



Travel Ban 3.0 at the Supreme Court: Oral Argument Preview

On April 25, 2018, the Supreme Court of the United States will hear [oral arguments](#) in the case of *Trump v. Hawaii*. (Travel Ban 3.0). The Supreme Court has asked both parties to answer the four following questions:

- 1) Can the Court review the respondent's challenge to Travel Ban 3.0?
- 2) Is Travel Ban 3.0 a lawful exercise of the President's authority?
- 3) Is a nationwide injunction impermissibly overbroad?
- 4) Does Travel Ban 3.0 violate the Establishment Clause of the First Amendment?

WHAT IS THE CURRENT STATE OF TRAVEL BAN 3.0?

On September 24, 2017, the President issued a Proclamation titled [Enhancing Vetting Capabilities and Processes For Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats](#) (Proclamation). Section 2 of the Proclamation suspends the entry of certain nationals from Chad, Iran, Libya, North Korea, Syria, Venezuela, Yemen, and Somalia based on the perceived threat posed by each country. Like with two earlier versions of the travel ban, the Proclamation was challenged in federal courts. Despite the robust activity in the district and appellate courts (as described below) the Supreme Court issued twin orders on [December 4, 2017](#) to reinstate the full version Travel Ban 3.0. This means that the Proclamation remains in effect unless and until the Supreme Court issues a different decision. On April 10, 2018, the White House [announced](#) that Chad will be removed from the travel ban after finding that the country met "baseline" security standards.

WHAT IS THE LITIGATION HISTORY?

While Travel Ban 3.0 remains in full effect as of this writing, the history of litigation journey has been rich. On October 17, 2017, the federal district court in [Hawaii](#) issued a nationwide decision blocking enforcement suspensions under Section 2, except those pertaining to North Korea and Venezuela. On December 22, 2017, the [Ninth Circuit Court of Appeals](#) upheld the district court's decision. The appellate court found that the ban was inconsistent with certain sections of the INA. For example, § 212(f) authorizes the president "by proclamation and for such period as he shall deem necessary," to suspend the entry of any non-citizen or class of noncitizens "whenever the President finds that the entry [...] would be detrimental to the interests of the United States." However, § 202(a)(1)(A) of the same statute states "[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." The appellate court summarized the legislative history of this nondiscrimination clause and concluded that it limits the President's authority under § 212(f). The [court limited the injunction](#) to those "with a credible bona fide relationship with the United States" and then stayed its own decision pending a decision by the Supreme Court.

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A second court case blocking the Proclamation was issued by a federal district court in Maryland, and upheld in a [Fourth Circuit decision](#) dated February 15, 2018. The Fourth Circuit focused on the constitutional arguments. The court held that Proclamation likely violates the Establishment Clause of the Constitution. It found that the Proclamation is “unconstitutionally tainted with animus toward Islam.” The appellate court further found that “an objective observer could conclude that the President’s repeated statements convey the primary purpose of the Proclamation—to exclude Muslims from the United States. In fact, it is hard to imagine how an objective observer could come to any other conclusion when the President’s own deputy press secretary made this connection express.” The [court similarly limited the injunction](#) to “foreign nationals with a bona fide relationship with an individual or entity in the United States,” and also stayed its own decision pending the Supreme Court’s decision.

LITIGATION AT THE SUPREME COURT: WHAT DO THE PARTIES ARGUE?

The Government: In [a brief](#) filed by Solicitor General Noel Francisco on February 21, 2018, the government makes four arguments. First, the government argues that the court does not have the authority to override the President’s authority. According to the government, the President’s Proclamation is a political decision, left to the authority of the political branches. The government argues that the text, structure, and history of the INA clearly demonstrate Congress’ intent that decisions to exclude noncitizens be unreviewable by the court.

Second, the government argues that the President does have the authority to issue the Proclamation. Citing to the INA, the government argues that Congress has granted “sweeping” authority for the President to suspend or restrict entry of noncitizens abroad. The government also argues that, while § 202 bars nationality-based discrimination in the issuance of visas, the statute does not mention the process for obtaining entry, nor does it compel the government to issue visas to people who are found ineligible under some other provision. Third, the government argues that the Proclamation does not violate the Establishment Clause, because it is facially neutral and has a legitimate purpose—national security. Finally, the government argues that the court overstepped its judicial authority by issuing a nationwide injunction.

Hawaii et al. (Respondents): Hawaii and others filed [a response brief](#) on March 23, 2018, represented by Russell A. Suzuki, Acting Attorney General of Hawaii; Clyde J. Wadsworth, Solicitor General of Hawaii; and their lawyers, led by counsel of record Neal Kumar Katyal. The brief makes five major points. First, they that the court does have the power to review certain presidential actions. They state that the INA and precedent only bar the court from reviewing Congress’ policy choices, or individual exercises of Executive discretion, not congressionally imposed limits on executive authority.

Second, Hawaii et al. argue that the Proclamation conflicts with the policies laid out by Congress. It does so by barring “immigration of 150 million aliens who share nothing in common but nationality...” even though the INA specifically identifies nationality as a disfavored characteristic. The bar on the identified nationals is indefinite, which they also argue violates the requirement that the President suspend entry only for a period of time. They also argue that the Proclamation seeks to impose the exact same information sharing requirements already considered by Congress when it passed the Visa Waiver Program. At that time, Congress did not find that the justifications given by the government warranted exclusion of a country’s nationals. Hawaii et al.

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also argue the Proclamation raises constitutional concerns by giving the President “a line-item veto over the entire immigration code.”

Third, they argue that the Proclamation violates the INA’s nondiscrimination clause and enables the President to revive the discredited national origin quotas that Congress sought to banish. Fourth, they note that because the Proclamation contains statutory defects the Court need not reach the constitutional questions but even so, the Proclamation violates the Establishment Clause. Hawaii et al, argue that the government has not offered a facially legitimate and neutral purpose, and that there is an overwhelming amount of evidence that the true purpose of the Proclamation was to exclude Muslims from the United States. Finally, they argue that a nationwide injunction is not only within the power of the court but is necessary to afford complete relief and to maintain the unity of the national immigration laws.

AMICUS BRIEFS

Numerous groups and individuals filed amicus or “friend of the court” briefs in support of each party. One amicus brief from [the conservative nonprofit Citizens United](#), argues that the Establishment Clause is not meant to prevent the legal *disfavor* of any religion, but rather the legal preference of one religion over another, and therefore it does not matter if the ban is discriminatory. Citizens United also argues that the hardships that challengers allege—family separation, marginalization, and exclusion—are not cognizable injuries, and that the Establishment Clause does not protect “hurt feelings.”

The majority of amicus briefs filed were in support of the respondents. One brief filed by [the Attorneys General of sixteen states and the District of Columbia](#), describes how the Proclamation harms their states’ universities, hospitals, businesses, and residents. Another brief, filed by [Peter Margulies, WilmerHale and Shoba Sivaprasad Wadhia](#) on behalf of immigration legal scholars, explains how the Proclamation conflicts with the legislative history leading to the end of national origin quotas.

For more on the travel ban, visit [our website](#) and the [SCOTUS Blog page](#) on *Trump v. Hawaii*.