of law, but finding that there were no substantial grounds for difference of opinion and that an interlocutory appeal would not materially advance the ultimate termination of the litigation. ***Shoots v. iQor Holdings US Inc.***, 2018 WL 2383158 (D. Minn. 5/25/2018).

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IMMIGRATION LAW

JUDICIAL LAW

■ **Supreme Court upholds Travel Ban 3.0.** On 6/26/2018, the U.S. Supreme Court issued a 5-4 decision in *Trump v. Hawaii*, upholding President Trump's 9/24/2017 Proclamation 9645 (aka Travel Ban 3.0). The proclamation, in its third incarnation, sought to improve vetting procedures for foreign nationals seeking entry into the United States from certain countries failing to provide sufficient information necessary for assessing whether those individuals present a national security threat. The eight countries designated as deficient in providing the information were Chad, Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen. (Chad was later removed from the list following a review of that country's improved practices.)

Chief Justice Roberts majority opinion (joined by Justices Kennedy, Thomas, Alito, and Gorsuch with concurring opinions by Justices Kennedy and Thomas): The majority opinion upheld the proclamation based on an analysis of the following:

8 U.S.C. §1182(f): This provision of the law gives broad discretion to the president to suspend the entry of foreign nationals into the United States. In fact, according to the Court, §1182(f) "exudes deference to the President in every clause." Thus, the president need only find the admission of certain foreign nationals into the United States to be detrimental to its interests to call for suspension of entry "for such period as he shall deem necessary." And the Court finds the Department of Homeland Security's worldwide review and recommendations provide sufficient grounds to warrant such a finding by the president. In sum, the "Plaintiffs have not identified any conflict between the Proclamation and the immigration scheme reflected in the INA that would implicitly bar the President from addressing deficiencies in the Nation's vetting system."

Establishment clause of the 1st Amendment: The issue here involves the significance of a president's statements, sometimes inflammatory, by way of speeches, tweets, and other avenues, in relation to a presidential directive which, on its face, is neutral and issued within the traditional core of executive responsibility.

■ Applying a rational basis review, the Court asks if the proclamation is "plausibly related" to the government's objective of protecting the United States and improving the vetting process for issuance of visas to foreign nationals seeking entry into the United States. While acknowledging the president's outside statements, the Court discounts their significance and insists a presidential directive should be upheld "so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds." Somewhat forebodingly, the Court notes, "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*, 426 U. S., at 81–82."

■ At the same time, the Court notes that the proclamation does not universally ban foreign nationals from those countries since it makes allowance for exceptions (e.g., lawful permanent residents and those granted asylum or refugee status) and waivers, following review on a case-by-case basis.

■ In sum, the Court finds the proclamation to be based on legitimate objectives involving national security interests and to "say[] nothing about religion."

Justice Breyer dissent (joined by Justice Kagan): Much of the dissent is devoted to whether waivers are actually being granted as provided for by the proclamation or instead used in the proclamation as mere window dressing. Citing data suggestive of the latter, the dissent notes that, according to State Department reports, two waivers were approved out of 6,555 applications during the first month. Similarly, while refugees are exempted by the proclamation, few have been allowed into the United States. According to the State Department, 13 Syrian refugees (with 3 from Iran, 1 from Libya, 0 from Yemen, and 122 from Somalia) have arrived since January 2018. In light of this information and more, the dissent urges a remand for further fact-finding on the waiver process while leaving the injunction in place. "If this Court must decide the question without this further litigation, I would, on balance, find the evidence of antireligious bias… a sufficient basis to set the Proclamation aside."

Justice Sotomayor dissent (joined by Justice Ginsburg): The dissent contends that the proclamation clearly violates the establishment clause's guarantee of religious neutrality.

■ The proclamation, now in its third guise, fails to remove the discriminatory intent of the President's outside statements. The Proclamation "was driven primarily by anti-Muslim animus, rather than by the Government's asserted national-security justifications."

■ The dissent also criticizes the majority for failing to recognize the government's asserted national security rationale as nothing more than a "religious gerrymander." The Department of Homeland Security's worldwide review fails to "break the clear connection between the Proclamation and the President's anti-Muslim statements." In fact, the majority "empowers the President to hide behind an administrative review process [rational basis review] that the Government refuses to disclose to the public."

■ The dissent notes the irony of the majority's 6/4/2018 opinion in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* "where a state civil rights commission was found to have acted without 'the neutrality that the Free Exercise Clause requires,' [but] the government actors in this case will not be held accountable to breaching the First Amendment's guarantee of religious neutrality and tolerance."

■ Citing the Court's 1944 decision in *Korematsu v. United States*, upholding Executive Order 9066—a 1942 decree effectively allowing for Japanese Americans to be removed from designated "military areas" and surrounding communities and placed into internment camps—the dissent notes the government continues its reliance on national security interests to justify government action that is, at its heart, discriminatory. "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."

Trump, President of the United States, et al. v. Hawaii et al., 585 U.S. ____ (2018). *https://www.supremecourt.gov/opinions/17pdf/17-965_h315.pdf*

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INTELLECTUAL PROPERTY

JUDICIAL LAW

■ **Patents: Recovering damages for foreign lost profits.** The United States Supreme Court recently held that a plaintiff, having proven patent infringement, could recover lost-profit damages for sales lost in foreign countries. WesternGeco sued ION Geophysical Corp. for infringement of U.S. patents related to surveying the ocean floor. A jury found ION liable and awarded WesternGeco $12.5 million in royalties and $93.4 million in lost profits. The lost profits award included profits from 10 service contracts performed abroad. ION moved to set aside the jury's verdict, arguing that the lost profits award was improper because U.S. patents have no force beyond U.S. borders and, thus, there can be no damages on sales abroad.

The district court denied the motion. The Court of Appeals for the Federal Circuit reversed, however, and held that the lost-profit damages were improper because lost-profit damages cannot be recovered on foreign sales. But the Supreme Court disagreed. In determining whether a statute has been improperly applied in an extraterritorial way, a court, first, identifies the statute's "focus" and, second, asks whether the conduct relevant to that focus has occurred domestically or extraterritorially. If the conduct occurred domestically, the statute is not being given improper extraterritorial effect. The Supreme Court held that the statutory focus of the patent damages statute, §284, is "the infringement." Next, the Court held that the statutory focus of the infringement statute in this case, §271(f)(2), is the act of "suppl[ying a component of a patented invention]... in or from the United States." By its plain language, the conduct occurs domestically. Accordingly, the jury's award of lost profits for sales in foreign countries was not an improper extraterritorial application of U.S. patent law. ***WesternGeco LLC v. ION Geophysical Corp.***, 585 U.S. __ (2018).

■ **Patents: Issue-preclusive effects of PTAB proceedings.** Judge Frank recently denied a motion for summary judgment, finding a claim was not precluded based on an intervening judgment at the Patent and Trial Appeal Board (PTAB). Wilson Wolf Manufacturing sued Corning alleging that Corning acquired information about Wilson Wolf's proprietary technology under a confidentiality agreement and subsequently (i) misappropriated Wilson Wolf's trade secret technology, (ii) breached the confidentiality agreement, and (iii) filed patent applications on Wilson Wolf's technology, improperly identifying Corning employees as the inventors. Corning moved for summary judgment, arguing that all of Wilson Wolf's claims should be precluded by an intervening PTAB decision in which the PTAB invalidated most of the claims in one of Wilson Wolf's patents. According to Corning, the technology covered in the invalidated patent was the same technology that was at issue in the lawsuit. Thus, under Corning's theory, this "generally known" technology could be neither trade secret nor confidential. The court ruled, however, that the doctrine of issue preclusion did not apply. The Patent Act provides that patent claims shall be canceled when there has been "a final judgment adverse to a patentee from which no appeal or other review has been or can be taken." The court rejected Corning's issue-preclusion argument because Wilson Wolf could still appeal the PTAB's decision, meaning that the claims had not yet been "finally" canceled. Accordingly, the court denied Corning's motion for summary judgment. ***Wilson v. Corning***, No. 13-210 (DWF/FLN), 2018 Dist. LEXIS 88173 (D. Minn. 5/25/2018).

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