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

"Section 1182(f) does not set forth any judicially enforceable limits that constrain the President. Nor could it, since the President has *inherent* authority to exclude aliens from the country."—Justice THOMAS

"Today, the Court takes the important step of finally overruling *Korematsu*, denouncing it as 'gravely wrong the day it was decided' (citing *Korematsu* (Jackson, J., dissenting)). This formal repudiation of a shameful precedent is laudable and long overdue. But it does not make the majority's decision here acceptable or right. By blindly accepting the Government's misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underlying *Korematsu* and merely replaces one 'gravely wrong' decision with another."—Justice SOTOMAYOR

Trump v. Hawaii

585 U.S. ___, 138 S. Ct. 2392, 201 L.Ed.2d 775 (2018)

■CHIEF JUSTICE **ROBERTS** delivered the opinion of the Court.

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

I

A

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

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

These interim measures were immediately challenged in court. The District Courts for the Districts of Maryland and Hawaii entered nationwide preliminary injunctions barring enforcement of the entry suspension, and the respective Courts of Appeals upheld those injunctions, albeit on different grounds. This Court granted certiorari and stayed the injunctions—allowing the entry suspension to go into effect—with respect to foreign nationals who lacked a "credible claim of a bona fide relationship" with a person or entity in the United States. The temporary restrictions in EO–2 expired before this Court took any action, and we vacated the lower court decisions as moot.

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

The Proclamation exempts lawful permanent residents and foreign nationals who have been granted asylum. It also provides for case-by-case waivers when a foreign national demonstrates undue hardship, and that his entry is in the national interest and would not pose a threat to public safety. The Proclamation further directs DHS to assess on a continuing basis

whether entry restrictions should be modified or continued, and to report to the President every 180 days. Upon completion of the first such review period, the President, on the recommendation of the Secretary of Homeland Security, determined that Chad had sufficiently improved its practices, and he accordingly lifted restrictions on its nationals.

B

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

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

The District Court granted a nationwide preliminary injunction barring enforcement of the entry restrictions. . . . The Court of Appeals affirmed. . . . We granted certiorari.

II. . . .

III

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

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

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

A

The text of § 1182(f) states:

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

By its terms, § 1182(f) exudes deference to the President in every clause. It entrusts to the President the decisions whether and when to suspend entry ("[w]henever [he] finds that the entry" of aliens "would be detrimental" to the national interest); whose entry to suspend ("all aliens or any class of aliens"); for how long ("for such period as he shall deem necessary"); and on what conditions ("any restrictions he may deem to be appropriate"). It is therefore unsurprising that we have previously observed that § 1182(f) vests the President with "ample power" to impose entry restrictions in addition to those elsewhere enumerated in the INA.

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

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

Such arguments are grounded on the premise that § 1182(f) not only requires the President to *make* a finding that entry "would be detrimental to the interests of the United States," but also to explain that finding with sufficient detail to enable judicial review. That premise is questionable. But even assuming that some form of review is appropriate, plaintiffs' attacks on the sufficiency of the President's findings cannot be sustained. The 12–page

Proclamation—which thoroughly describes the process, agency evaluations, and recommendations underlying the President's chosen restrictions—is more detailed than any prior order a President has issued under § 1182(f).

Moreover, plaintiffs' request for a searching inquiry into the persuasiveness of the President's justifications is inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere. And when the President adopts "a preventive measure ... in the context of international affairs and national security," he is "not required to conclusively link all of the pieces in the puzzle before [courts] grant weight to [his] empirical conclusions." Holder v. Humanitarian Law Project (2010).

The Proclamation also comports with the remaining textual limits in § 1182(f). We agree with plaintiffs that the word "suspend" often connotes a "defer[ral] till later," Webster's Third New International Dictionary 2303 (1966). But that does not mean that the President is required to prescribe in advance a fixed end date for the entry restrictions. Section 1182(f) authorizes the President to suspend entry "for such period as he shall deem necessary." It follows that when a President suspends entry in response to a diplomatic dispute or policy concern, he may link the duration of those restrictions, implicitly or explicitly, to the resolution of the triggering condition. In fact, not one of the 43 suspension orders issued prior to this litigation has specified a precise end date.

Like its predecessors, the Proclamation makes clear that its "conditional restrictions" will remain in force only so long as necessary to "address" the identified "inadequacies and risks" within the covered nations. Proclamation Preamble, and § 1(h). To that end, the Proclamation establishes an ongoing process to engage covered nations and assess every 180 days whether the entry restrictions should be modified or terminated.

Finally, the Proclamation properly identifies a "class of aliens"—nationals of select countries—whose entry is suspended. Plaintiffs argue that "class" must refer to a well-defined group of individuals who share a common "characteristic" apart from nationality. But the text of § 1182(f), of course, does not say that, and the word "class" comfortably encompasses a group of people linked by nationality. Plaintiffs also contend that the class cannot be "overbroad." But that simply amounts to an unspoken tailoring requirement found nowhere in Congress's grant of authority to suspend entry of not only "any class of aliens" but "all aliens."

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

B

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

1

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

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

2

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

C

Plaintiffs' final statutory argument is that the President's entry suspension violates § 1152(a)(1)(A), which provides that "no person shall ... 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." They contend that we should interpret the provision as prohibiting nationality-based discrimination throughout the *entire* immigration process, despite the reference in § 1152(a)(1)(A) to the act of visa issuance alone. Specifically, plaintiffs argue that § 1152(a)(1)(A) applies to the predicate question of a visa applicant's eligibility for admission and the subsequent question whether the holder of a visa may in fact enter the country. Any other conclusion, they say, would allow the President to circumvent the protections against discrimination enshrined in § 1152(a)(1)(A).

As an initial matter, this argument challenges only the validity of the entry restrictions on *immigrant* travel. Section 1152(a)(1)(A) is expressly limited to the issuance of "immigrant visa[s]" while § 1182(f) allows the President to suspend entry of "immigrants or nonimmigrants." At a minimum, then, plaintiffs' reading would not affect any of the limitations on nonimmigrant travel in the Proclamation.

In any event, we reject plaintiffs' interpretation because it ignores the basic distinction between admissibility determinations and visa issuance that runs throughout the INA. . . .

Sections 1182(f) and 1152(a)(1)(A) . . . operate in different spheres: Section 1182 defines the universe of aliens who are admissible into the United States (and therefore eligible to receive a visa). Once § 1182 sets the boundaries of admissibility into the United States, § 1152(a)(1)(A) prohibits discrimination in the allocation of immigrant visas based on nationality and other traits. The distinction between admissibility—to which § 1152(a)(1)(A) does not apply—and visa issuance—to which it does—is apparent from the text of the provision, which specifies only that its protections apply to the "issuance" of "immigrant visa[s]," without mentioning admissibility or entry. Had Congress instead intended in § 1152(a)(1)(A) to constrain the President's power to determine who may enter the country, it could easily have chosen language directed to that end.

Common sense and historical practice confirm as much. Section 1152(a)(1)(A) has never been treated as a constraint on the criteria for admissibility in § 1182. Presidents have repeatedly exercised their authority to suspend entry on the basis of nationality. . . .

***

The Proclamation is squarely within the scope of Presidential authority under the INA. Indeed, neither dissent even attempts any serious argument to the contrary, despite the fact that plaintiffs' primary contention below and in their briefing before this Court was that the Proclamation violated the statute.

IV

A

We now turn to plaintiffs' claim that the Proclamation was issued for the unconstitutional purpose of excluding Muslims. . . .

B

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

At the heart of plaintiffs' case is a series of statements by the President and his advisers casting doubt on the official objective of the Proclamation. For example, while a candidate on

the campaign trail, the President published a "Statement on Preventing Muslim Immigration" that called for a "total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on." That statement remained on his campaign website until May 2017. Then-candidate Trump also stated that "Islam hates us" and asserted that the United States was "having problems with Muslims coming into the country." Shortly after being elected, when asked whether violence in Europe had affected his plans to "ban Muslim immigration," the President replied, "You know my plans. All along, I've been proven to be right."

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

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

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

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

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

C

For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a "fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." Fiallo v. Bell (1977). Because decisions in these matters may implicate "relations with foreign powers," or involve "classifications defined in the light of changing political and economic circumstances," such judgments "are frequently of a character more appropriate to either the Legislature or the Executive." Mathews v. Diaz (1976).

Nonetheless, although foreign nationals seeking admission have no constitutional right to entry, this Court has engaged in a circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U.S. citizen. In Kleindienst v. Mandel (1972), the Attorney General denied admission to a Belgian journalist and self-described "revolutionary Marxist," Ernest Mandel, who had been invited to speak at a conference at Stanford University. The professors who wished to hear Mandel speak challenged that decision under the First Amendment, and we acknowledged that their constitutional "right to receive information" was implicated. But we limited our review to whether the Executive gave a "facially legitimate and bona fide" reason for its action. Given the authority of the political branches over admission, we held that "when the Executive exercises this [delegated] power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification" against the asserted constitutional interests of U.S. citizens.

The principal dissent suggests that *Mandel* has no bearing on this case (opinion of Sotomayor, J.), but our opinions have reaffirmed and applied its deferential standard of review across different contexts and constitutional claims. . . .

Mandel 's narrow standard of review "has particular force" in admission and immigration cases that overlap with "the area of national security." Kerry v. Din (2015) (Kennedy, J.,

concurring in judgment). For one, "[j]udicial inquiry into the national-security realm raises concerns for the separation of powers" by intruding on the President's constitutional responsibilities in the area of foreign affairs. Ziglar v. Abbasi (2017) (internal quotation marks omitted). For another, "when it comes to collecting evidence and drawing inferences" on questions of national security, "the lack of competence on the part of the courts is marked." *Humanitarian Law Project*.

The upshot of our cases in this context is clear: "Any rule of constitutional law that would inhibit the flexibility" of the President "to respond to changing world conditions should be adopted only with the greatest caution," and our inquiry into matters of entry and national security is highly constrained. *Mathews*. We need not define the precise contours of that inquiry in this case. A conventional application of *Mandel*, asking only whether the policy is facially legitimate and bona fide, would put an end to our review. But the Government has suggested that it may be appropriate here for the inquiry to extend beyond the facial neutrality of the order. For our purposes today, we assume that we may look behind the face of the Proclamation to the extent of applying rational basis review. That standard of review considers whether the entry policy is plausibly related to the Government's stated objective to protect the country and improve vetting processes. See *Railroad Retirement Bd. v. Fritz* (1980). As a result, we may consider plaintiffs' extrinsic evidence, but will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.[1]

D

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

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[1] The dissent finds "perplexing" the application of rational basis review in this context. But what is far more problematic is the dissent's assumption that courts should review immigration policies, diplomatic sanctions, and military actions under the *de novo* "reasonable observer" inquiry applicable to cases involving holiday displays and graduation ceremonies. The dissent criticizes application of a more constrained standard of review as "throw[ing] the Establishment Clause out the window." But as the numerous precedents cited in this section make clear, such a circumscribed inquiry applies to any constitutional claim concerning the entry of foreign nationals. The dissent can cite no authority for its proposition that the more free-ranging inquiry it proposes is appropriate in the national security and foreign affairs context. [Footnote 5 by the Court.]

legitimate state interests," and "its sheer breadth [was] so discontinuous with the reasons offered for it" that the initiative seemed "inexplicable by anything but animus." Romer v. Evans (1996).

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

The Proclamation is expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices. The text says nothing about religion. Plaintiffs and the dissent nonetheless emphasize that five of the seven nations currently included in the Proclamation have Muslim-majority populations. Yet that fact alone does not support an inference of religious hostility, given that the policy covers just 8% of the world's Muslim population and is limited to countries that were previously designated by Congress or prior administrations as posing national security risks.

The Proclamation, moreover, reflects the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies. Plaintiffs seek to discredit the findings of the review, pointing to deviations from the review's baseline criteria resulting in the inclusion of Somalia and omission of Iraq. But as the Proclamation explains, in each case the determinations were justified by the distinct conditions in each country. . . . It is, in any event, difficult to see how exempting one of the largest predominantly Muslim countries in the region from coverage under the Proclamation can be cited as evidence of animus toward Muslims. . . .

More fundamentally, plaintiffs and the dissent challenge the entry suspension based on their perception of its effectiveness and wisdom. They suggest that the policy is overbroad and does little to serve national security interests. But we cannot substitute our own assessment for the Executive's predictive judgments on such matters, all of which "are delicate, complex, and involve large elements of prophecy." Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp. (1948). While we of course "do not defer to the Government's reading of the First Amendment," the Executive's evaluation of the underlying facts is entitled to appropriate weight, particularly in the context of litigation involving "sensitive and weighty interests of national security and foreign affairs." *Humanitarian Law Project*.

Three additional features of the entry policy support the Government's claim of a legitimate national security interest. First, since the President introduced entry restrictions in January 2017, three Muslim-majority countries—Iraq, Sudan, and Chad—have been removed from the list of covered countries. . . .

Second, for those countries that remain subject to entry restrictions, the Proclamation includes significant exceptions for various categories of foreign nationals. The policy permits nationals from nearly every covered country to travel to the United States on a variety of nonimmigrant visas. The Proclamation also exempts permanent residents and individuals who have been granted asylum.

Third, the Proclamation creates a waiver program open to all covered foreign nationals seeking entry as immigrants or nonimmigrants. . . . The Proclamation also directs DHS and the State Department to issue guidance elaborating upon the circumstances that would justify a waiver.[2]

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

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

***

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

V

Because plaintiffs have not shown that they are likely to succeed on the merits of their claims, we reverse the grant of the preliminary injunction as an abuse of discretion. The case now returns to the lower courts for such further proceedings as may be appropriate. Our disposition of the case makes it unnecessary to consider the propriety of the nationwide scope of the injunction issued by the District Court.

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

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[2] Justice Breyer focuses on only one aspect of our consideration—the waiver program and other exemptions in the Proclamation. Citing selective statistics, anecdotal evidence, and a declaration from unrelated litigation, [he] suggests that not enough individuals are receiving waivers or exemptions. Yet even if such an inquiry were appropriate under rational basis review, the evidence he cites provides "but a piece of the picture" and does not affect our analysis. [Footnote 7 by the Court.]

■JUSTICE **KENNEDY**, concurring.

I join the Court's opinion in full.

There may be some common ground between the opinions in this case, in that the Court does acknowledge that in some instances, governmental action may be subject to judicial review to determine whether or not it is "inexplicable by anything but animus," *Romer v. Evans* (1996), which in this case would be animosity to a religion. . . .

In all events, it is appropriate to make this further observation. There are numerous instances in which the statements and actions of Government officials are not subject to judicial scrutiny or intervention. That does not mean those officials are free to disregard the Constitution and the rights it proclaims and protects. The oath that all officials take to adhere to the Constitution is not confined to those spheres in which the Judiciary can correct or even comment upon what those officials say or do. Indeed, the very fact that an official may have broad discretion, discretion free from judicial scrutiny, makes it all the more imperative for him or her to adhere to the Constitution and to its meaning and its promise.

The First Amendment prohibits the establishment of religion and promises the free exercise of religion. From these safeguards, and from the guarantee of freedom of speech, it follows there is freedom of belief and expression. It is an urgent necessity that officials adhere to these constitutional guarantees and mandates in all their actions, even in the sphere of foreign affairs. An anxious world must know that our Government remains committed always to the liberties the Constitution seeks to preserve and protect, so that freedom extends outward, and lasts.

■JUSTICE **THOMAS**, concurring.

I join the Court's opinion, which highlights just a few of the many problems with the plaintiffs' claims. There are several more. Section 1182(f) does not set forth any judicially enforceable limits that constrain the President. Nor could it, since the President has *inherent* authority to exclude aliens from the country. Further, the Establishment Clause does not create an individual right to be free from all laws that a "reasonable observer" views as religious or antireligious. The plaintiffs cannot raise any other First Amendment claim, since the alleged religious discrimination in this case was directed at aliens abroad. See United States v. Verdugo–Urquidez (1990). And, even on its own terms, the plaintiffs' proffered evidence of anti-Muslim discrimination is unpersuasive.

Merits aside, I write separately to address the remedy that the plaintiffs sought and obtained in this case. The District Court imposed an injunction that barred the Government from enforcing the President's Proclamation against anyone, not just the plaintiffs. Injunctions that prohibit the Executive Branch from applying a law or policy against anyone—often called "universal" or "nationwide" injunctions—have become increasingly common. District courts, including the one here, have begun imposing universal injunctions without considering their authority to grant such sweeping relief. These injunctions are beginning to take a toll on the federal court system—preventing legal questions from percolating through the federal courts,

encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch.

I am skeptical that district courts have the authority to enter universal injunctions. These injunctions did not emerge until a century and a half after the founding. And they appear to be inconsistent with longstanding limits on equitable relief and the power of Article III courts. . . . [Justice Thomas argued at length that "universal injunctions are legally and historically dubious."—Eds.]

■JUSTICE **BREYER**, with whom JUSTICE **KAGAN** joins, dissenting.

The question before us is whether Proclamation No. 9645 is lawful. If its promulgation or content was significantly affected by religious animus against Muslims, it would violate the relevant statute or the First Amendment itself. If, however, its sole *ratio decidendi* was one of national security, then it would be unlikely to violate either the statute or the Constitution. Which is it? Members of the Court principally disagree about the answer to this question, *i.e.*, about whether or the extent to which religious animus played a significant role in the Proclamation's promulgation or content.

In my view, the Proclamation's elaborate system of exemptions and waivers can and should help us answer this question. That system provides for case-by-case consideration of persons who may qualify for visas despite the Proclamation's general ban. Those persons include lawful permanent residents, asylum seekers, refugees, students, children, and numerous others. There are likely many such persons, perhaps in the thousands. . . .

On the one hand, if the Government is applying the exemption and waiver provisions as written, then its argument for the Proclamation's lawfulness is strengthened. For one thing, the Proclamation then resembles more closely the two important Presidential precedents on point, President Carter's Iran order and President Reagan's Cuba proclamation, both of which contained similar categories of persons authorized to obtain case-by-case exemptions.

Further, since the case-by-case exemptions and waivers apply without regard to the individual's religion, application of that system would help make clear that the Proclamation does not deny visas to numerous Muslim individuals (from those countries) who do not pose a security threat. And that fact would help to rebut the First Amendment claim that the Proclamation rests upon anti-Muslim bias rather than security need. Finally, of course, the very fact that Muslims from those countries would enter the United States (under Proclamation-provided exemptions and waivers) would help to show the same thing.

On the other hand, if the Government is *not*applying the system of exemptions and waivers that the Proclamation contains, then its argument for the Proclamation's lawfulness becomes significantly weaker. For one thing, the relevant precedents—those of Presidents Carter and Reagan—would bear far less resemblance to the present Proclamation. Indeed, one might ask, if those two Presidents thought a case-by-case exemption system appropriate, what is different about present circumstances that would justify that system's absence? . . . .

And, perhaps most importantly, if the Government is not applying the Proclamation's exemption and waiver system, the claim that the Proclamation is a "Muslim ban," rather than a "security-based" ban, becomes much stronger. How could the Government successfully claim that the Proclamation rests on security needs if it is excluding Muslims who satisfy the Proclamation's own terms? At the same time, denying visas to Muslims who meet the Proclamation's own security terms would support the view that the Government excludes them for reasons based upon their religion.

Unfortunately there is evidence that supports the second possibility. . . .

[Justice Breyer recounted "[d]eclarations, anecdotal evidence, facts, and numbers taken from *amicus* briefs" that support the second possibility, acknowledging that these sources "are not judicial factfindings."—Eds.] The Government has not had an opportunity to respond, and a court has not had an opportunity to decide. But, given the importance of the decision in this case, the need for assurance that the Proclamation does not rest upon a "Muslim ban," and the assistance in deciding the issue that answers to the "exemption and waiver" questions may provide, I would send this case back to the District Court for further proceedings. And, I would leave the injunction in effect while the matter is litigated. Regardless, the Court's decision today leaves the District Court free to explore these issues on remand.

If this Court must decide the question without this further litigation, I would, on balance, find the evidence of antireligious bias, including statements on a website taken down only after the President issued the two executive orders preceding the Proclamation, along with the other statements also set forth in Justice Sotomayor's opinion, a sufficient basis to set the Proclamation aside. And for these reasons, I respectfully dissent.

■JUSTICE **SOTOMAYOR**, with whom JUSTICE **GINSBURG** joins, dissenting.

The United States of America is a Nation built upon the promise of religious liberty. Our Founders honored that core promise by embedding the principle of religious neutrality in the First Amendment. The Court's decision today fails to safeguard that fundamental principle. It leaves undisturbed a policy first advertised openly and unequivocally as a "total and complete shutdown of Muslims entering the United States" because the policy now masquerades behind a facade of national-security concerns. But this repackaging does little to cleanse Presidential Proclamation No. 9645 of the appearance of discrimination that the President's words have created. Based on the evidence in the record, a reasonable observer would conclude that the Proclamation was motivated by anti-Muslim animus. That alone suffices to show that plaintiffs are likely to succeed on the merits of their Establishment Clause claim. The majority holds otherwise by ignoring the facts, misconstruing our legal precedent, and turning a blind eye to the pain and suffering the Proclamation inflicts upon countless families and individuals, many of whom are United States citizens. Because that troubling result runs contrary to the Constitution and our precedent, I dissent.

I

~~Plaintiffs challenge the Proclamation on various grounds, both statutory and constitutional. Ordinarily, when a case can be decided on purely statutory grounds, we strive to~~

~~follow a "prudential rule of avoiding constitutional questions." Zobrest v. Catalina Foothills School Dist. (1993). But that rule of thumb is far from categorical, and it has limited application where, as here, the constitutional question proves far simpler than the statutory one. Whatever the merits of plaintiffs' complex statutory claims, the Proclamation must be enjoined for a more fundamental reason: It runs afoul of the Establishment Clause's guarantee of religious neutrality.~~

A

The Establishment Clause forbids government policies "respecting an establishment of religion." U.S. Const., Amdt. 1. The "clearest command" of the Establishment Clause is that the Government cannot favor or disfavor one religion over another. . . . Consistent with that clear command, this Court has long acknowledged that governmental actions that favor one religion "inevitabl[y]" foster "the hatred, disrespect and even contempt of those who [hold] contrary beliefs." Engel v. Vitale (1962). That is so, this Court has held, because such acts send messages to members of minority faiths " 'that they are outsiders, not full members of the political community.' " Santa Fe Independent School Dist. v. Doe (2000). . . .

"When the government acts with the ostensible and predominant purpose" of disfavoring a particular religion, "it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides." McCreary County v. American Civil Liberties Union of Ky. (2005). To determine whether plaintiffs have proved an Establishment Clause violation, the Court asks whether a reasonable observer would view the government action as enacted for the purpose of disfavoring a religion (accord, Town of Greece v. Galloway (2014)) (plurality opinion).

In answering that question, this Court has generally considered the text of the government policy, its operation, and any available evidence regarding "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by" the decisionmaker. *Lukumi* (opinion of Kennedy, J.). . . .

B

1

Although the majority briefly recounts a few of the statements and background events that form the basis of plaintiffs' constitutional challenge, that highly abridged account does not tell even half of the story. The full record paints a far more harrowing picture, from which a reasonable observer would readily conclude that the Proclamation was motivated by hostility and animus toward the Muslim faith.

During his Presidential campaign, then-candidate Donald Trump pledged that, if elected, he would ban Muslims from entering the United States. Specifically, on December 7, 2015, he issued a formal statement "calling for a total and complete shutdown of Muslims entering the United States." That statement . . . remained on his campaign website until May 2017 (several months into his Presidency). . . .

On December 8, 2015, Trump justified his proposal during a television interview by noting that President Franklin D. Roosevelt "did the same thing" with respect to the internment of Japanese Americans during World War II. In January 2016, during a Republican primary debate, Trump was asked whether he wanted to "rethink [his] position" on "banning Muslims from entering the country." He answered, "No." A month later, at a rally in South Carolina, Trump told an apocryphal story about United States General John J. Pershing killing a large group of Muslim insurgents in the Philippines with bullets dipped in pigs' blood in the early 1900's. In March 2016, he expressed his belief that "Islam hates us. ... [W]e can't allow people coming into this country who have this hatred of the United States ... [a]nd of people that are not Muslim." That same month, Trump asserted that "[w]e're having problems with the Muslims, and we're having problems with Muslims coming into the country." He therefore called for surveillance of mosques in the United States, blaming terrorist attacks on Muslims' lack of "assimilation" and their commitment to "sharia law." A day later, he opined that Muslims "do not respect us at all" and "don't respect a lot of the things that are happening throughout not only our country, but they don't respect other things."

As Trump's presidential campaign progressed, he began to describe his policy proposal in slightly different terms. In June 2016, for instance, he characterized the policy proposal as a suspension of immigration from countries "where there's a proven history of terrorism." He also described the proposal as rooted in the need to stop "importing radical Islamic terrorism to the West through a failed immigration system." Asked in July 2016 whether he was "pull[ing] back from" his pledged Muslim ban, Trump responded, "I actually don't think it's a rollback. In fact, you could say it's an expansion." He then explained that he used different terminology because "[p]eople were so upset when [he] used the word Muslim."

A month before the 2016 election, Trump reiterated that his proposed "Muslim ban" had "morphed into a[n] extreme vetting from certain areas of the world." Then, on December 21, 2016, President-elect Trump was asked whether he would "rethink" his previous "plans to create a Muslim registry or ban Muslim immigration." He replied: "You know my plans. All along, I've proven to be right."

On January 27, 2017, one week after taking office, President Trump signed EO–1, entitled "Protecting the Nation From Foreign Terrorist Entry Into the United States." As he signed it, President Trump read the title, looked up, and said "We all know what that means." That same day, President Trump explained to the media that, under EO–1, Christians would be given priority for entry as refugees into the United States. In particular, he bemoaned the fact that in the past, "[i]f you were a Muslim [refugee from Syria] you could come in, but if you were a Christian, it was almost impossible." Considering that past policy "very unfair," President Trump explained that EO–1 was designed "to help" the Christians in Syria. The following day, one of President Trump's key advisers candidly drew the connection between EO–1 and the "Muslim ban" that the President had pledged to implement if elected. According to that adviser, "[W]hen [Donald 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.' " . . .

On March 6, 2017, President Trump issued that new executive order, . . . EO–2. One of

the President's senior advisers publicly explained that EO–2 would "have the same basic policy outcome" as EO–1, and that any changes would address "very technical issues that were brought up by the court." After EO–2 was issued, the White House Press Secretary told reporters that, by issuing EO–2, President Trump "continue[d] to deliver on ... his most significant campaign promises." That statement was consistent with President Trump's own declaration that "I keep my campaign promises, and our citizens will be very happy when they see the result." . . .

While litigation over EO–2 was ongoing, President Trump repeatedly made statements alluding to a desire to keep Muslims out of the country. For instance, he said at a rally of his supporters that EO–2 was just a "watered down version of the first one" and had been "tailor[ed]" at the behest of "the lawyers." He further added that he would prefer "to go back to the first [executive order] and go all the way" and reiterated his belief that it was "very hard" for Muslims to assimilate into Western culture. During a rally in April 2017, President Trump recited the lyrics to a song called "The Snake," a song about a woman who nurses a sick snake back to health but then is attacked by the snake, as a warning about Syrian refugees entering the country. And in June 2017, the President stated on Twitter that the Justice Department had submitted a "watered down, politically correct version" of the "original Travel Ban" "to S[upreme] C[ourt]."[3] The President went on to tweet: "People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!" He added: "That's right, we need a TRAVEL BAN for certain DANGEROUS countries, not some politically correct term that won't help us protect our people!" Then, on August 17, 2017, President Trump issued yet another tweet about Islam, once more referencing the story about General Pershing's massacre of Muslims in the Philippines: "Study what General Pershing ... did to terrorists when caught. There was no more Radical Islamic Terror for 35 years!"

In September 2017, President Trump tweeted that "[t]he travel ban into the United States should be far larger, tougher and more specific—but stupidly, that would not be politically correct!" Later that month, on September 24, 2017, President Trump issued Presidential Proclamation No. 9645, 82 Fed. Reg. 45161 (2017) (Proclamation), which restricts entry of certain nationals from six Muslim-majority countries. On November 29, 2017, President Trump "retweeted" three anti-Muslim videos, entitled "Muslim Destroys a Statue of Virgin Mary!", "Islamist mob pushes teenage boy off roof and beats him to death!", and "Muslim migrant beats up Dutch boy on crutches!"[4] Those videos were initially tweeted by a British political party whose mission is to oppose "all alien and destructive politic[al] or religious doctrines, including ... Islam." When asked about these videos, the White House Deputy Press Secretary connected them to the Proclamation, responding that the "President has been talking about these security issues for years now, from the campaign trail to the White House" and "has addressed these issues with the travel order that he issued earlier this year and the companion proclamation."

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[3] According to the White House, President Trump's statements on Twitter are "official statements." [Footnote by Justice Sotomayor.]

[4] The content of these videos is highly inflammatory, and their titles are arguably misleading. . . . P. Baker & E. Sullivan, Trump Shares Inflammatory Anti–Muslim Videos, and Britain's Leader Condemns Them, N.Y. Times, Nov. 29, 2017. [Footnote by Justice Sotomayor.]

As the majority correctly notes, "the issue before us is not whether to denounce" these offensive statements. Rather, the dispositive and narrow question here is whether a reasonable observer, presented with all "openly available data," the text and "historical context" of the Proclamation, and the "specific sequence of events" leading to it, would conclude that the primary purpose of the Proclamation is to disfavor Islam and its adherents by excluding them from the country. The answer is unquestionably yes.

Taking all the relevant evidence together, a reasonable observer would conclude that the Proclamation was driven primarily by anti-Muslim animus, rather than by the Government's asserted national-security justifications. Even before being sworn into office, then-candidate Trump stated that "Islam hates us," warned that "[w]e're having problems with the Muslims, and we're having problems with Muslims coming into the country," promised to enact a "total and complete shutdown of Muslims entering the United States," and instructed one of his advisers to find a "lega[l]" way to enact a Muslim ban.[5] The President continued to make similar statements well after his inauguration, as detailed above.

Moreover, despite several opportunities to do so, President Trump has never disavowed any of his prior statements about Islam. Instead, he has continued to make remarks that a reasonable observer would view as an unrelenting attack on the Muslim religion and its followers. Given President Trump's failure to correct the reasonable perception of his apparent hostility toward the Islamic faith, it is unsurprising that the President's lawyers have, at every step in the lower courts, failed in their attempts to launder the Proclamation of its discriminatory taint. Notably, the Court recently found less pervasive official expressions of hostility and the failure to disavow them to be constitutionally significant. Cf. Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n (2018). It should find the same here.

Ultimately, what began as a policy explicitly "calling for a total and complete shutdown of Muslims entering the United States" has since morphed into a "Proclamation" putatively based on national-security concerns. But this new window dressing cannot conceal an unassailable fact: the words of the President and his advisers create the strong perception that the Proclamation is contaminated by impermissible discriminatory animus against Islam and its followers.

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[5] The Government urges us to disregard the President's campaign statements. But nothing in our precedent supports that blinkered approach. To the contrary, courts must consider "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history." Church of Lukumi Babalu Aye, Inc. v. Hialeah (1993) (opinion of Kennedy, J.). Moreover, President Trump and his advisers have repeatedly acknowledged that the Proclamation and its predecessors are an outgrowth of the President's campaign statements. . . . [Footnote by Justice Sotomayor.]

II

Rather than defend the President's problematic statements, the Government urges this Court to set them aside and defer to the President on issues related to immigration and national security. The majority accepts that invitation and incorrectly applies a watered-down legal standard in an effort to short circuit plaintiffs' Establishment Clause claim. . . .

[T]he Court, without explanation or precedential support, limits its review of the Proclamation to rational-basis scrutiny. That approach is perplexing, given that in other Establishment Clause cases, including those involving claims of religious animus or discrimination, this Court has applied a more stringent standard of review.[6] As explained above, the Proclamation is plainly unconstitutional under that heightened standard.

But even under rational-basis review, the Proclamation must fall. That is so because the Proclamation is " 'divorced from any factual context from which we could discern a relationship to legitimate state interests,' and 'its sheer breadth [is] so discontinuous with the reasons offered for it' " that the policy is " 'inexplicable by anything but animus.' " *Ante* (quoting *Romer*); see also *Cleburne*. The President's statements, which the majority utterly fails to address in its legal analysis, strongly support the conclusion that the Proclamation was issued to express hostility toward Muslims and exclude them from the country. Given the overwhelming record evidence of anti-Muslim animus, it simply cannot be said that the Proclamation has a legitimate basis.

The majority insists that the Proclamation furthers two interrelated national-security

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[6] The majority chides as "problematic" the importation of Establishment Clause jurisprudence "in the national security and foreign affairs context." *Ante*, n. 5. As the majority sees it, this Court's Establishment Clause precedents do not apply to cases involving "immigration policies, diplomatic sanctions, and military actions." But just because the Court has not confronted the precise situation at hand does not render these cases (or the principles they announced) inapplicable. Moreover, the majority's complaint regarding the lack of direct authority is a puzzling charge, given that the majority itself fails to cite any "authority for its proposition" that a more probing review is inappropriate in a case like this one, where United States citizens allege that the Executive has violated the Establishment Clause by issuing a sweeping executive order motivated by animus. In any event, even if there is no prior case directly on point, it is clear from our precedent that "[w]hatever power the United States Constitution envisions for the Executive" in the context of national security and foreign affairs, "it most assuredly envisions a role for all three branches when individual liberties are at stake." Hamdi v. Rumsfeld (2004) (plurality opinion). This Court's Establishment Clause precedents require that, if a reasonable observer would understand an executive action to be driven by discriminatory animus, the action be invalidated. See *McCreary*. That reasonable-observer inquiry includes consideration of the Government's asserted justifications for its actions. The Government's invocation of a national-security justification, however, does not mean that the Court should close its eyes to other relevant information. Deference is different from unquestioning acceptance. Thus, what is "far more problematic" in this case is the majority's apparent willingness to throw the Establishment Clause out the window and forgo any meaningful constitutional review at the mere mention of a national-security concern. [Footnote by Justice Sotomayor.]

interests: "preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices." But the Court offers insufficient support for its view "that the entry suspension has a legitimate grounding in [those] national security concerns, quite apart from any religious hostility." Indeed, even a cursory review of the Government's asserted national-security rationale reveals that the Proclamation is nothing more than a "'religious gerrymander.'" *Lukumi*. . . .

[N]one of the features of the Proclamation highlighted by the majority supports the Government's claim that the Proclamation is genuinely and primarily rooted in a legitimate national-security interest. What the unrebutted evidence actually shows is that a reasonable observer would conclude, quite easily, that the primary purpose and function of the Proclamation is to disfavor Islam by banning Muslims from entering our country.

III. . . .

IV

The First Amendment stands as a bulwark against official religious prejudice and embodies our Nation's deep commitment to religious plurality and tolerance. That constitutional promise is why, "[f]or centuries now, people have come to this country from every corner of the world to share in the blessing of religious freedom." Town of Greece v. Galloway (Kagan, J., dissenting). Instead of vindicating those principles, today's decision tosses them aside. In holding that the First Amendment gives way to an executive policy that a reasonable observer would view as motivated by animus against Muslims, the majority opinion upends this Court's precedent, repeats tragic mistakes of the past, and denies countless individuals the fundamental right of religious liberty.

Just weeks ago, the Court rendered its decision in *Masterpiece Cakeshop,* which applied the bedrock principles of religious neutrality and tolerance in considering a First Amendment challenge to government action ("The Constitution 'commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures' " (quoting *Lukumi*)). Those principles should apply equally here. In both instances, the question is whether a government actor exhibited tolerance and neutrality in reaching a decision that affects individuals' fundamental religious freedom. But unlike in *Masterpiece*, where a state civil rights commission was found to have acted without "the neutrality that the Free Exercise Clause requires," the government actors in this case will not be held accountable for breaching the First Amendment's guarantee of religious neutrality and tolerance. Unlike in *Masterpiece,* where the majority considered the state commissioners' statements about religion to be persuasive evidence of unconstitutional government action, the majority here completely sets aside the President's charged statements about Muslims as irrelevant. That holding erodes the foundational principles of religious tolerance that the Court elsewhere has so emphatically protected, and it tells members of minority religions in our country "'that they are outsiders, not full members of the political community.'" *Santa Fe.*

Today's holding is all the more troubling given the stark parallels between the reasoning of this case and that of *Korematsu.* In *Korematsu,* the Court gave "a pass [to] an odious, gravely injurious racial classification" authorized by an executive order. Adarand Constructors, Inc. v. Penã (1995) (Ginsburg, J., dissenting). As here, the Government invoked an ill-defined national-security threat to justify an exclusionary policy of sweeping proportion. As here, the exclusion order was rooted in dangerous stereotypes about, *inter alia,* a particular group's supposed inability to assimilate and desire to harm the United States. See *Korematsu,* (Murphy, J., dissenting). As here, the Government was unwilling to reveal its own intelligence agencies' views of the alleged security concerns to the very citizens it purported to protect. And as here, there was strong evidence that impermissible hostility and animus motivated the Government's policy.

Although a majority of the Court in *Korematsu* was willing to uphold the Government's actions based on a barren invocation of national security, dissenting Justices warned of that decision's harm to our constitutional fabric. Justice Murphy recognized that there is a need for great deference to the Executive Branch in the context of national security, but cautioned that "it is essential that there be definite limits to [the government's] discretion," as "[i]ndividuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support" (Murphy, J., dissenting). Justice Jackson lamented that the Court's decision upholding the Government's policy would prove to be "a far more subtle blow to liberty than the promulgation of the order itself," for although the executive order was not likely to be long lasting, the Court's willingness to tolerate it would endure.

In the intervening years since *Korematsu,* our Nation has done much to leave its sordid legacy behind. See, *e.g.,* Civil Liberties Act of 1988, 50 U.S.C.App. § 4211 *et seq.* (setting forth remedies to individuals affected by the executive order at issue in *Korematsu*). Today, the Court takes the important step of finally overruling *Korematsu,* denouncing it as "gravely wrong the day it was decided" (citing *Korematsu* (Jackson, J., dissenting)). This formal repudiation of a shameful precedent is laudable and long overdue. But it does not make the majority's decision here acceptable or right. By blindly accepting the Government's misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underlying *Korematsu* and merely replaces one "gravely wrong" decision with another.

Our Constitution demands, and our country deserves, a Judiciary willing to hold the coordinate branches to account when they defy our most sacred legal commitments. Because the Court's decision today has failed in that respect, with profound regret, I dissent.

EDITORS' NOTES

(1) There is a vigorous disagreement between Chief Justice Roberts for the majority and Justice Sotomayor in dissent concerning whether the present case is analogous to Korematsu v. United States (1944; reprinted above, ___). Roberts states: "*Korematsu* has nothing to do with this case." He also states: "[I]t is wholly inapt to liken that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission." Yet, as Sotomayor points out, President Trump himself likened his "travel ban" to the exclusion order at issue in *Korematsu*: "On December 8, 2015, Trump justified his proposal during a television interview

by noting that President Franklin D. Roosevelt 'did the same thing' with respect to the internment of Japanese Americans during World War II." Who has the better view of whether Trump's travel ban is analogous to Roosevelt's exclusion order, Roberts or Trump?

(2) In *Korematsu*, the Court proclaimed that racial classifications were "suspect" and were contrary to our traditions, yet it upheld the use of a racial classification on national security grounds. In *Trump*, is Roberts doing the same thing, decrying racial and ethnic classifications while upholding them in the name of national security?

(3) What is the level of review here? In *Korematsu*, the Court officially states that the level of review is strict scrutiny, yet it is quite deferential to military judgment concerning the necessity for the exclusion order. Here, the Court makes no pretense of applying strict scrutiny. In fact, the Court mentions the idea that there can be virtually no judicial review at all, citing Kleindienst v. Mandel (1972)—a position embraced by Justice Thomas—but ends up saying, officially, that the level of review is rational basis scrutiny, citing Railroad Retirement Bd. v. Fritz (1980). Under this standard of review, what would it take for an executive initiative to be found unconstitutional? The Court acknowledges that a more stringent form of rational basis scrutiny applies where the initiative is not "explicable by anything but animus," citing Justice Kennedy's majority opinion in Romer v. Evans (1996; reprinted above, _____). After 22 years of vigorously criticizing it as wrongly decided, are the conservatives on the Court finally accepting that *Romer* was rightly decided? Might Roberts have included this acknowledgment of *Romer* to secure Kennedy's agreement?

(4) To what extent is the majority opinion rooted in institutional concerns for the presidency? That is, with upholding the authority of *the presidency* as distinguished from upholding the actions of *this particular president*?

(5) Here, the Supreme Court holds that President Trump's statements about Muslims do not require it to declare the Proclamation to be unconstitutional. Consider this holding in relation to that in Masterpiece Cakeshop, Ltd v. Colorado Civil Rights Commission (2018; reprinted below, ____). In these two cases, there was a law that was ostensibly justifiable on the basis of legitimate policy objectives, national security and freedom from discrimination, respectively. Here, the President himself had uttered statements which the lower courts interpreted as expressing hostility toward Muslims. In *Masterpiece Cakeshop*, one commissioner uttered statements which the Supreme Court viewed as expressing hostility toward the baker's Christian religion. Why didn't the Supreme Court in *Masterpiece Cakeshop* make an argument analogous to the argument it made in this case: irrespective of what one commissioner said, the Commission's decision is still justifiable on the ground that the law promotes legitimate governmental interests in protecting against discrimination on the basis of sexual orientation in places of public accommodation? Can these two decisions be squared with one another? If not, which case takes the more defensible approach?

(6) Is the majority opinion basically saying, yes, there is evidence of President Trump's hostility toward Muslims, but we must set it aside because the Proclamation is independently justifiable on national security grounds? Or is it saying that there is inadequate proof of hostility? Thomas clearly takes the view that "plaintiffs' proffered evidence of anti-Muslim discrimination

is unpersuasive." What might it take to persuade Thomas that President Trump's initiative was based on hostility toward Muslims?

(7) Furthermore, Thomas writes: "Section 1182(f) does not set up any judicially enforceable limits that constrain the President. Nor could it, since the President has *inherent* authority to exclude aliens from the country." Is Thomas suggesting that, even if Congress specifically set out to do so, it may not place limits on the President's authority to exclude aliens from the country? Is Thomas suggesting that, even if Congress had not passed 1182(f), the President already possesses authority to exclude aliens from the country on any basis the President deems supportable?

(8) In other contexts, Kennedy has been concerned to vindicate the authority of the Supreme Court to have the final say about the constitutionality of actions of the President. See, e.g., Boumediene v. Bush (2008; reprinted above, ___), mentioned by Sotomayor in dissent. What is Kennedy saying here in concurrence? He seems to want to distinguish constitutional review from judicial review, and to say that, even if there might not be judicial review of the President's action, that does not mean that the Constitution is silent and imposes no obligations. That is, the Constitution may impose obligations on the President even in the absence of judicial review. Ponder this view in relation to the tradition of departmentalism, as against judicial exclusivity, in response to the question, WHO may authoritatively interpret the Constitution? See, e.g., Chapter 7.