six months of detention, adding another layer to the national debate over immigrant detention.

The high court granted certiorari to *Jennings v. Rodriguez*, in which the Ninth Circuit ruled, among other things, that immigrants are entitled to bond hearings after six months if they were detained under a provision allowing the government to hold immigrants during their deportation proceedings. As is customary, the justices did not explain their reasoning for taking up the case.

In its March 25 petition, the U.S. Department of Justice had strongly urged the justices to review the October ruling from the Ninth Circuit. The agency claimed the appeals court’s “wholesale revision” of the law on the detention of immigrants during deportation proceedings “oversteps the proper judicial role.”

The government also argued that the court’s decision gets in the way of the Department of Homeland Security’s ability to control U.S. borders.

But Alejandro Rodriguez, a green card holder representing a class of noncitizens challenging their detention, had asked the justices not to hear the appeal.

“The government’s contention that certiorari is warranted to preserve its ability to control the borders and reduce the risk of terrorism is hyperbolic and unsupported by anything in the decision below or the voluminous record compiled in the district court,” Rodriguez had argued.

If the high court were to affirm the Ninth Circuit, the impact of such a ruling could be significant, according to Denise Gilman, the director of the immigration clinic at the University of Texas School of Law. Such a decision would mean "whole swaths of the country" would be in a situation where people held under mandatory detention provisions would have a right to detention review, she previously told Law360.

However, if the justices upheld the Ninth Circuit, the already overburdened immigration courts across the country could find themselves overwhelmed with having to set new hearings, according to Holly Cooper, the associate director of the immigration law clinic at University of California Davis School of Law, who submitted an amicus brief in the *Rodriguez* appeal.

"It would be enormous if every circuit adopted this ruling," Cooper said, noting that
"immigration courts would probably almost buckle with the overwhelming need to set new hearings."

The issue of immigrant detention has also popped up in other courts, such as the Second Circuit. The appeals court held in October that the government cannot indefinitely detain immigrants awaiting deportation proceedings following criminal offenses, saying they must be given a bail hearing within six months of being taken into custody.

And in another case, the federal government is asking the Ninth Circuit to overturn a ruling that found the Obama administration’s detention of immigrant families violated a 1997 agreement that set national standards for dealing with undocumented children.

The federal petitioners are represented by Solicitor General Donald B. Verrilli Jr.

The respondents have been represented in the case by Ahilan Thevanesan Arulanantham of the ACLU Foundation of Southern California, Sean Ashley Commons of Sidley Austin LLP and others.

The case is David Jennings v. Alejandro Rodriguez, case number 15-1204, in the U.S. Supreme Court.
“Courts Say Detained Non-Citizens Have The Right To Bond Hearings”

NPR
Richard Gonzales
October 29, 2015

At the same time that immigration is a hot-button issue on the presidential campaign trail, in the courts, immigration advocates are chipping away at the government's authority to detain non-citizens indefinitely.

Two rulings issued this week from the Second Circuit Court of Appeals in New York and the Ninth Circuit Court of Appeals in California say that detainees have the right to a bond hearing while they are fighting their deportation cases.

The practical impact? Thousands of immigrants, legal or not, who were held for indefinite periods now have the right to a release hearing where it will be up to an immigration judge to decide whether they are dangerous or present a flight risk. The courts' rulings apply in the states covered by those circuits.

Ever since 1996, when Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act, the government has detained broad categories of non-citizens for prolonged periods and denied them the right to challenge their detention.

The constitutionality of that section of the law was first challenged in 2003. Since then, there's been a flurry of court rulings.

"Every circuit [appeals] court has ruled that it is unlawful to hold a detainee without that person having the possibility of a hearing," said Ahilan Arulanantham, deputy legal director of the ACLU of Southern California.

The Ninth Circuit, in Rodriguez v. Robbins, ruled that the government has to justify "by clear and convincing evidence that an alien is a flight risk or a danger to the community to justify denial of bond." It also ruled the government has to consider alternatives to detention such as electronic monitoring devices. Finally, it said detainees should get a bond hearing every six months.

"This decision substantially decreases the likelihood people will get lost in the system for years on end because there will be some examination of why the person is still locked away. It provides them with an elemental component of due process," said Arulanantham.

In a more limited ruling, the Second Circuit in New York, in a case called Lora v. Shanahan adopted what it called "a bright-line rule" that detainees must get a hearing within six months of his or her detention.

Two other appellate courts, the Third and the Sixth Circuits, have ruled that a detainee
must file a habeas petition or a lawsuit before getting a hearing.

With respect to the Ninth Circuit ruling, a spokesman for U.S. Immigration and Customs Enforcement said his agency "is aware of the judges' order and reviewing it."
**Sessions v. Dimaya**  
15-1498

**Ruling Below:** Dimaya v. Lynch, 803 F.3d 1110 (9th Cir. 2015)

Petitioner James Dimaya seeks review of the Board of Immigration’s decision that his convictions for first-degree burglary qualify as crimes of violence under 8 U.S.C. § 1101 (a)(43)(F). Based on the 2015 Johnson v. United States ruling, he claims that the definition of “violent crime” under which he was convicted is vague, and therefore unconstitutional.

The Court of Appeals affirms the right of a noncitizen to bring a challenge of vagueness to the definition of a crime of violence. The Court ruled that the language under which Dimaya was convicted is unconstitutionally vague.

**Question Presented:** Whether 18 U.S.C. 16(b), as incorporated into the Immigration and Nationality Act's provisions governing an alien's removal from the United States, is unconstitutionally vague.

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**Loretta Lynch, Attorney General, v. James Dimaya.**

United States Court of Appeal for the Ninth Circuit

Decided on October 19, 2015

[Excerpt; some citations and footnotes omitted]

**OPINION**

REINHARDT, Circuit Judge:

Petitioner James Garcia Dimaya seeks review of the Board of Immigration Appeals’ (BIA) determination that a conviction for burglary under California Penal Code Section 459 is categorically a “crime of violence” as defined by 8 U.S.C. § 1101(a)(43)(F), a determination which rendered petitioner removable for having been convicted of an aggravated felony. During the pendency of petitioner’s appeal, the United States Supreme Court decided *Johnson v. United States*, 135 S. Ct. 2551 (2015), which held that the Armed Career Criminal Act’s (“ACCA”) so-called “residual clause” definition of a “violent felony” is unconstitutionally vague. In this case, we consider whether language similar to ACCA’s residual clause that is incorporated into § 1101(a)(43)(F)’s definition of a crime of violence is also void for vagueness. We hold that it suffers from the same indeterminacy as ACCA’s residual clause and, accordingly, grant the petition for review.

I

Petitioner, a native and citizen of the Philippines, was admitted to the United States in 1992 as a lawful permanent resident.
In both 2007 and 2009, petitioner was convicted of first-degree residential burglary under California Penal Code section 459 and sentenced each time to two years in prison. If a non-citizen is convicted of an aggravated felony, he is subject to removal. 8 U.S.C. § 1227(a)(2)(A)(iii). Citing petitioner’s two first-degree burglary convictions, the Department of Homeland Security (“DHS”) charged that petitioner was removable because he had been convicted of a “crime of violence . . . for which the term of imprisonment [was] at least one year”—an aggravated felony under 8 U.S.C. § 1101(a)(43)(F). That statute defines a “crime of violence” by reference to 18 U.S.C. § 16, which provides the following definition:

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

The Immigration Judge (IJ) agreed with DHS that first degree burglary in California is a crime of violence. Citing § 16(b) and United States v. Becker, the IJ explained that “unlawful entry into a residence is by its very nature an offense where is apt to be violence [sic], whether in the efforts of the felon to escape or in the efforts of the occupant to resist the felon.” Because the charging documents for each conviction alleged an unlawful entry, and because the term of imprisonment for each conviction was greater than one year, the IJ determined that these convictions were crimes of violence. On the basis of this conclusion, the IJ held that petitioner was removable and ineligible for any relief. The BIA dismissed petitioner’s appeal on the same ground. Citing § 16(b) and Becker, the BIA concluded that “[e]ntering a dwelling with intent to commit a felony is an offense that by its nature carries a substantial risk of the use of force,” and therefore affirmed the IJ’s holding that petitioner was convicted of a crime of violence.

Petitioner filed a timely petition with this Court for review of the BIA’s decision. After the parties argued this case, the United States Supreme Court decided Johnson and, because the definition of a crime of violence that the BIA relied on in this case is similar to the unconstitutional language in ACCA’s residual clause, we ordered supplemental briefing and held a supplemental oral argument regarding whether § 16(b), as incorporated into the INA, is also unconstitutionally vague. We have jurisdiction under 8 U.S.C. § 1252(a)(2)(D) to review questions of law, including whether language in the immigration statutes is void for vagueness. See Alphonsus v. Holder, 705 F.3d 1031, 1036–37 (9th Cir. 2013). That question, as a pure question of law, receives de novo review from this Court. Aguilar-Ramos v. Holder, 594 F.3d 701, 704 (9th Cir. 2010).

II

The Fifth Amendment’s Due Process Clause “requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that
does not encourage arbitrary and discriminatory enforcement.” *Alphonsus*, 705 F.3d at 1042 (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). Although most often invoked in the context of criminal statutes, the prohibition on vagueness also applies to civil statutes, including those concerning the criteria for deportation. *Jordan v. De George*, 341 U.S. 223, 231 (1951) (“Despite the fact that this is not a criminal statute, we shall nevertheless examine the application of the vagueness doctrine to this case. We do this in view of the grave nature of deportation.”); see also *A.B. Small Co. v. Am. Sugar Ref. Co.*, 267 U.S. 233, 239 (1925) (“The defendant attempts to distinguish [prior vagueness] cases because they were criminal prosecutions. But that is not an adequate distinction. The ground or principle of the decisions was not such as to be applicable only to criminal prosecutions.”).

Previously, we have recognized the vagueness doctrine’s applicability in the context of withholding of removal “because of the harsh consequences attached to . . . denial of withholding of removal.” *Alphonsus*, 705 F.3d at 1042 (citing *Jordan*, 341 U.S. at 230–31). In this case, Petitioner challenges a statute as unconstitutionally vague in the context of denial of cancellation of removal.

For due process purposes, this context is highly analogous to denial of withholding of removal because both pose the harsh consequence of almost certain deportation. Under withholding of removal, a non-citizen who is otherwise removable cannot be deported to his home country if he establishes that his “life or freedom would be threatened in that country because of [his] race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1231(b)(3)(A). Under cancellation of removal, immigration authorities may cancel the removal of a lawful permanent resident who satisfies certain criteria based on length of residency, good behavior, and exceptional hardship. *Id.* § 1229b(b)(1). Non-citizens who commit certain criminal offenses are ineligible for these forms of relief. See *id.* §§ 1231(b)(3)(B)(ii), 1229b(b)(1)(C). As with denial of withholding of removal, then, denial of cancellation of removal renders an alien ineligible for relief, making deportation “a virtual certainty.” *United States v. Bonilla*, 637 F.3d 980, 984 (9th Cir. 2011).

The government argues that our circuit’s reliance on *Jordan* “is misguided as *Jordan* did not authorize vagueness challenges to deportation statutes.” We find this suggestion baffling. *Jordan* considered whether the term “crime involving moral turpitude” in section 19(a) of the Immigration Act of 1917, a type of offense that allowed for a non-citizen to “be taken into custody and deported,” was void for vagueness. 341 U.S. at 225–31 (emphasis added). In considering this challenge, the Court explicitly rejected the argument that the vagueness doctrine did not apply. *Id.* at 231. The government also argues that subsequent Supreme Court decisions rejected due process challenges to various immigration statutes. See *Marcello v. Bonds*, 349 U.S. 302, 314 (1955); *Galvan v. Press*, 347 U.S. 522, 530–31 (1954); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–91 (1952). None of these cases, however, suggests that the Due Process Clause does not apply to deportation proceedings. Nor could they, for it “is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.” *Demore v. Kim*, 538 U.S. 510, 523 (2003) (internal quotation marks omitted).
As the Supreme Court recognized in *Jordan*, a necessary component of a non-citizen’s right to due process of law is the prohibition on vague deportation statutes. Recently, the Supreme Court noted the need for “efficiency, fairness, and predictability in the administration of immigration law.” *Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015). Vague immigration statutes significantly undermine these interests by impairing non-citizens’ ability to “anticipate the immigration consequences of guilty pleas in criminal court.” Id. (internal quotation marks omitted); see also *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010) (“[A]ccurate legal advice for noncitizens accused of crimes has never been more important” because “deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.” (footnote omitted)). For these reasons, we reaffirm that petitioner may bring a void for vagueness challenge to the definition of a “crime of violence” in the INA.

III

To understand *Johnson*’s effect on this case, it is helpful to view §16(b), as incorporated into the INA, alongside the residual clause at issue in *Johnson*. The INA provides for the removal of non-citizens who have been “convicted of an aggravated felony.” 8 U.S.C. § 1227(a)(2)(A)(iii). Its definition of an aggravated felony includes numerous offenses, including “a crime of violence (as defined in section 16 of Title 18 . . . ).” 8 U.S.C. § 1101(a)(43)(F). The subsection of 18 U.S.C. § 16 that the BIA relied on in this case defines a crime of violence as an “offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” 18 U.S.C. § 16(b).

Had Congress written out the relevant definition in full instead of relying on cross-referencing, a lawful permanent resident would be removable if “convicted of an offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense” (emphasis added). The language in ACCA that *Johnson* held unconstitutional is similar. The ACCA provision defined a “violent felony” as “any crime punishable by imprisonment for a term exceeding one year [i.e., a felony] . . . that . . . involves conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. § 924(e)(2)(B)(ii) (emphasis added).

Importantly, both the provision at issue here and ACCA’s residual clause are subject to the same mode of analysis. Both are subject to the categorical approach, which demands that courts “look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner’s crime.” *Leocal v. Ashcroft*. Specifically, courts considering both § 16(b) and the residual clause must decide what a “‘usual or ordinary’ violation” of the statute entails and then determine how great a risk of injury that “ordinary case” presents.

In *Johnson*, the Supreme Court recognized two features of ACCA’s residual clause that “conspire[d] to make it unconstitutionally vague.” 135 S. Ct. at 2557. First, the Court explained, the clause left “grave uncertainty” about “deciding what kind of conduct the ‘ordinary case’ of a crime involves.” That is, the provision “denie[d] fair notice to defendants and invite[d] arbitrary enforcement by judges” because it “tie[d] the
judicial assessment of risk to a judicially imagined ‘ordinary case’ of a crime, not to real-world facts or statutory elements.” Second, the Court stated, ACCA’s residual clause left “uncertainty about how much risk it takes for a crime to qualify as a violent felony.” By combining these two indeterminate inquiries, the Court held, “the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates.” On that ground it held the residual clause void for vagueness. The Court’s reasoning applies with equal force to the similar statutory language and identical mode of analysis used to define a crime of violence for purposes of the INA. The result is that because of the same combination of indeterminate inquiries, § 16(b) is subject to identical unpredictability and arbitrariness as ACCA’s residual clause. In sum, a careful analysis of the two sections, the one at issue here and the one at issue in Johnson, shows that they are subject to the same constitutional defects and that Johnson dictates that § 16(b) be held void for vagueness.

A

In Johnson, the Supreme Court condemned ACCA’s residual clause for asking judges “to imagine how the idealized ordinary case of the crime subsequently plays out.” To illustrate its point, the Court asked rhetorically whether the “ordinary instance” of witness tampering involved “offering a witness a bribe” or instead “threatening a witness with violence.”

As with ACCA’s residual clause, the INA’s crime of violence provision requires courts to “inquire whether ‘the conduct encompassed by the elements of the offense, in the ordinary case, presents’” a substantial risk of force. We see no reason why this aspect of Johnson would not apply here, and indeed the government concedes that it does. As with the residual clause, the INA’s definition of a crime of violence at issue in this case offers “no reliable way to choose between these competing accounts” of what a crime looks like in the ordinary case.

B

In many circumstances, of course, statutes require judges to apply standards that measure various degrees of risk. The vast majority of those statutes pose no vagueness problems because they “call for the application of a qualitative standard such as ‘substantial risk’ to real-world conduct.” The statute at issue in Johnson was not one of those statutes, however. Nor is the provision at issue here. If the uncertainty involved in describing the “ordinary case” of a crime was not enough, its combination with the uncertainty in determining the degree of risk was. ACCA’s violent felony definition requires judges to apply “an imprecise ‘serious potential risk’ standard . . . to [the] judge-imagined abstraction” of a crime in the ordinary case. The same is equally true of the INA’s definition of a crime of violence at issue here. Section 16(b) gives judges no more guidance than does the ACCA provision as to what constitutes a substantial enough risk of force to satisfy the statute. Accordingly, Johnson’s holding with respect to the imprecision of the serious potential risk standard is also clearly applicable to § 16(b). As with ACCA’s residual clause, § 16(b)’s definition of a crime of violence, combines “indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as” a crime of violence.
Notwithstanding the undeniable identity of the constitutional defects in the two statutory provisions, the government and dissent offer several unpersuasive arguments in an attempt to save the INA provision at issue in this case. First, the government and dissent argue that the Supreme Court found ACCA’s standard to be arbitrary in part because the residual clause “force[d] courts to interpret ‘serious potential risk’ in light of the four enumerated crimes” in the provision, crimes which are “far from clear in respect to the degree of risk each poses.” It is true that, after the Court set forth its holding in Johnson, it cited the provision’s four enumerated offenses in responding to the government’s argument that the Court’s holding would cast doubt on the many criminal statutes that include language similar to the indeterminate term “serious potential risk.” In doing so, however, it stated that while the listed offenses added to the uncertainty, the fundamental reason for the Court’s holding was the residual clause’s “application of the ‘serious potential risk’ standard to an idealized ordinary case of the crime.” In short, this response clearly reiterated that what distinguishes ACCA’s residual clause from many other provisions in criminal statutes was, consistent with its fundamental holding, the use of the “ordinary case” analysis. Johnson therefore made plain that the residual clause was void for vagueness in and of itself for the reasons stated in reaching its decision, and not because of the clause’s relation to the four listed offenses.

Next, the government argues that ACCA’s residual clause requires courts to consider the risk that would arise after completion of the offense, and that § 16(b) applies only to violence occurring “in the course of committing the offense,” 18 U.S.C. § 16(b). First, we doubt that this phrase actually creates a distinction between the two clauses. For example, we have consistently held that California’s burglary statute (the very statute at issue in this case) is a crime of violence for the purposes of the INA precisely because of the risk that violence will ensue after the defendant has committed the acts necessary to constitute the offense. By the time the risk of physical force against an occupant arises, however, the defendant has frequently already satisfied the elements of the offense of burglary under California law. More important, even if such a distinction did exist, it would not save the INA’s definition of a crime of violence from unconstitutionality. The Court, in Johnson, held ACCA’s residual clause to be unconstitutionally vague because it combined the indeterminate inquiry of “how to measure the risk posed by a crime” in the ordinary case with “indeterminacy about how much risk it takes for the crime to qualify as a violent felony.” This reasoning applies equally whether the inquiry considers the risk of violence posed by the commission and the aftereffects of a crime, or whether it is limited to consideration of the risk of violence posed by acts necessary to satisfy the elements of the offense.

The government also argues that § 16(b) has not generated the same degree of confusion among courts that ACCA’s residual clause generated. It notes that, in contrast to the five residual clause cases that the Supreme Court has decided in addition to Johnson, the Court has decided only a single case interpreting section 16(b). That the Supreme Court has decided more residual clause cases than § 16(b) cases, however, does not indicate that it believes the latter clause to be any more capable of consistent application. We can discern very little regarding he merits of an
issue from the composition of the Supreme Court’s docket. The Court has repeatedly indicated that a denial of certiorari means only that, for one reason or another which is seldom disclosed, and not infrequently for conflicting reasons which may have nothing to do with the merits and certainly may have nothing to do with any view of the merits taken by a majority of the Court, there were not four members of the Court who thought the case should be heard.

Moreover, the Supreme Court in recent years has decided substantially more federal criminal appeals than immigration appeals. The Court’s history of deciding ACCA residual clause cases in greater numbers than INA crime of violence cases is thus consistent with its greater interest in federal criminal cases than in immigration cases. In fact, over this period the ratio of federal criminal cases to immigration cases significantly exceeds the ratio of ACCA residual clause cases to INA crime of violence cases on which the government relies.

IV

In Johnson, the Supreme Court held that ACCA’s residual clause “produces more unpredictability and arbitrariness than the Due Process Clause tolerates” by “combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony.” Although the government can point to a couple of minor distinctions between the text of the residual clause and that of the INA’s definition of a crime of violence, none undermines the applicability of Johnson’s fundamental holding to this case. As with ACCA, section 16(b) (as incorporated in 8 U.S.C. §1101(a)(43)(F)) requires courts to 1) measure the risk by an indeterminate standard of a “judicially imagined ‘ordinary case,’” not by real world-facts or statutory elements and 2) determine by vague and uncertain standards when a risk is sufficiently substantial. Together, under Johnson, these uncertainties render the INA provision unconstitutionally vague.

We GRANT the petition for review and REMAND to the BIA for further proceedings consistent with this opinion.

CALLAHAN, Circuit Judge, dissenting:

Contrary to the majority’s perspective, the Supreme Court’s opinion in Johnson v. United States, 135 S. Ct. 2551 (2015), does not infect 18 U.S.C. § 16(b) —or other statutes—with unconstitutional vagueness. Rather, the Supreme Court carefully explained that the statute there in issue, a provision of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B), is unconstitutionally vague for two specific reasons: the clause (1) “leaves grave uncertainty about how to estimate the risk posed by a crime”; and (2) “leaves uncertainty about how much risk it takes for a crime to qualify as a violent crime.” Id. at 2557–58. In contrast, §16(b), as it has been interpreted by the Supreme Court and the Ninth Circuit, has neither of these shortcomings. The majority’s contrary conclusion fails to appreciate the purpose of § 16(b), elevates the Supreme Court’s reference to “ordinary cases” from an example to a rule, and ignores the Court’s
statement that it was not calling other statutes into question (which explains why the Court did not even mention *Leocal v. Ashcraft*, 543 U.S. 1 (2004)). Accordingly, I dissent.

Our criminal and immigration laws are not as simple as the majority opinion implies. Accordingly, I first describe the purpose of § 16 and how courts have interpreted the statute, before reviewing the Supreme Court’s decision in *Johnson*, and concluding that the twin concerns expressed by the Supreme Court in *Johnson* do not infect § 16(b).

I.

Title 18 U.S.C. § 16 contains two distinct definitions of “crime of violence,” with distinct purposes, effects, and judicial pedigrees. Subsection (a) defines “crime of violence” as “an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another.” (emphasis added). Subsection (b) sets forth a distinct definition that covers offenses that are not within subsection (a)’s definition. It states that “crime of violence” means “any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” It follows that an offense that is a “crime of violence” under subsection (a) also meets the criteria in subsection (b), but that subsection (b) covers offenses that do not meet the criteria in subsection (a). These subsections serve different functions with different consequences.

An appreciation of the differences between the subsections and their roles informs my understanding of the Supreme Court’s opinions in *Descamps v. United States*, 133 S. Ct. 2276 (2013), and *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013). Although the terms “crime of violence,” “violent felony,” and “aggravated felonies” may appear to be synonymous to a lay person, courts have recognized that, as used in their statutory contexts, they are distinct terms of art covering distinct acts with different legal consequences.

A.

In *Descamps*, the Government sought an enhancement of Descamps’ sentence under the ACCA, 18 U.S.C. § 924(e), on the basis that his California conviction for burglary was a “violent felony.” *Descamps*, 133 S. Ct. at 2281–82. In *Taylor v. United States*, 495 U.S. 575 (1990), the Supreme Court had established a “rule for determining when a defendant’s prior conviction counts as one of ACCA’s enumerated predicate offenses.” *Descamps*, 133 S. Ct. at 2283. In other words, *Taylor* focused on whether the state crime and the enumerated federal predicate offense had the same elements. In *Taylor*, the Court first determined the federal definition of burglary, and then considered how courts were to determine whether a state conviction met that definition. The Court, concerned with the substantive and practical problems of determining that the state conviction met the criteria for a federal offense, set forth a “categorical approach” instructing sentencing courts to look at the statutory definitions and not to the particular facts underlying a conviction. *Descamps*, 133 S. Ct. at 2283 (citing *Taylor*, 495 U.S. at 600).

In *Shepard v United States*, 544 U.S. 13 (2005), the Court had established the “modified categorical approach,” which allows a sentencing court to scrutinize a restricted set of materials to determine
whether a state conviction matches the generic federal offense. The Supreme Court later explained in Descamps that the modified categorical approach was a tool “to identify, from among several alternatives, the crime of conviction so that the court can compare it to the generic offense.” 133 S. Ct. at 2285. The Court reiterated that its “elements-centric” approach was based on three grounds: (1) “it comports with ACCA’s test and history”; (2) “it avoids the Sixth Amendment concerns that would arise from sentencing courts making findings of fact that properly belong to juries”; and (3) “it averts the practical difficulties and potential unfairness of a factual approach.” Id. at 2287 (internal citation omitted).

Similar concerns with fairness underlie the Supreme Court’s opinion in Moncrieffe, 133 S. Ct. 1678. The Court stated that it granted certiorari “to resolve a conflict among the Courts of Appeals with respect to whether a conviction under a statute that criminalizes conduct described by both [21 U.S.C.] § 841’s felony provision and its misdemeanor provision, such as a statute that punishes all marijuana distribution without regard to the amount or remuneration, is a conviction for an offense that ‘proscribes conduct punishable as a felony under’ the CSA [Controlled Substance Act].” Id. at 1684. This, in turn, required a determination of whether the state conviction qualified as an “aggravated felony” under the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 et seq. Id. The Court, accordingly, applied the categorical approach “to determine whether the state offense is comparable to an offense listed in the INA.” Id. It explained that in order to satisfy the categorical approach, the state drug offense “must ‘necessarily’ proscribe conduct that is an offense under the CSA, and the CSA must ‘necessarily’ prescribe felony punishment for that offense.” Id. at 1685. The Court concluded that Moncrieffe’s state conviction failed to meet this standard, and accordingly, he was not convicted of an aggravated felony. Id. at 1687.

In both Descamps and Moncrieffe, the critical inquiry was whether the underlying state criminal conviction fit within a generic federal definition of a crime so that a defendant could be expected to have asserted all relevant defenses in his state trial. The underlying concerns had been set forth by the Supreme Court in Shepard:

Developments in the law since Taylor, and since the First Circuit’s decision in Harris, provide a further reason to adhere to the demanding requirement that any sentence under the ACCA rest on a showing that a prior conviction “necessarily” involved (and a prior plea necessarily admitted) facts equating to generic burglary. The Taylor Court, indeed, was prescient in its discussion of problems that would follow from allowing a broader evidentiary enquiry. “If the sentencing court were to conclude, from its own review of the record, that the defendant [who was convicted under a nongeneric burglary statute] actually committed a generic burglary, could the defendant challenge this conclusion as abridging his right to a jury trial?” 495 U.S. at 601. The Court thus anticipated the very rule later imposed for the sake of
preserving the Sixth Amendment right, that any fact other than a prior conviction sufficient to raise the limit of the possible federal sentence must be found by a jury, in the absence of any waiver of rights by the defendant. *Jones v. United States*, 526 U.S. 227, 243, n. 6 (1999); see also *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

544 U.S. at 24 (alteration in original). Thus, for purposes such as sentencing under the ACCA, a state conviction is only an aggravated felony under § 16(a) if the court can fairly conclude that the conviction included all the elements of a federal offense.

**B.**

While 18 U.S.C. § 16(a) looks to whether the state conviction contained the elements of a federal offense, the Supreme Court and the circuit courts have recognized that § 16(b) asks a different question with different parameters and consequences. In *Leocal v. Ashcroft*, 543 U.S. 1, a unanimous Court held that a Florida conviction for driving under the influence of alcohol was not a crime of violence under § 16(a) or § 16(b). *Id.* at 4. The opinion describes § 16(b) as follows:

Section 16(b) sweeps more broadly than § 16(a), defining a crime of violence as including “any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” But § 16(b) does not thereby encompass all negligent misconduct, such as the negligent operation of a vehicle. It simply covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense. . . . The classic example is burglary. A burglary would be covered under § 16(b) not because the offense can be committed in a generally reckless way or because someone may be injured, but because burglary, by its nature, involves a substantial risk that the burglar will use force against a victim in completing the crime.

543 U.S. at 10 (footnote omitted). Thus, when applying § 16(b), courts do not ask whether the state conviction contained the elements of a federal offense, but whether there was a “risk that the use of physical force against another might be required in committing” the state crime. 18 U.S.C. § 16(b).

We most recently recognized this distinct treatment of § 16(b) in *Rodriguez-Castellon v. Holder*, 733 F.3d 847 (9th Cir. 2013). In this opinion, rendered after the Supreme Court issued its decision in *Descamps*, we explained:

Under 18 U.S.C. § 16, the phrase “crime of violence” has two meanings. First, under § 16(a), a state crime of conviction is a crime of violence if it “has as an element the use, attempted use, or threatened use of physical force against the person or property of another.” . . . Second, even if the state crime does not
include one of the elements listed in § 16(a), it is a “crime of violence” under § 16(b) if it is: (I) a felony; and (ii) “by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” 18 U.S.C. § 16(b). The Supreme Court has explained that § 16(b) criminalizes conduct that “naturally involve[s] a person acting in disregard of the risk that physical force might be used against another in committing an offense.” *Leocal v. Ashcroft*, 543 U.S. 1, 10 (2004).

Our holding in *Rodriguez-Castellon* is consistent with our prior opinions recognizing that first-degree burglary under California Penal Code § 459 remains an “aggravated felony” under § 16(b) even if the state crime did not include an element of the federal crime and thus was not an “aggravated felony” under § 16(a). See *United States v. Ramos-Medina*, 706 F.3d 932, 937–38 (9th Cir. 2013).

In *Chuen Piu Kwong v. Holder*, 671 F.3d 872 (9th Cir. 2011), we explained:

The question for decision, then, is whether Kwong’s [burglary] offense “by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of [its commission].” 18 U.S.C. § 16(b).

We answered that question in the affirmative some time ago in *United States v. Becker*, 919 F.2d 568, 573 (9th Cir. 1990), where we held that “first-degree burglary under California law is a ‘crime of violence’” as defined by 18 U.S.C. § 16(b). See also *United States v. Park*, 649 F.3d 1175, 1178–79 (9th Cir. 2011). We pointed out in *Becker* that “[a]ny time a burglar enters a dwelling with felonious or larcenous intent there is a risk that in the course of committing the crime he will encounter one of its lawful occupants, and use physical force against that occupant either to accomplish his illegal purpose or to escape apprehension.” 919 F.2d at 571 (footnote omitted).

Id. at 878.

Similarly, in *United States v. Avila*, 770 F.3d 1100, 1105 (4th Cir. 2014), the Fourth Circuit concluded that “California first-degree burglary qualifies as a crime of violence under the residual clause of 18 U.S.C. § 16(b).” It held that it need look no further than the Supreme Court’s opinion in *Leocal*, 543 U.S. at 10, in concluding that burglary was the classic example of an offense covered by § 16(b).

Thus, the Supreme Court, our prior decisions, and the Fourth Circuit, all recognize that the inquiries under § 16(a) and § 16(b) are distinct, and that even though a state conviction for burglary may not include an element of a generic federal offense, as required to come within § 16(a), a burglary conviction nonetheless involves a substantial risk of physical force, and thus is covered by § 16(b).
II.

Having set forth the scope of § 16(b) and the courts’ treatment of the section, I turn to the Supreme Court’s opinion in Johnson.

A.

The Supreme Court held that the residual clause of the Armed Career Criminal Act of 1984 violates the Constitution’s guarantee of due process. The Court concluded “that the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges.” Johnson, 135 S. Ct. at 2557. The Court concluded that two features of the residual clause “conspire to make it unconstitutional.” Id. at 2557. “In the first place, the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime. It ties judicial assessment of risk to a judicially imagined ‘ordinary case’ of a crime, not to real world facts or statutory elements.” Id. Second, “the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony.” Id. at 2558.

By asking whether the crime “otherwise involves conduct that presents a serious potential risk,” moreover, the residual clause forces courts to interpret “serious potential risk” in light of the four enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives. These offenses are “far from clear in respect to the degree of risk each poses.” Begay [v. United States], 553 U.S. [137] 143 [(2008)] . . . . By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates.

Id. at 2558.

The Court then reviewed its prior efforts to establish a standard and concluded that “James, Chambers, and Sykes failed to establish any generally applicable test that prevents the risk comparison required by the residual clause from devolving into guesswork and intuition.” Id. at 2559. The Court further noted that in the lower courts, the residual clause has created numerous splits and the clause has proved nearly impossible to apply consistently. Id. at 2560. The Court concluded that “[n]ine years’ experience trying to derive meaning from the residual clause convinces us that we have embarked on a failed enterprise.” Id.

The Court stated, in rejecting the argument that because there may be straightforward cases under the residual clause, the clause is not constitutionally vague:

The Government and the dissent next point out that dozens of federal and state criminal laws use terms like “substantial risk,” “grave risk,” and “unreasonable risk,” suggesting that to hold the residual clause unconstitutional is to place these provisions in constitutional doubt. See post, at 2558–2559. Not at all. Almost none of the cited laws links a phrase such as “substantial risk” to a confusing list of examples. “The phrase ‘shades of red,’
standing alone, does not generate confusion or unpredictability; but the phrase ‘fire-engine red, light pink, maroon, navy blue, or colors that otherwise involve shades of red’ assuredly does so.” *James*, 550 U.S., at 230, n. 7, (Scalia, J., dissenting).

More importantly, almost all of the cited laws require gauging the riskiness of conduct in which an individual defendant engages on a particular occasion. As a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as “substantial risk” to real-world conduct; “the law is full of instances where a man’s fate depends on his estimating rightly . . . some matter of degree,” *Nash v. United States*, 229 U.S. 373, 377 (1913). The residual clause, however, requires application of the “serious potential risk” standard to an idealized ordinary case of the crime. Because “the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect,” this abstract inquiry offers significantly less predictability than one “[t]hat deals with the actual, not with an imaginary condition other than the facts.” *Int. Harvester Co. of Am. v. Kentucky*, 234 U.S. 216, 223 (1914).

The Court also declined the dissent’s invitation “to save the residual clause from vagueness by interpreting it to refer to the risk posed by the particular conduct in which the defendant engaged, not the risk posed by the ordinary case of the defendant’s crime.” *Id.* at 2562. It explained:

In the first place, the Government has not asked us to abandon the categorical approach in residual-clause cases. In addition, *Taylor* had good reasons to adopt the categorical approach, reasons that apply no less to the residual clause than to the enumerated crimes. *Taylor* explained that the relevant part of the Armed Career Criminal Act “refers to ‘a person who . . . has three previous convictions’ for—not a person who has committed—three previous violent felonies or drug offenses.” 495 U.S. at 600. This emphasis on convictions indicates that “Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions.” *Ibid.* *Taylor* also pointed out the utter impracticability of requiring a sentencing court to reconstruct, long after the original conviction, the conduct underlying that conviction.

*Id.* at 2562.

Finally, the opinion’s penultimate paragraph reads:
We hold that imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution’s guarantee of due process. Our contrary holdings in James and Sykes are overruled. Today’s decision does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act’s definition of a violent felony.

*Id.* at 2563.

**B.**

I read *Johnson* as setting forth a two-part test: whether the statute in issue (1) “leaves grave uncertainty about how to estimate the risk posed by the crime”; and (2) “leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony.” *Id.* at 2557–58. Applying this test, the Court faulted the residual clause for requiring potential risk to be determined in light of “four enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives . . . [which] are far from clear in respect to the degree of risk each poses.” *Id.* at 2558 (internal citation omitted). The Court’s concern was clarified by its reference to a prior dissent by Justice Scalia: “The phrase ‘shades of red,’ standing alone does not generate confusion or unpredictability; but the phrase ‘fire-engine red, light pink, maroon, navy blue or colors that otherwise involve shades of red’ assuredly does so.” *Id.* at 2561.

The Court also faulted the residual clause for tying “the judicial assessment of risk to a judicially imagined ‘ordinary case’ of a crime, not to real-world facts or statutory elements.” *Id.* at 2557. However, the Court specifically stated that it was not abandoning the categorical approach, which, as noted, looks to the “ordinary case.” See *Descamps*, 133 S. Ct. at 2285 (holding the categorical approach’s central feature is “a focus on the elements, rather than the facts, of a crime”). It is true that *Descamps*, like § 16(a), looks to the elements of a crime, not to the potential risk from the crime. Nonetheless, in declining the dissent’s suggestion that it “jettison for the residual clause . . . the categorical approach,” the Court recognized that there were “good reasons to adopt the categorical approach,” one of which is “the utter impracticability of requiring a sentencing court to reconstruct, long after the original conviction, the conduct underlying that conviction.” *Johnson*, 135 S. Ct. at 2562. Thus, *Johnson* does not prohibit all use of the “ordinary case.” It only prohibits uses that leave uncertain both how to estimate the risk and amount of risk necessary to qualify as a violent crime.

Indeed, such an interpretation seems compelled in light of the fact that *Johnson* did not even mention *Leocal v. Ashcroft*, 543 U.S. 1. In *Leocal*, the Supreme Court recognized the breadth of § 16(b) and noted that it “simply covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing the offense.” *Id.* at 10.

Finally, I note that perhaps in an attempt to foreclose approaches such as that offered by today’s majority in this appeal, the Supreme Court concluded by stating that its decision “does not call into question application of the Act to the four enumerated offenses [which include burglary] or the remainder of the Act’s definition of a violent felony.” *Johnson*, 135 S. Ct. at 2563.

**III.**

After such an esoteric discussion, it would be easy to lose sight of what is at issue in this case. Dimaya, a native and citizen of the
Philippines, was twice convicted of first-degree residential burglary under California Penal Code § 459 and sentenced each time to two years in prison. The Department of Homeland Security charged Dimaya with being removable because he had been convicted of an aggravated felony under 8 U.S.C. § 1101(a)(43)(F), which is a “crime of violence . . . for which the term of imprisonment [was] at least one year.” That statute in turn defines “crime of violence” by reference to 18 U.S.C. § 16. Thus, we are asked whether the statutory scheme is somehow so vague or ambiguous as to preclude the BIA from concluding that Dimaya’s two first-degree burglaries under California law are “crimes of violence” under § 16(b). Supreme Court precedent and our case law answer the question in the negative.

There is no uncertainty as to how to estimate the risk posed by Dimaya’s burglary crimes. The Supreme Court held in Leocal that § 16(b) “covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense.” 543 U.S. at 10. The court emphasized that burglary as “the classic example” of a crime covered by 16(b) because “burglary, by its nature involves a substantial risk that the burglar will use force against a victim in completing the crime.” Id. See also Taylor, 495 U.S. at 599 (a person has been convicted of a crime for sentencing enhancement “if he is convicted of any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime”).

We have consistently followed this line of reasoning. See United States v. Becker, 919 F.2d 568, 571 (9th Cir. 1990) (“Any time a burglar enters a dwelling with felonious or larcenous intent there is a risk that in the course of committing the crime he will encounter one of its lawful occupants, and use physical force against that occupant either to accomplish his illegal purpose or to escape apprehension.”); Lopez-Cardina v. Holder, 662 F.3d 1110, 1113 (9th Cir. 2011) (noting that “Becker itself recognized that the California crime of burglary might not be a ‘crime of violence’ under a federal statute defining the term by reference to the generic crime, even though it is a ‘crime of violence’ under the risk-focused text of § 16(b)’); Chuen Piu Kwong, 671 F.3d at 877 (reaffirming that “first-degree burglary under [Cal. Penal Code] § 459 is a crime of violence because it involves a substantial risk that physical force may be used in the course of committing the offense.”).

Nor is there any uncertainty as to “how much risk it takes for a crime to qualify as a violent felony,” Johnson, 135 S. Ct. at 2558, when burglary is at issue. Section 16(b) itself requires a “substantial risk” of the use of physical force. As noted, neither the Supreme Court nor the Ninth Circuit has had any trouble in applying this standard. See Leocal, 543 U.S. at 10; Chuen Piu Kwong, 671 F.3d at 877; Becker, 919 F.2d at 571. Any person intent on committing a burglary inherently contemplates the risk of using force should his nefarious scheme be detected. Is this not what the Supreme Court was referring to when it noted “we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as ‘substantial risk’ to real-world conduct”? Johnson 135 S. Ct. at 2561.

IV.

In Johnson, after nine years of trying to derive meaning from the residual clause, the Supreme Court held that it was unconstitutionally vague. Section 16(b) is not the ACCA’s residual clause; nor has its standard proven to be unworkably vague. Over a decade ago, the Supreme Court in Leocal held that § 16(b) “covers offenses that
naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense.” 543 U.S. at 10. Moreover, as the Supreme Court recognized, the statute sets forth the test of a “substantial risk that physical force against the person or property of any may be used in the course of committing the offense.” 18 U.S.C. § 16(b). Certainly, there is no unconstitutional vagueness in this case, which involves the hallmark “crime of violence,” burglary. See Leocal, 543 U.S. at 10. The Supreme Court will be surprised to learn that its opinion in Johnson rendered § 16(b) unconstitutionally vague, particularly as its opinion did not even mention Leocal and specifically concluded with the statement limiting its potential scope. I fear that we have again ventured where no court has gone before and that the Supreme Court will have to intervene to return us to our proper orbit. Accordingly, I dissent.
The U.S. Supreme Court said it will hear another argument on the constitutionality of a provision in federal immigration law used to deport foreigners convicted of serious crimes.

The move suggests that new Justice Neil Gorsuch will break what is currently a 4-4 tie. The case was argued in January, before Gorsuch joined the court.

The case could affect the Trump administration’s efforts to step up deportation efforts.

The issue is whether the law’s definition of "crime of violence" is so vague as to be unconstitutional. People convicted of a violent crime are subject to mandatory deportation.

The case concerns James Dimaya, a Philippine citizen who was twice convicted of residential burglary in California and has been fighting deportation efforts.

The new argument will take place after the court returns from its three-month recess in early October.

The case is Sessions v. Dimaya, 15-1498.
“Supreme Court justices skeptical of deportation order against Bay Area burglar”

*Los Angeles Times*

David G. Savage

January 17, 2017

The Supreme Court, hearing arguments Tuesday in a California deportation case, signaled it may make it harder for the government to forcibly remove legal immigrants with certain kinds of crimes on their record.

The case involves a native Filipino and longtime legal resident of the Bay Area who was convicted of breaking into a garage and an empty house in separate incidents.

At issue is whether crimes such as home burglary, fleeing from the police, money laundering or child abuse can be considered “crimes of violence” that trigger mandatory deportation under federal law.

The ruling could set new rules for the Trump administration if it seeks to forcibly remove legal immigrants who have criminal records.

James Garcia Dimaya was charged with residential burglary under California law and served more than five years in prison. U.S. immigration officials said those crimes were enough to trigger his deportation under the law.

But in their questions, the justices cast doubt on whether his crimes were properly classified as “aggravated felonies.”

If they conclude they were not, their ruling could complicate efforts by the Trump administration to speed up deportations. President-elect Donald Trump has pledged to accelerate the deportation of immigrants here illegally who have been accused or convicted of crimes.

The law in this area is not entirely clear. Beginning in 1988, Congress ordered deportation for noncitizens who are convicted of an “aggravated felony,” and it cited specific examples such as murder and rape. Later the law was expanded to include a general category of “crimes of violence.” This was defined to include offenses that involve a use of physical force or a “substantial risk” that force would be used.

Judges have been divided as to what crimes call for deportation. Looming over Tuesday’s argument was an opinion written two years ago by the late Justice Antonin Scalia. He spoke for an 8-to-1 majority in striking down part of a federal law known as the Armed Career Criminal Act. It called for extra years in prison for people convicted of more than one violent felony.

In that case, the extra prison term was triggered by the defendant’s possession of a shotgun. In frustration, Scalia and his
colleagues said the law was unconstitutionally vague because they could not decide whether gun possession is itself evidence of a violent crime.

“You could say the exact same thing about burglary,” Justice Elena Kagan said Tuesday. A midday burglary of a home could result in violence, she said, but perhaps not if it were an empty garage or an abandoned house. “So it seems like we’re replicating the same kind of confusion,” she said.

Justice Stephen G. Breyer said judges have no way to decide which crimes typically or usually involve violence. “We’re just left guessing,” he said, suggesting a better approach would be “look at what the person did.”

But Deputy Solicitor Gen. Edwin Kneedler said a home burglary poses a risk of violence. And he said the court should defer to the government on matters of immigration. The law, he said, calls for a “broad delegation” of authority to executive officials.

This is the argument government lawyers made in defense of President Obama’s use of executive authority to try to shield millions of immigrants from deportation. It is also the argument that would call for upholding an aggressive deportation policy if pursued by the Trump administration.

In their legal briefs, government lawyers said a ruling in favor of Dimaya, the Philippine burglar, could have a domino effect and prompt judges to block deportations that were triggered by a host of other crimes.

Dimaya was born in the Philippines and came to the United States in 1992, when he was 13 years old. He went to high school, became a lawful permanent resident and settled in Hayward.

He was convicted and sent to state prison for the burglaries of a garage in 2007 and an empty house in 2009.

Immigration judges agreed with deporting Dimaya because his burglary convictions were “crimes of violence” that qualified as “aggravated felonies.”

But the 9th Circuit Court of Appeals disagreed in a 2-1 ruling and said this provision was unconstitutionally vague. Judge Stephen Reinhardt in Los Angeles cited Scalia’s opinion and said the immigration law had the same flaw as the Armed Career Criminal Act. Judge Kim McLane Wardlaw agreed to form the majority, while Judge Consuelo Callahan dissented.

The 7th Circuit Court in Chicago handed down a similar ruling, while the 5th Circuit in New Orleans ruled in favor of the government.

The split prompted the high court to decide the case of Lynch vs. Dimaya. By the time the decision is handed down, the case will probably be relabeled Sessions vs. Dimaya, to reflect expected change of attorney general.

Still pending before the court is a class-action suit from Los Angeles challenging whether immigrants facing possible deportation may be arrested and jailed for more than six months without a bail hearing.
“When Can Immigrants Be Deported for Crimes? Justices Hear Sides”

The New York Times
Adam Liptak
January 17, 2017

The Supreme Court considered on Tuesday how broad the government’s authority is to deport immigrants who commit serious crimes.

The question was in one sense fairly technical, concerning whether a federal law on the subject was unconstitutionally vague. In another sense, though, the argument was part of a larger debate over the nation’s immigration laws, which President-elect Donald J. Trump has pledged to enforce vigorously.

Justice Sonia Sotomayor said the laws have grown increasingly draconian.

“We have many more criminal sanctions with harsher sentences now,” she said. “Today what’s at stake is a lot more than what was at stake decades ago.”

Edwin S. Kneedler, a deputy solicitor general, said there was another side to the question.

“What’s at stake can’t be viewed just from that perspective,” he said. “What’s at stake is the fact that the immigration laws are vital to the nation’s national security and foreign relations and the safety and welfare of the country.”

The case, Lynch v. Dimaya, No. 15-1498, concerns James Dimaya, a native of the Philippines who became a lawful permanent resident in 1992, when he was 13. In 2007 and 2009, he was convicted of residential burglary.

The government sought to deport him on the theory that he had committed an “aggravated felony,” which the immigration law defines to include any offense “that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”

In 2015, in Johnson v. United States, the Supreme Court ruled that a similar criminal law was unconstitutionally vague. The United States Court of Appeals for the Ninth Circuit, in San Francisco, said the reasoning in the Johnson case also doomed the provision of the immigration law.

When the Johnson case was before the Supreme Court, the government warned that a ruling striking down the law at issue there would make the law that was the subject of Tuesday’s case “equally susceptible” to constitutional attack.

Both laws, the government said then, require courts to identify features of a hypothetical typical offense and then to judge the risk of violence arising from them.
Justice Elena Kagan, quoting from Justice Antonin Scalia’s majority opinion in the 2015 case, asked how judges are to decide the features of a typical offense.


“So that’s a multiple-choice test,” Justice Kagan said, suggesting that all of the choices risked unconstitutional vagueness. “What do we do?”

Mr. Kneedler said there were important distinctions between the two cases, notably that the one in 2015 arose from a criminal prosecution and the one at issue on Tuesday from an immigration proceeding, which is a civil action.

In its brief in Tuesday’s case, the government said civil laws are almost never so vague as to violate the Constitution. “Although the court has on occasion tested civil provisions for vagueness,” the brief said, “it has struck down those provisions under the due process clause because they were so unintelligible as to effectively supply no standard at all.”

A 1951 Supreme Court decision, Jordan v. De George, indicated that both criminal and immigration laws should be tested against the same constitutional standard for vagueness “in view of the grave nature of deportation.”

Mr. Kneedler asked the justices not to place too much weight on that observation, saying the question had not been raised in the briefs at the time. Justice Anthony M. Kennedy did not seem to think that mattered.

“Something has to be briefed before we say it’s the law?” he asked.

E. Joshua Rosenkranz, a lawyer for Mr. Dimaya, said the 1951 case concluded the matter.

“In our view and in the view of all of the lower courts,” he said, “Jordan settles the question on whether it’s the same standard for criminal deportation.”

But Justice Samuel A. Alito Jr. said that extending scrutiny that applies to criminal laws challenged for vagueness to civil ones would be a major step.

“It certainly is true that deportation has more severe consequences than the typical civil case,” he said. “But there are many other civil cases that can have a devastating impact on someone, such as child custody, loss of a professional license, complete destruction of a business, loss of the home.”
The Ninth Circuit on Monday ruled that, after a recent U.S. Supreme Court ruling, the federal test for a “crime of violence” is unconstitutionally vague, reversing a Board of Immigrant Appeals ruling that a citizen of the Philippines can be deported after committing felony burglary.

Petitioner James Garcia Dimaya had asked the Ninth Circuit to review the BIA’s ruling that a conviction for burglary is categorically a “crime of violence” as defined by federal code—a determination which rendered him deportable under the Immigration and Nationality Act for having been convicted of an aggravated felony.

In a published opinion, a three-judge panel ruled 2 to 1 on Monday that the statutory definition relied upon by the BIA is subject to the “same mode of analysis” as the statute in Johnson, which the Supreme Court held left “grave uncertainty” about what kind of conduct an “ordinary case’ of a crime involves, and which left uncertainty about how much risk it takes for a crime to qualify as a violent felony.

“The court’s reasoning applies with equal force to the similar statutory language and identical mode of analysis used to define a crime of violence for purposes of the INA,” Judge Reinhardt wrote. “In sum, a careful analysis of the two sections, the one at issue here and the one at issue in Johnson, shows that they are subject to the same constitutional defects and that Johnson dictates that [Section] 16(b) be held void for vagueness.”

Holly S. Cooper, an associate director of the Immigration Law Clinic at the University of California Davis School of Law, told Law360 on Monday that the ruling could impact an “extraordinary” number of removal proceedings, given the number of immigration cases in the Ninth Circuit's territory.
Dimaya came to the U.S. from the Philippines in 1992 and was convicted of first-degree residential burglary in both 2007 and 2009, after which the Department of Homeland Security sought to have him removed from the country for having been convicted of an aggravated felony, according to the ruling.

An Immigration Judge agreed with the DHS that first-degree burglary in California is a “crime of violence” and held that Dimaya was removable, and the BIA dismissed his appeal on the same ground, according to the ruling.

On June 2, while Dimaya's appeal was pending, the BIA held in In the Matter of Francisco-Alonzo that the correct way to determine whether a state conviction is for an aggravated felony crime of violence is to apply an ordinary-case analysis, by looking to the risk of violent force present in the "ordinary case" rather than the particular case in question in considering whether a state offense is categorically a crime of violence under 18 U.S.C. Section 16(b), the federal statute that defines violent crimes.

Weeks later, after Dimaya's appeal had been already argued, the high court in Johnson v. U.S. held that imposing an increased sentence under the "residual clause" of the Armed Career Criminal Act, which allowed a crime to be classified as a violent felony if it posed a serious risk of injury to others, violates the Constitution’s guarantee of due process, and it struck down the residual clause.

The Ninth Circuit ordered additional briefing and oral argument as to whether Section 16(b) is unconstitutionally vague, and on Monday decided that it is.

Circuit Judge Consuelo Maria Callahan dissented, however, writing that the criticisms levied by the Supreme Court against the ACCA in the Johnson ruling do not apply to Section 16(b), given the fundamental distinctions between the statutes.

“Although the terms 'crime of violence,' 'violent felony' and 'aggravated felonies' may appear to be synonymous to a lay person, courts have recognized that, as used in their statutory contexts, they are distinct terms of art covering distinct acts with different legal consequences,” Judge Callahan wrote.

Circuit Judges Stephen Reinhardt, Kim McLane Wardlaw and Consuelo M. Callahan sat on the panel that issued Monday's opinion.

Dimaya is represented by Andrew Michael Knapp of Immigrant Access to Justice Assistance at Southwestern Law School.

The government is represented by Nancy Canter, Jennifer Khouri, Stuart F. Delery and Jennifer P. Levings of the U.S. Department of Justice.

The case is James Garcia Dimaya v. Loretta E. Lynch, case number 11-71307, in the U.S. Court of Appeal for the Ninth Circuit.