No. 17-17168
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF HAWAII, *et al.*,
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Hawaii, No. 1:17-cv-00050-DKW-KSC
District Judge Derrick K. Watson

BRIEF OF *AMICI CURIAE* IMMIGRATION LAW SCHOLARS ON STATUTORY CLAIMS IN SUPPORT OF PLAINTIFFS-APPELLEES

FATMA MAROUF*
Texas A&M Univ. School of Law
1515 Commerce Street
Fort Worth, TX 76102
(817) 212-4123

SABRINEH ARDALAN*
PHILIP L. TORREY*
NATHAN MACKENZIE (Law Clerk)
DALIA DEAK (Law Student)
NIKU JAFARNIA (Law Student)
RACHEL KROLL (Law Student)
Harvard Immigration and Refugee Clinical Program
Harvard Law School
6 Everett Street
Cambridge, MA 02138
(617) 384-8165

GEOFFREY HOFFMAN*
University of Houston Law Center
4604 Calhoun Road, Room 56, TU-II
Houston, TX 77204
(713) 743-2094

KARLA MCKANDERS*
Vanderbilt Law School
131 21st Avenue South
Nashville, TN 37203
(615) 322-3092

*Filed in an individual capacity.
University affiliation is for identification only.

Counsel for Amici Curiae and Amici Curiae

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INTEREST OF *AMICI CURIAE*

Amici are immigration law scholars. They teach immigration law, have written numerous scholarly articles on immigration law, and understand the practical aspects of immigration law through client representation. They submit this brief to show that the Immigration and Nationality Act ("INA") as a whole constrains the authority delegated to the Executive Branch under 8 U.S.C. § 1182(f), rendering Proclamation 9645, 82 Fed. Reg. 45161 (Sept. 27, 2017) ("Proclamation"), *ultra vires*.[1]

SUMMARY OF THE ARGUMENT

While Congress has delegated broad powers to the Executive Branch concerning the enforcement of immigration laws, the INA's content, structure, and usage limit those powers. Viewing the INA in its entirety, as an integrated statute, proves fatal to the Government's arguments that Congress imposed no constraints on the President's power to suspend the entry of classes of aliens under 8 U.S.C. § 1182(f).[2]

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[1] All parties have consented to the filing of this amicus brief. *See* Fed. R. App. P. 29(a)(2). No party's counsel authored any part of the brief, and no party, party's counsel, or person, other than the amici, contributed money that was intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29(a)(4)(E).

[2] While the President cites both 1182(f) and 1185(a)(1) in the Proclamation as the statutory basis for his authority, the boilerplate language in 1185(a)(1) has never been held by itself to authorize any particular Executive Branch restriction on entry; 1182(f) is the broader grant of authority, subsuming 1185(a)(1). *See Jean v.*

Although Congress has delegated broad authority to the President under the INA, he cannot impermissibly use that authority to fundamentally upend the INA's system of determining who should be allowed into the country and who should not be allowed. Congress has carefully crafted the categories of aliens who may and may not be admitted to the United States, and, in doing so, it specifically created terrorism-related and foreign policy grounds of inadmissibility. *See* 8 U.S.C. § 1182(a)(3)(B)–(C). Congress did not grant the President unbridled power under 1182(f) to circumvent or fundamentally alter those provisions.

Other INA provisions would similarly be rendered meaningless if the President had unchecked power under 1182(f). Most notably, the INA's nondiscrimination provision, which was created with the express purpose of ending an admissions system based solely on national origin, would be rendered meaningless if the President could prevent the admission of aliens based solely on

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Nelson, 727 F.2d 957, 966–67 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985); *Int'l Refugee Assistance Project v. Trump*, 2017 WL 4674314, at *23 (D. Md. Oct. 17, 2017) ("Although the Proclamation also relies on § 1185(a)(1), the parties do not argue that this section provides broader authority than § 1182(f). Therefore, the Court need only consider whether the Proclamation exceeds the President's delegated authority under § 1182(f)."); *see also Hawaii v. Trump*, 859 F.3d 741, 770 n.10 (9th Cir. 2017) (per curiam), *order vacated*, No. 17-15589, 2017 WL 5034677 (D. Haw. Nov. 2, 2017) ("Because . . . [§ 1185(a)(1)] does not grant the President a meaningfully different authority than § 1182(f), and because § 1182(f) specifically provides for the President's authority to suspend entry, our analysis proceeds under § 1182(f), understanding that the 'reasonable rules, regulations, and orders' the President prescribes would need to, at a minimum, align with the President's authority under § 1182(f).").

their nationality. Since 1952, when 1182(f) was enacted, Congress has repeatedly amended the INA. One of the critical changes that occurred in 1965 involved abandoning a system rooted in national origin discrimination and creating a more equitable method for determining admission.

The grant of authority under 1182(f) can only be reconciled with the rest of the statute if construed to apply in exceptional circumstances involving diplomacy and the Commander-in-Chief powers, where the President's authority is at its peak. Indeed, prior usage of 1182(f) has rested on such an interpretation. The President's Proclamation here purports to be related to national security and diplomacy, but its provisions and its origin undercut those proffered justifications.

In this brief, we demonstrate how the INA as a whole unambiguously dooms the Proclamation.

ARGUMENT

I. CONGRESS HAS GIVEN THE PRESIDENT BROAD, BUT IN NO WAY UNLIMITED, POWERS OVER IMMIGRATION.

Primary responsibility over immigration policy-making lies with Congress, which has the power to "establish an uniform Rule of Naturalization," "regulate Commerce with foreign Nations," "declare War," and—in a veiled reference to slavery—prohibit "[t]he Migration or Importation of such Persons as any of the States now existing shall think proper to admit" after the year 1808. U.S. Const. art. I , § 8, cl. 3, 4, 11 & § 9, cl.1. Based on those enumerated powers, combined

with the Necessary and Proper Clause, the Supreme Court has long recognized that regulating immigration is primarily—if not exclusively—within Congress's domain.[3] *See, e.g.*, *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) ("[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." (internal quotation marks omitted)); *Galvan v. Press*, 347 U.S. 522, 531 (1954) ("[T]hat the formulation of [immigration policy] is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government."); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 340 (1909) ("[T]he authority of Congress over the right to bring aliens into the United States embraces every conceivable aspect of that subject.").

[3] While the Supreme Court has suggested in *dicta* that the President has some inherent power over immigration derived from the foreign affairs power, those cases involved actions taken pursuant to statutory delegations of authority. *See, e.g.*, *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 539–41 (1950) (explaining that the President acted pursuant to a 1941 Act that authorized him to impose additional restrictions on entry and departure "during the national emergency proclaimed May 27, 1941," upon finding that the interests of the United States required it); *Kleindienst v. Mandel*, 408 U.S. 753, 769–70 (1972) (stating that the Executive Branch denied a waiver of inadmissibility pursuant to a delegation of authority in 8 U.S.C. § 1182(a)(28)); *Kerry v. Din*, 135 S. Ct. 2128, 2131–32 (2015) (upholding the denial of a visa by a consular official acting pursuant to a statutory provision prohibiting the issuance of visas to persons who engage in terrorist activities).

Congress can, of course, delegate authority to the Executive Branch. *See Yamataya v. Fisher*, 189 U.S. 86, 97–98 (1903); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892). Via the INA, Congress has delegated substantial authority to certain Executive Branch officials, including the President, Attorney General, Secretary of State, Secretary of Homeland Security, Secretary of Labor, and Secretary of Health and Human Services.[4] *See, e.g.*, 8 U.S.C. §§ 1103(a) (delegating authority to the Secretary of Homeland Security), 1104 (Secretary of State), 1182(a)(1)(A) (Secretary of Health and Human Services), and 1188(a)(2) (Secretary of Labor). But those delegated powers are not so broad as to allow the Executive Branch authorities to bypass the elaborate admission scheme developed by Congress.

Part A below describes the main powers that Congress has delegated to the Executive Branch regarding immigration enforcement and the admission of individuals. Part B turns to the authority delegated under 8 U.S.C. § 1182(f). The brief explains that the INA as a whole constrains the President's power under 1182(f), limiting that power to exigent diplomatic or military concerns where the President's authority is already at its peak. *See Youngstown Steel and Tube v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

[4] The Homeland Security Act of 2002 transferred certain powers from the Attorney General to the Secretary of the Department of Homeland Security ("DHS"). Homeland Security Act, H.R. 5005, 107th Cong. (2002).

A. Congress Has Delegated Significant Yet Restricted Powers Over Immigration Enforcement, Adjudication, and Visa Processing to the Executive Branch.

The broadest delegations of authority from Congress to the Executive Branch pertain to enforcement and removal, rather than admission. Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 Yale L.J. 458, 464–65 (2009). Congress has charged the Secretary of Homeland Security with "[e]stablishing national immigration enforcement policies and priorities," and, even more generally, with "the administration and enforcement" of immigration laws. 6 U.S.C. § 202(5); 8 U.S.C. § 1103(a). Those powers allow the President, through the Secretary of Homeland Security, to prioritize certain classes of noncitizens for removal and provide guidance regarding the use of prosecutorial discretion. Although Congress has set forth detailed grounds of deportability, *see* 8 U.S.C. § 1227, decisions about who is actually placed in removal proceedings and who is ultimately deported pursuant to those statutory grounds remain largely in the hands of the Executive Branch.

In addition, Congress has authorized the Executive Office for Immigration Review of the Department of Justice, as well as DHS, to make determinations about whether to grant certain forms of relief and protection from removal if an individual satisfies the INA's eligibility criteria. Some of those determinations, including whether to grant asylum, different types of cancellation of removal, voluntary departure, and adjustment of status, require an Executive Branch official

to exercise some degree of discretion. *See* 8 U.S.C. §§ 1158, 1229b, 1229c, 1255(c).

Congress has also delegated some limited authority to the Executive Branch concerning the admission of individuals into the country, including whether to grant discretionary waivers of certain inadmissibility grounds in individual cases. While some types of waivers are quite broad, *see, e.g.*, 8 U.S.C. § 1182(d)(3), others may be granted only if the applicant satisfies specific statutory requirements. *See, e.g.*, 8 U.S.C. §§ 1182(a)(9)(B)(v) (waiver of three and ten-year bars to admission for unlawful presence), (a)(9)(C)(iii) (waiver for aliens unlawfully present after previous immigration violations), (d)(4) (waiver of requirement to have a valid entry document), 1157(c)(3) (waiver of inadmissibility grounds for refugees). Congress has also authorized Executive Branch officials to grant "parole," which allows entry "on a case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A).

Furthermore, Congress has authorized certain Executive Branch officials to determine the form and manner of processing "immigrant" and "nonimmigrant" visa applications. 8 U.S.C. § 1202(a)–(d). For example, Congress has authorized the Secretary of State to waive the general requirement of an in-person interview for nonimmigrant visa applicants if it is "in the national interest of the United States" or "necessary as a result of unusual or emergent circumstances." 8 U.S.C. §

1202(h)(1)(C). The Secretary of State has also been authorized to grant an exception to the general rule that overstaying a nonimmigrant visa makes an individual ineligible to be readmitted as a nonimmigrant. 8 U.S.C. § 1202(g)(2)(B).

B. The Delegation of Authority Under 1182(f) Gives the President Broad Discretion in Exigencies Involving Diplomacy or Military Affairs, But Does Not Provide Unlimited Power.

The President may suspend the "entry" of "classes of aliens" under 1182(f) only if he "finds" that such entry would be "detrimental to the interests of the United States." 8 U.S.C. § 1182(f); *Hawaii*, 859 F.3d at 770 ("Section 1182(f) requires that the President *find* that the entry of a class of aliens into the United States *would be detrimental* to the interests of the United States."). Each of those terms must be given some effect to avoid being mere surplusage, which would render the statutory admission scheme and its restraints on the Executive Branch's discretion meaningless. *See Marx v. General Revenue Corp.*, 568 U.S. 371, 386 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme."); *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 209 (1997) ("Statutes must be interpreted, if possible, to give each word some operative effect."); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal quotation marks omitted)); *Reiter v. Sonotone Corp.*, 442

U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used.").

When determining the scope of authority under 1182(f), courts should examine how prior Presidents have used the provision. *See Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2090 (2015) (Kennedy, J., concurring) (turning to "judicial precedent and historical practice" in interpreting the President's power to decide what foreign power is legitimate); *N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550, 2559–60 (2014) (putting "*significant weight upon historical practice*" in interpreting the President's powers under the Recess Appointments Clause, and explaining that "[t]he longstanding 'practice of the government' . . . can inform [the Court's] determination of 'what the law is'" in a separation-of-powers case (emphasis added) (citations omitted)); *see also* Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 Colum. L. Rev. 1097 (2013) (addressing the importance of history in defining the scope of executive power).

Prior Presidents have typically relied upon 1182(f) in emergency situations that implicate their Commander-in-Chief powers or their authority concerning international diplomacy. *See* U.S. Const. art. II, § 2, cl. 1–2. Such situations include suspending entry of specific classes of aliens in order to put pressure on a foreign government, often as part of broader sanctions, enforce a treaty, or respond

to a foreign coup, act of aggression, or emergency. *See* Kate M. Manuel, Cong. Research Serv., R44743, *Executive Authority to Exclude Aliens* 6–10 (2017) (listing all previous presidential suspensions). In those situations, the President's power is at its zenith. In contrast, when the President attempts to restrict entry of classes of aliens in situations that do not implicate specific diplomatic exigencies or military crises, he is encroaching on Congress's power to establish the classes of persons who may and may not be admitted to the United States, and consequently his power is at its lowest ebb. *See Youngstown Steel and Tube*, 343 U.S. at 637 (Jackson, J., concurring).

For example, President Carter used his delegated authority under 1182(f) in response to the 1980 Iranian hostage crisis, when he directed the Secretary of State to invalidate and suspend the issuance of visas to Iranians "except for compelling and proven humanitarian reasons or where the national interest of our own country requires." President's Announcement of Sanctions Against Iran, 16 Weekly Comp. of Pres. Doc. 611 (Apr. 7, 1980). Restricting the entry of Iranians was just one of several measures, including ending diplomatic relations, which President Carter used to increase pressure on Iran to release hostages taken during the attack on the U.S. embassy. *Id.*

Perhaps the most sweeping use of 1182(f) was President Reagan's exercise of the power to "suspend entry into the United States as immigrants by all Cuban

nationals," subject to certain exceptions. Proclamation No. 5517, 51 Fed. Reg. 30,470 (Aug. 22, 1986). President Reagan issued Proclamation No. 5517 in response to the Cuban government's refusal to honor an immigration agreement between the two countries, which disrupted normal migration procedures. *Id.* Two years prior to President Reagan's Proclamation, the Supreme Court upheld President Reagan's ability to restrict U.S. citizens' travel to Cuba, citing "weighty concerns of foreign policy" as the justification for the restriction. *Regan v. Wald*, 468 U.S. 222, 241–42 (1984).

In this case, the Proclamation's reach is unprecedented. *See Hawaii*, 859 F.3d at 772 n.13 ("'None of the Executive actions cited elsewhere by the Government, nor any others known to amici, invoked § 1182(f) to suspend entry from one or more countries based on the assumption that nationals from those countries were inherently dangerous.'") (quoting Brief of Former Federal Immigration and Homeland Security Officials as *Amici Curiae*, *Hawaii v. Trump*, 859 F.3d 741 (2017)). President Trump's Proclamation suspending the entry of foreign nationals from eight countries cannot fairly be characterized as an act related to exigent diplomatic or military affairs. There is no evidence, for example, that the President suspended entry to negotiate or enforce a treaty with any of these eight countries or to respond to an act of aggression by or a coup or recent revolution within any of those eight countries.

The Proclamation summarily asserts that information-sharing and identity-management deficiencies in the designated countries compromise national security, and that the Proclamation serves a diplomatic purpose by encouraging the designated countries to improve their practices in those areas. But the Government's purported reasons are utterly disjointed from the restrictions actually imposed. *See Hawaii v. Trump*, No. CV 17-00050, 2017 WL 4639560, at *10 (D. Haw. Oct. 17, 2017) ("[The Proclamation], like its predecessor, makes 'no finding that nationality alone renders entry of this broad class of individuals a heightened security risk to the United States.'" (quoting *Hawaii*, 859 F.3d at 772)).

The Proclamation fails to show why the current admission system Congress crafted should be scrapped and replaced with a system that bans individuals from eight countries based solely on their nationality. *See Hawaii*, 2017 WL 4639560, at *10 ("The Ninth Circuit's analysis [determining that the President's findings in EO-2 were insufficient] applies no less to [the Proclamation], where the 'findings' cited in Section 1(h) and (i) similarly omit any explanation of the inadequacy of individual vetting sufficient to justify the categorical, nationality-based ban chosen by the Executive." (quoting *Hawaii*, 859 F.3d at 773)).

The Proclamation makes no mention of any deficiencies with the current visa system; provides no explanation for shifting from the current system to a ban based on nationality; and provides no information about the review process,

agency recommendations, or report that purportedly supports the restrictions imposed. *See Hawaii*, 2017 WL 4639560, at *10 (emphasizing that the Proclamation does not tie nationals from the listed countries "in any way to terrorist organizations within the six designated countries," find them "responsible for insecure country conditions," or provide "any link between an individual's nationality and their propensity to commit terrorism or their inherent dangerousness" (quoting *Hawaii*, 859 F.3d at 772)). The Proclamation's restrictions are thus far afield from its asserted goal and bear no rational relationship to the Proclamation's purported purpose.

Further, if information-sharing and identity-management deficiencies compromise national security, it does not serve the Government's purported purpose to allow individuals from Chad, Yemen and Libya with all types of nonimmigrant visas, except for business and tourist visas, to be allowed entry. *See id.* at *11 (describing the "internal incoherencies" of the Proclamation). Likewise, it makes no sense to allow only Iranian nonimmigrants with student and exchange visas to enter, while barring all other Iranian nonimmigrants. *Id.* ("[The Proclamation's] individualized country findings make no effort to explain why some *types* of visitors from a particular country are banned, while others are not.").

If the purpose of the Proclamation is indeed to serve a diplomatic purpose by encouraging foreign governments to improve their practices, why would the

President contradict his own supposed findings by excluding a country like Iraq, which did not meet the baseline criteria, while including a country like Somalia, which met the baseline criteria? Indiscriminately excluding certain nonimmigrants as opposed to the previous Executive Orders' wholesale exclusion of nonimmigrants does not automatically render the Proclamation a permissible exercise of presidential authority. *See id.* (describing "internal incoherencies that markedly undermine" the Proclamation's "stated 'national security' rationale"); *Hawaii*, 859 F.3d at 772–73 (noting that proper exercise of Section 1182(f) authority must "provide a rationale" and "bridge the gap" between findings and the ultimate restrictions imposed).

The Proclamation's asserted purpose rings hollow when considering that the INA places the burden on individual visa applicants—not their governments—to provide the information necessary to establish their identity and eligibility for a visa, including their admissibility into the United States, through both documentation and an in-person interview. *See* 8 U.S.C. § 1202 (a)–(d), (g)–(h); *see also* 8 U.S.C. § 1182 (a)(2), (a)(3)(A)–(C) (inadmissibility bars based on threats to national security and public safety). Under the INA, consular officers must deny visas to individuals who fail to provide sufficient information and documentation. 8 U.S.C. § 1361; 22 C.F.R. § 40.6.

The Proclamation also cannot be viewed in isolation from the President's prior attempts to ban foreign nationals from certain countries. Executive Order 13769 ("EO-1") was issued on January 27, 2017 within days of the President's inauguration and corresponded only to his campaign promises—not to any identifiable information, classified or otherwise, or pursuant to any security review that could conceivably have been ordered in such a short time. The President provided no "findings" to support either EO-1 or its second version, Executive Order 13780 ("EO-2"), and no nexus to any identifiable U.S. interests. Furthermore, as the Fourth Circuit noted, both EO-1 and EO-2 invoked "the specter of 'honor killings,' . . . a well-worn tactic for stigmatizing and demeaning Islam and painting the religion, and its men, as violent and barbaric." *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 596 n. 17 (4th Cir. 2017) (en banc), *vacated and remanded by Trump v. Int'l Refugee Assistance Project*, No. 16-1436, 2017 WL 4518553 (U.S. Oct. 10, 2017).

The most recent version of the travel ban attempts, belatedly, to correct those prior deficiencies, but it fails to do so adequately. To be certain, it does not mention honor killings and nominally adds two non-Muslim countries with little practical impact on migration; it also provides a new purported rationale. But its roots cannot be ignored. The Proclamation fulfills its predecessors' promise of a permanent ban, using nationality as a proxy for religion. Furthermore, as the

District Circuit noted, the Proclamation's nationality-based ban would lead to "absurd results," as it is "simultaneously overbroad *and* underinclusive." *Hawaii*, 2017 WL 4639560, at *10 (quoting *Hawaii*, 859 F.3d at 772). Under these circumstances, the Proclamation exceeds the authority delegated to the President by Congress.

II. THE INA AS A WHOLE CONSTRAINS THE DELEGATION OF AUTHORITY PROVIDED IN 1182(f).

Allowing the President to ignore the statutory constraints on his delegated authority would upend the INA and improperly allow the Executive Branch unchecked, absolute authority in an area historically deemed to be a Congressional power. *See Youngstown Steel and Tube*, 343 U.S. at 637 (Jackson, concurring). Section 1182(f) must be interpreted in a manner that is consistent with the INA as a whole. *See, e.g.*, *Dada v. Mukasey*, 554 U.S. 1, 16 (2008) ("In reading a statute we must not look merely to a particular clause, but consider in connection with it the whole statute." (internal quotation marks omitted)). Indeed, the Supreme Court has cautioned that reading provisions of the INA in isolation could lead to "so much trickery, violating the cardinal rule that statutory language must be read in context." *Lopez v. Gonzales*, 549 U.S. 47, 56 (2006) (citations and internal quotation marks omitted) (emphasizing that "our interpretive regime reads whole sections of a statute together to fix on the meaning of any one of them"). As shown below, reading 1182(f) in the context of the entire INA demonstrates that the

provision does not authorize the blanket ban on immigrant visas and improper and self-contradictory restrictions on nonimmigrant visas set forth in the Proclamation.

Congress has already carefully determined the categories of aliens who may and may not be admitted to the country. Congress amended the current admissibility rules nearly fifty years ago to prohibit nationality-based discrimination. As a result, today's admission system prohibits the admission of certain individuals who meet specified criteria—it does not allow for the exclusion of an entire population based solely on that group's nationality. *See Hawaii*, 2017 WL 4639560, at *10 ("[T]he categorical restrictions on entire populations of men, women, and children, based upon nationality, are a poor fit for the issues regarding the sharing of "public-safety and terrorism-related information" that the President identifies.").

The President cannot bypass that structure by effectively rewriting the rules of admission via executive fiat. Indeed, Congress has repeatedly legislated to limit the President's authority related to the admissions system, and he is not free to ignore those constraints.

A. The INA Constrains the President's Delegated Authority by Specifying Categories of Aliens Who May Be Admitted to the United States.

The INA provides detailed categories of aliens who may be admitted to the United States, which the President cannot unilaterally alter. For individuals seeking permanent residence, Congress has established three primary methods to obtain an

immigrant visa: family relationships, employment, and the diversity lottery. 8 U.S.C. § 1153 (a)–(c). For both family and employment-based immigrant visas, Congress has devised an intricate method for calculating the number of visas available. *See* 8 U.S.C. §§ 1153 (a)–(b); 1151(b)(2)(A)(i) (providing an unlimited number of visas to "immediate relatives"). The diversity lottery, which requires applicants to meet certain threshold conditions, similarly applies a complicated, statutorily-designated formula to determine the number of people who will be admitted in a random order from certain underrepresented geographical regions. 8 U.S.C. § 1153(c)–(e).

For nonimmigrants, who comprise the vast majority of individuals admitted to the United States, Congress has created an equally elaborate system. That system includes an alphabet soup of nonimmigrant visa categories, including visas for individuals coming to the United States for tourism, business, investment, study, training, agricultural or seasonal work, artistic performances, athletic events, and exchange programs. 8 U.S.C. § 1101(a)(15).

The President's Proclamation directly contravenes the deliberate and systematic process for immigrant and nonimmigrant admissions set forth in the INA. By suspending the entry of foreign nationals from eight countries, the Proclamation attempts to side-step the statutory admissions scheme that Congress created, and it is thus "incompatible with the express or implied will of Congress."

Zivotofsky, 135 S. Ct. at 2084 (quoting *Youngstown Steel and Tube*, 343 U.S. at 635 (Jackson, J., concurring)); *see also Hawaii*, 859 F.3d at 782 (describing EO-2 as "incompatible with the express will of Congress" because it conflicts, *inter alia*, with the INA's nondiscrimination provision, and thereby places his power "'at its lowest ebb'") (quoting *Youngstown Steel and Tube*, 343 U.S. at 635 (Jackson, J. concurring)); *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987) ("[Although] the Executive has broad discretion over the admission and exclusion of aliens, [that discretion] . . . extends only as far as the statutory authority conferred by Congress and may not transgress constitutional limitations.").

B. The INA Constrains the President's Delegated Authority by Specifying Classes of Aliens Who May Not Be Admitted to the United States, Including Those Who Trigger Certain National Security and Foreign Policy Concerns.

Just as Congress has specified categories for admission, so too, has it specified categories of aliens who may *not* be admitted. 8 U.S.C § 1182. Those inadmissibility grounds render certain aliens "ineligible to receive visas and ineligible to be admitted to the United States." 8 U.S.C. § 1182(a). The inadmissibility grounds include, but are not limited to, categories based on: criminal convictions; crime-related conduct; immigration violations; fraudulent misrepresentation; national security; and foreign policy. *See* 8 U.S.C. § 1182(a). Congress has incorporated into this framework very specific exceptions to certain

inadmissibility grounds, as well as discretionary "waivers" of certain grounds of inadmissibility. *See supra* Section I.A.

The two grounds of inadmissibility addressing national security and foreign policy are critical in interpreting the scope of the President's authority under 1182(f). First, the national security ground at 8 U.S.C. § 1182(a)(3)(B) provides very broad definitions of "terrorist activity" and "engag[ing] in terrorist activity," facilitating their use in a discretionary manner by consular officials and immigration officers. *See* Gerald L. Neuman, *Terrorism, Selective Deportation and the First Amendment After* Reno v. AADC, 14 Geo. Immigr. L. J. 313, 321–22 (2000). For example, the definition of "terrorist activity" includes any unlawful use of a weapon or dangerous device "other than for mere personal monetary gain," and "[e]ngag[ing] in terrorist activity" includes providing "material support" for any "terrorist activity" or organization. 8 U.S.C. § 1182(a)(3)(B)(iii)(V)(bb), (B)(iv).

Congress has also provided a mechanism for seeking an exemption from that inadmissibility ground. 8 U.S.C. § 1182(d)(3)(B). It would be pointless for Congress to legislate specific criteria for terrorism-related inadmissibility, as well as inadmissibility exceptions and exemptions, if Congress also authorized the President to bypass those provisions by summarily excluding entire nations. *See Abourezk*, 785 F.2d at 1057–58 (prohibiting the Executive Branch from using the

general exclusionary authority conferred by Congress in one provision of the INA to circumvent a more specific provision dealing with exclusion of aliens on the basis of organizational affiliation).

Second, the foreign policy inadmissibility ground applies to any alien "whose entry or proposed activities in the United States the Secretary of State has reasonable grounds to believe would have potentially serious adverse foreign policy consequences for the United States." 8 U.S.C. § 1182(a)(3)(C). Congress has carved out two exceptions to this inadmissibility ground, providing that a person generally should not be excluded based on "past, current, or expected beliefs, statements, or associations that would be lawful within the United States." 8 U.S.C. § 1182(a)(3)(C)(ii)–(iii).

The conference committee report accompanying the 1990 Immigration Act, which introduced the foreign policy ground, provides:

> Under current law there is some ambiguity as to the authority of the Executive Branch to exclude aliens on foreign policy grounds . . . . The foreign policy provision in this title would establish a single clear standard for policy exclusions (which is designated as 212(a)(3)(C) of the INA). The conferees . . . expect that, with the enactment of this provision, aliens will be excluded not merely because of the potential signal that might be sent because of their admission, but when there would be a clear negative foreign policy impact associated with their admission.

H.R. Rep. No. 101-955, at 128–29 (1990). There would be no point in requiring the Executive Branch to have "reasonable grounds to believe" that an individual

"would have potentially serious adverse foreign policy consequences for the United States" before denying the admission of such an individual, if the President had unfettered authority to restrict entry under 1182(f). *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (interpreting a statute to avoid "the superfluity of a specific provision that is swallowed by the general one").

Construing 1182(f) as broadly as the Government suggests would allow the President to destabilize—and ultimately destroy—the detailed admission structure described above. The President would effectively be able to create new categories of inadmissible aliens by suspending entry of classes he defines, thereby also altering the categories of people admitted to the country. *See Hawaii*, 2017 WL 4639560, at *12 ("The Government reads in Sections 1182(f) and 1185(a) a grant of limitless power and absolute discretion to the President . . . . Yet, '[n]ational security is not a 'talismanic incantation' that, once invoked, can support any and all exercise of executive power under § 1182(f).'" (quoting Hawaii, 859 F.3d at 774)).

Denying entry to classes of aliens based on alleged governmental deficiencies in information-sharing and identity verification also unlawfully extends Congress's requirements for participation in the Visa Waiver Program to the regular visa application process, where the individual applicant has the burden of proving eligibility. *Cf.* 8 U.S.C. § 1187(a)(3)(B), (c)(2)(D)–(F) (requiring

foreign governments to issue electronic passports, report lost or stolen passports, and share security-related information about its nationals to participate in the Visa Waiver Program) *with* 8 U.S.C. § 1202(a)–(d), (h) (placing the burden on applicants in the visa application process). When a country ceases to be eligible for the Visa Waiver Program, as is true of the countries affected by the Proclamation, its nationals are still eligible for admission into the United States if they apply for the relevant visa and thereby go through the careful visa-vetting process. Those visa processes are well defined under 8 U.S.C. § 1202 and cannot be changed by the President unilaterally.

Indeed, Congress did not intend to delegate such unlimited discretionary authority under 1182(f). As the District Court observed, the provisions of the INA that the President invokes "do not afford the President unbridled discretion to do as he pleases." *Hawaii*, 2017 WL 4639560, at *9. The Proclamation, in essence, seeks to enact legislative changes to the INA, which the President is prohibited from doing.

C. The INA's Nondiscrimination Provision Constrains the President's Delegated Authority Under 1182(f).

Section 1152(a)(1)(A) of the INA prohibits discrimination on the basis of nationality and place of birth in the issuance of immigrant visas. Introduced as part of the Immigration Act of 1965, the INA's nondiscrimination provision was designed to remedy the "harsh injustice of the national origins quota system." *See*

Remarks at the Signing of the Immigration Bill, Liberty Island, New York, 546 Pub. Papers 1037, 1038 (Oct. 3, 1965) (noting the national origins quota system "violated the basic principle of American democracy—the principle that values and rewards each man on the basis of his merit as a man"); *see also Olsen v. Albright*, 990 F. Supp. 31, 37 (D.D.C. 1997) (discussing enactment of the 1965 Amendments, including "[t]he legislative history surrounding the 1965 Act [which] is replete with the bold anti-discriminatory principles of the Civil Rights Era," and noting that visas may not be denied through applying prejudicial national stereotypes).

Congress rejected a proposal to transition gradually away from national origin quotas, preferring instead to require their immediate abolition and to limit the executive's discretion in the visa allocation process. S.500/H.R. 2580, 89th Cong., 1st Sess. (1965) (Hart-Celler, Johnson administration bill); H.R. 8662, 89th Cong., 1st Sess. (1965) (Feighan bill); *Hawaii*, 859 F.3d at 777 ("Congress could not have used 'more explicit language' in 'unambiguously direct[ing] that no nationality-based discrimination shall occur.'" (quoting *Legal Assistance for Vietnamese Asylum Seekers v. Department of State*, 45 F.3d 469, 473 (D.C. Cir. 1995), *vacated on other grounds*, 519 U.S. 1, 136 L.Ed.2d 1 (1996)).

Considering Congress's specific intent to repeal the national origin quota system and its discriminatory foundation, it is unsurprising that the text of the

nondiscrimination provision is succinct and unambiguous: "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a)(1)(A). That text is clear and should be interpreted in accordance with its plain meaning. *See Puello v. Bureau of Citizenship & Immigr. Servs*., 511 F.3d 324, 327 (2d Cir. 2007).

Although Congress did create some narrow statutory exceptions to the nondiscrimination provision, none are applicable with regard to the Proclamation.[5] Notably, Congress did not choose to exempt from the nondiscrimination provision the President's authority pursuant to 1182(f). *See Hillman v. Maretta*, 133 S. Ct. 1943, 1953 (2013) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." (citations omitted)); *see also Hawaii*, 859 F.3d at 777 (describing the President's efforts to "restore discrimination on the basis of nationality" as presenting a "clear conflict" between 1152(a)(1)(A) and 1182). Yet, none of the statutory exceptions to the nondiscrimination provision

[5] Most significantly, Congress can discriminate by assigning per-country caps on the number of family and employment-based visas that are issued. 8 U.S.C. § 1152(a)(1)(A), (a)(2). Also, the Secretary of State's authority to determine "the procedures for the processing of immigrant visa applications or the locations where such applications will be processed" is not limited by the provision. 8 U.S.C. § 1152(a)(1)(B).

grant the President the authority to create his own exceptions. There would be no point to a law that proscribes the President from discriminating, except when the President chooses to discriminate.

Presidential authority pursuant to 1182(f) must therefore be construed in conformance with the INA's nondiscrimination provision. *Hawaii*, 2017 WL 4639560, at *13 (describing the Ninth Circuit's finding that "suspending the issuance of immigrant visas and denying entry based on nationality, [EO–2] exceeds the restriction of § 1152(a)(1)(A) and the overall statutory scheme intended by Congress." (quoting *Hawaii*, 859 F.3d at 778–79)). Only then can both statutory provisions be given effect as Congress intended. *See Inhabitants of Montclair Twp. v. Ramsdell*, 107 U.S. 147, 152 (1883) ("It is the duty of the court to give effect, if possible, to every clause and word of a statute."); *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633 (1973) (holding that an interpretation of one statutory provision that renders another provision superfluous "offends the well-settled rule of statutory construction that all parts of a statute, if at all possible, are to be given effect"). As the District Court emphasized, the Proclamation, which "indefinitely and categorically suspend[s] immigration from the six countries challenged by Plaintiffs," "attempts to do exactly what Section 1152 prohibits." *Hawaii*, 2017 WL 4639560, at *12. As a result, the Proclamation,

"like its predecessor," "runs afoul'" of the INA's nondiscrimination provision. *Id.* (quoting *Hawaii*, 859 F.3d at 756).

Additionally, established canons of statutory interpretation dictate that the nondiscrimination provision should cabin 1182(f). *See Morton v. Mancari*, 417 U.S. 535, 550–51 (1974) ("[A] specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment."). Congress enacted 1152(a)(1) against the backdrop of 1182(f), meaning that 1182(f) must be read as limited by the later-enacted nondiscrimination provision. *See Hawaii*, 859 F.3d at 780 (concluding that "[w]ell-settled interpretive canons further explain why § 1182(f) does not give the President authority to override the requirements of § 1157," based on "the 'later in time' canon" and the fact that "§ 1157, the more specific provision, controls the more general § 1182(f)" (citations omitted)).

Although the President has the authority to suspend the entry of immigrants "detrimental to the interests of the United States" via 1182(f), he cannot establish blanket prohibitions on entry based solely on nationality. *See Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. 442, 453 (S.D. Fla. 1980) ("[U]nder 8 U.S.C. § 1152(a), INS has no authority to discriminate on the basis of national origin, except perhaps by promulgating regulations in a time of national emergency."). Indeed, as noted, the only instances in which the Executive Branch has imposed nationality-based restrictions on entry to the United States—in the context of the bar to entry of

Cuban nationals imposed by President Reagan in response to Cuba's suspension of an immigration agreement and the limitations on entry of Iranians imposed by President Carter in the wake of the Iran Hostage Crisis—were both highly limited in time and in scope.

This Proclamation, in contrast, imposes a blanket prohibition on the issuance of immigrant visas for the named countries, with "no specified end date and no requirement of renewal," in direct contravention of 1152(a). *See Hawaii*, 2017 WL 4639560, at *11 (noting that the "nature and scope" of the Proclamation's "inconsistencies and unexplained findings cannot lawfully justify an exercise of Section 1182(f) authority, particularly one of indefinite duration"). To allow such a blanket prohibition would undermine the visa allocation system over which Congress retains authority and would run afoul of the INA's nondiscrimination provision.

CONCLUSION

Amici submit that the arguments set forth above show that the INA unambiguously constrains the President's authority under 1182(f), rendering the Proclamation *ultra vires* and inconsistent with the statute.

Dated: November 22, 2017

Respectfully submitted,

/s/ Fatma E. Marouf

SABRINEH ARDALAN*
PHILIP L. TORREY*
NATHAN MACKENZIE (Law Clerk)
DALIA DEAK (Law Student)
NIKU JAFARNIA (Law Student)
RACHEL KROLL (Law Student)
Harvard Immigration and Refugee Clinical Program
Harvard Law School
6 Everett Street
Cambridge, MA 02138
(617) 348-8165
sardalan@law.harvard.edu
ptorrey@law.harvard.edu
(617) 384-8165

KARLA MCKANDERS*
Vanderbilt Law School
131 21st Avenue South
Nashville, TN 37203
(615) 322-3092

FATMA E. MAROUF*
Texas A&M Univ. School of Law
1515 Commerce St.
Fort Worth, TX 76102
(817) 212-4123
fatma.marouf@law.tamu.edu

GEOFFREY HOFFMAN*
University of Houston Law Center
4604 Calhoun Road, Room 56, TU-II
Houston, TX 77204
(713) 743-2094
ghoffman@central.uh.edu

*Filed in an individual capacity. University affiliation is for identification only.

CERTIFICATION OF COMPLIANCE

This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5)(a) and (a)(6) because it has been prepared in a proportionally spaced typeface, using Microsoft Word in Times New Roman 14-point font.

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Dated: November 22, 2017 /s/ Fatma E. Marouf

Fatma E. Marouf

CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit using the appellate CM/ECF system.

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Respectfully submitted,

/s/ Fatma E. Marouf

Fatma E. Marouf