No. 17-17168

United States Court of Appeals for the Ninth Circuit

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

v.

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

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

BRIEF OF *AMICI CURIAE* IMMIGRATION, FAMILY, AND CONSTITUTIONAL LAW PROFESSORS IN SUPPORT OF PLAINTIFFS-APPELLEES

Robert A. Wiygul
Mark A. Aronchick
HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER
One Logan Square, 27th Floor
Philadelphia, Pennsylvania 19103
(215) 568-6200

Counsel for Amici Curiae

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae are leading scholars of immigration, constitutional, and family law who are interested in the proper interpretation and application of U.S. laws as they concern Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017) [hereinafter "the Proclamation"]. This brief addresses issues specifically within amici's scholarly expertise. An Addendum contains biographical information on the amici, who are participating in their individual capacities and not as representatives of the institutions with which they are affiliated.

All parties have consented to the filing of this amicus brief.[1]

SUMMARY OF THE ARGUMENT

Amici, experts in immigration, constitutional, and family law, write to explain how the Proclamation infringes the constitutional family rights of American citizens and lawful permanent residents (hereinafter, "American citizens and residents") to a degree not permitted even in a case involving immigration, and undermines the congressional purpose of facilitating family reunification. We agree with the plaintiffs' primary contentions: that the Proclamation violates the Immigration and Nationality Act's (INA) prohibition on national origin and

[1] No counsel for any party authored any portion of this brief, nor did any person or entity other than amici curiae or their counsel make any monetary contribution to the preparation or submission of this brief.

religious discrimination, and the Establishment Clause of the First Amendment. In addition, many of the individuals directly affected by the Proclamation are American citizens and residents who possess constitutionally and statutorily protected interests in residing with and enjoying the companionship of family members who currently live outside the United States.

Noncitizens without family in the United States have suffered from the effects of the Proclamation, and they, too, have constitutional and statutory claims. This brief, however, focuses on the Proclamation's impact on American citizens and residents whose relatives' entry into the United States has been restricted indefinitely based on their race, religion, and nationality.

Notwithstanding the deference afforded to the executive and legislative branches in immigration matters, the Supreme Court has made clear that Americans' constitutional and statutory rights do not disappear in the immigration context. Rather, the federal courts must safeguard those rights while also recognizing the government's important interest in foreign affairs and national security. Even assuming that foreign nationals residing abroad have no constitutional right to enter the United States, American citizens and residents do have justiciable interests in the context of an immigration restriction, as the Supreme Court recognized in cases that include *Kleindienst v. Mandel*, 408 U.S.

753 (1972), *Landon v. Plasencia*, 459 U.S. 21 (1982), and *Zadvydas v. Davis*, 533 U.S. 678 (2001).

Where, as here, the interests of American citizens and residents are at stake, *Mandel* instructs courts to defer to the government's admissions decisions, but only when those decisions are supported by a "facially legitimate and bona fide reason." 408 U.S. at 770. The Supreme Court has applied this important check on the government's immigration decisions in cases involving constitutional family interests, recognizing a "limited judicial responsibility under the Constitution" in *Fiallo v. Bell*, 430 U.S. 787, 793 n.5 (1977); and acknowledging the "facially legitimate and bona fide" requirement in *Fiallo*, *id.* at 794–95, and most recently in *Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015). This degree of judicial scrutiny carries with it a serious possibility of invalidating the government decision for failure to meet this standard.

The Supreme Court's approach to immigration laws and policies implicating individual constitutional rights has developed over time to reflect changes in the Court's understanding of equal protection and fundamental rights, including constitutional family rights. Nineteenth-century decisions affirmed the exclusion of Chinese nationals by endorsing racially discriminatory rationales that reflected the long-ago discredited view of equal protection expressed in contemporaneous cases such as *Plessy v. Ferguson*, 163 U.S. 537 (1896). Similarly, the Supreme

Court's First Amendment jurisprudence has evolved to invalidate laws motivated by "animosity" toward or "distrust" of particular religious identities and practices. Cold War-era decisions declining to review the political branches' immigration decisions preceded the Supreme Court's recognition of constitutional family interests such as the right to marry unfettered by discrimination, and the right to share a household and associate with extended family members. Even when applying more deferential standards of review, the Court has forbidden statutes and regulations motivated by hostility toward disfavored groups—especially where, as here, such laws also infringe upon the constitutional family rights of American parties.

Congressional enactments such as the Immigration and Nationality Act prioritize family relationships, facilitating the reunification of nuclear and extended families by preferring relatives in the issuances of permanent resident and temporary visas, naturalization, derivative citizenship, and removal criteria. While the congressional purpose to support family reunification does not negate the executive's delegated authority under 8 U.S.C. § 1182(f) to suspend immigration, or its authority implied in 8 U.S.C. § 1185(a) to make "reasonable rules" governing the entry of aliens, it qualifies that authority and supports greater scrutiny of executive decisions that contravene the INA's statutory structure for evidence of unconstitutional animus.

Similarly, the statutory prioritization of family reunification operates in concert with the INA's antidiscrimination provision, 8 U.S.C. § 1152(a)(1) ("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"). Section 1152(a)(1) is informed by a commitment to nondiscrimination similar to that enshrined in the Constitution and also functions as an important statutory qualification on prior legislative grants of authority to the executive in regulating immigration, including Sections 1182(f) and 1185(a)(1).

The Supreme Court has long recognized equal protection and due process protections for family relationships such as those burdened by the Proclamation. The Proclamation's broad sweep affects married couples, fiancés, parents, children, siblings, grandparents, aunts, uncles, and cousins of American citizens and residents, implicating rights recognized by the Supreme Court in cases such as *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), and *Troxel v. Granville*, 530 U.S. 57 (2000). Most recently, in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Court explained how the dignity inherent in choosing a life partner and in making autonomous decisions about family life; the opportunity for mutual care and companionship; the nurturing of children; and the exercise of responsible citizenship all support the recognition of a constitutional interest in family relationships, including but not limited to marriage. These constitutional family

interests are particularly profound for transnational families, in which relatives who are especially reliant upon one another for support in times of hardship and adversity face the possibility of long-term or even permanent separation. The "two-person union," *Obergefell*, 135 S. Ct. at 2589, is especially integral to families separated by distance or riven by war, famine, or persecution. The reunification of parents and children "safeguards children and families" and facilitates Americans' exercise of their "rights of childrearing, procreation, and education." *See id.* at 2590. If marriage is generally "a keystone of our social order," *id.* at 2601, it is particularly so for immigrants, who often rely on family to facilitate their integration into the polity. The Supreme Court has been especially protective of individual rights where government action also discriminates based on unlawful animus—here, by targeting individuals from predominantly Muslim countries and their American family members.

By targeting noncitizens on these invidious grounds, and "slicing deeply into the family itself," *Moore*, 431 U.S. at 498, the Proclamation violates the constitutionally protected dignity and integrity of family relationships. Notwithstanding the deference afforded executive authority over immigration, the Proclamation offends constitutional as well as statutory law and cannot survive meaningful judicial review.

ARGUMENT

Amici write to apply their expertise in immigration, constitutional, and family law to the scope of federal power over immigration and the role of the judicial branch in cases involving immigration restriction and constitutional family interests. Many other noncitizens who do not have family in the United States have been affected adversely by the Proclamation. They, too, have constitutional and statutory claims. This brief, however, focuses on the specific impact of the Proclamation on the constitutional interests of American citizens and lawful permanent residents with family abroad.

I. American citizens and residents have a constitutional interest in their family relationships

The September 2017 Proclamation and the two Executive Orders that preceded it have disrupted the lives of many individuals, both in the United States and abroad. Many of those most directly affected are American citizens and lawful permanent residents who possess constitutionally protected interests in residing and associating with their family members. The Proclamation's broad sweep prevents them from reuniting with their noncitizen spouses, fiancés, parents, children, grandparents, siblings, and aunts and uncles. The Proclamation harms many American citizens and residents whose relatives seek temporary visas to join them for a variety of reasons: to mark important life events, such as a wedding,

graduation, funeral, or the birth of a child; to provide care to a new baby or an ill relative; or to receive medical care unavailable in their home country. The indefinite nature of the Proclamation also means that obtaining immigrant visas for many Americans' relatives will be extraordinarily difficult and in many cases impossible. The strength of the constitutional interests of these diverse individuals varies, but they all share a dignity interest in having their family relationships recognized and respected by the government.

A. Courts review cases implicating constitutional rights and interests when Congress and the executive regulate immigration

Both Congress and the executive routinely regulate the flow of immigrants into the United States. Although there is no textual grant of authority to either the legislature or the executive in the U.S. Constitution, the Supreme Court has repeatedly held that such authority is necessary for a sovereign nation to enjoy. *See, e.g.*, *Fong Yue Ting v. United States*, 149 U.S. 698, 712 (1893) (finding that "[t]he Constitution has granted to Congress the power to regulate commerce with foreign nations, including … the bringing of persons into the ports of the United States"). This power, however, coexists with the judicial branch's obligation to enforce the limitations on government power set forth in the U.S. Constitution. In particular, because of their ties to the nation, citizens and lawful permanent residents have a greater constitutional interest than noncitizens seeking first-time

admission to the United States. *See Landon v. Plasencia*, 459 U.S. 21, 33 (1982) (noting that "once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly"). Moreover, the Court has not foreclosed the possibility of constitutional review for discriminatory actions against noncitizens who are unlawfully present in the country. *See, e.g.*, *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999) (leaving open "the possibility of a rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations [regarding potential undermining of executive discretion] can be overcome").

Separation-of-powers principles thus require courts to scrutinize immigration laws and actions that implicate the constitutional rights of American citizens and lawful permanent residents, but in a manner that affords deference to Congress and the executive branch in light of their important interest in foreign affairs and national security. *See Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) (recognizing that American scholars who invited a foreign scholar to speak had a constitutionally protected interest in meeting and speaking with him). Indeed, recognition of a resident noncitizen's constitutional interest has resulted in the Court's rejection of the executive branch's position. For example, in *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Court invalidated the indefinite detention of

noncitizens beyond six months absent a significant likelihood of removal in the reasonably foreseeable future. *See id.* at 701. The Court's analysis made clear, first, that well-established constitutional protections apply to lawful permanent noncitizen residents, even those who lose lawful status because of criminal convictions, *id*. at 693, and, second, that the indefinite detention of former noncitizen residents raised a constitutional question serious enough, applying the doctrine of constitutional avoidance, to limit detention under 8 U.S.C. § 1231(a)(6). 533 U.S. at 694–95.

Many of the cases in which an American citizen or lawful permanent resident has an interest in the visa status of a noncitizen are cases in which the American party has an interest in sharing a household or visiting with the noncitizen. In these cases, the Supreme Court has recognized the American party's interest when adjudicating whether the government's denial of admission or decision to remove the noncitizen is constitutionally permissible. For example, in *Fiallo v. Bell*, 430 U.S. 787 (1977), the Court reviewed a constitutional challenge to Congress's definition of "child" in the Immigration and Nationality Act, 8 U.S.C. §§ 1101(b)(1)(D), 1101(b)(2). In reviewing, though ultimately upholding, these portions of the INA, the Court recognized its "limited judicial responsibility under the Constitution even with respect to the power of Congress to

regulate the admission and exclusion of aliens." 430 U.S. at 793 n.5.[2] Similarly, in *Landon v. Plasencia*, the Court recognized that a lawful permanent resident has "without question" a "weighty" interest sufficient to invoke procedural due process protections: "She stands to lose the right 'to stay and live and work in this land of freedom,'" and "may lose the right to rejoin her immediate family, a right that ranks high among the interests of the individual." 459 U.S. at 34 (remanding deportation case for application of *Mathew v. Eldridge* procedural due process test).

More recently, in *Kerry v. Din*, 135 S. Ct. 2128 (2015), the Supreme Court reaffirmed its authority to decide cases implicating constitutional family rights even where Congress has exercised its authority over immigration and where a consular official has made an individual determination regarding visa eligibility. In *Din*, a U.S. citizen to whose spouse the State Department had denied a permanent residency visa petitioned the Court for additional process. The Court split in its analysis, but six of the nine justices acknowledged that a court may continue to recognize a citizen's constitutional family rights even where the political branches have an interest in immigration control. *See id.* at 2139–41

[2] The government's citation to *Fiallo* in support of its contention that plaintiffs' claims are nonjusticiable is particularly misguided given that the Supreme Court explicitly rejected the government's contention that the *Fiallo* plaintiffs' claims were nonjusticiable. 430 U.S. at 793 n.5.

(Kennedy, J., concurring) (holding that the Court "need not decide" "whether Din has a protected liberty interest" because "the notice she received regarding her husband's visa denial satisfied due process"); *id.* at 2142 (Breyer, J., dissenting) (stating that Din "possesses the kind of 'liberty' interest to which the Due Process Clause grants procedural protection"). Although in *Din* the concurring (and controlling) opinion determined that the government's concerns that a specific individual posed a terrorist threat overrode the U.S. citizen's interest in additional process, it honored the citizen's constitutional family interest in residing with her husband by applying the same "facially legitimate and bona fide" test that it applied to an action that implicated the First Amendment rights of U.S. citizens in *Mandel*. *Id.* at 2139–41 (Kennedy, J., concurring).

In *Din*, like *Mandel*, the Court found that the Executive satisfied the requirement of a "facially legitimate and bona fide reason." *Id.* It is clear, however, that if the government acts for a reason that is *not* "facially legitimate and bona fide," the challenge must be sustained and the denial of admission must be invalidated. Indeed, judicial decisions calling for application of the "facially legitimate and bona fide reason" standard make up a substantial body of caselaw that scrutinizes government decisions to deny admission. *See Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 125–26 (2d Cir. 2009); *Bustamante v.*

Mukasey, 531 F.3d 1059, 1062 (9th Cir. 2008); *Adams v. Baker*, 909 F.2d 643, 647–50 (1st Cir. 1990).

In summary, courts routinely scrutinize immigration laws and actions, and although the standard applied is generally more deferential than in other contexts, courts have the authority to invalidate laws and actions that violate citizens' and residents' constitutional rights.

B. The Supreme Court's current approach to balancing individual constitutional interests with the political branches' authority over immigration has evolved over time

Early in our nation's history, the Supreme Court afforded much more deference to the political branches in cases involving immigration than it does today. Much of this change results from the evolution of the Court's jurisprudence of equal protection and fundamental rights, including constitutional family rights.

The earliest cases establishing congressional authority over immigration upheld the exclusion and deportation of Chinese immigrants by embracing racially discriminatory rationales. *See Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 606 (1889) (affirming government's power to determine that "foreigners of a different race" are "dangerous"); *Fong Yue Ting v. United States*, 149 U.S. 698, 729–32 (1893) (affirming government power to require "one credible white witness" for Chinese residents to obtain certificate necessary to avoid deportation). The Court decided these cases during the same

era in which it concluded that Jim Crow laws and racial segregation did not present constitutional problems. *See, e.g.*, *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) (upholding "separate but equal" railway cars for blacks and whites).

Today's Supreme Court no longer understands the Constitution to support racial discrimination. The Court's equal protection jurisprudence has evolved, so that "separate but equal" treatment of individuals based on race or other protected suspect characteristics is no longer constitutionally permissible. *See, e.g.*, *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954) (declaring racial discrimination in public education unconstitutional); *United States v. Virginia*, 518 U.S. 515 (1996) (categorical exclusion of women from a particular educational opportunity violates equal protection). Similarly, the Court's Free Exercise Clause and Establishment Clause jurisprudence has also developed, forbidding statutes that "stem from animosity to religion or distrust of its practices," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993), or that "signal disfavor toward nonparticipants or suggest that their stature in the community was in any way diminished," *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1826 (2014).

Even in cases involving a deferential standard of review, the Court has repeatedly held that "animus" or a "bare … desire to harm" a particular group is sufficient to invalidate a statute. *See, e.g.*, *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534–535

(1973)) (holding that the "Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group"). As a result, although the Supreme Court still gives wider latitude to Congress in matters involving immigration than in other areas, the racially discriminatory statutes at issue in *Chae Chan Ping* and *Fong Yue Ting* would now not survive even the most deferential review, nor would a statute targeting religious minorities or using immigration law to establish religion. *See American-Arab Anti-Discrimination Comm.*, 525 U.S. at 491 (noting that "discrimination" that is "outrageous" could require invalidation of executive action in an immigration case).

A similar evolution has occurred in the recognition of the constitutional status of family relationships. During the Cold War, the Supreme Court heard cases brought by the spouses of U.S. citizens who had been excluded from the country and denied the due process they sought. In *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), the German-born wife of an American citizen was excluded from the United States without a hearing on the ground that her admission would be "prejudicial to the interests of the United States." *Id.* at 539. In *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), a permanent resident of the United States left his wife and children in upstate New York to visit his dying mother abroad and was denied entry upon his return on suspicion of

communist activity because of his trip behind the "Iron Curtain." In both cases, the Court invoked immigration authority to avoid deciding the cases, stating that it could not review decisions of the political branches to exclude a particular alien. 338 U.S. at 543; 345 U.S. at 212.

Just as it decided *Chae Chan Ping* and *Fong Yue Ting* prior to the development of modern equal protection doctrine, the Supreme Court decided *Knauff* and *Mezei* during the very brief period in which it no longer recognized family rights as established by the common law in the immigration context but had not yet developed its modern constitutional approach to family rights. *See* Kerry Abrams, *Family Reunification and the Security State*, 32 Const. Comment. 247, 250–58 (2017) (showing how courts used common law family rights to interpret restrictive immigration statutes to allow for family reunification prior to *Knauff* and *Mezei* and applied constitutional family rights afterwards). Thus, in *Knauff* and *Mezei*, the Court did not consider the constitutional interests of family members to share a common residence, to marry unconstrained by racial discrimination, or the many other facets of constitutional family rights recognized by the Court today. *See infra* Part II. As the Court recently declared in *Obergefell v. Hodges*, "the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged." 135 S. Ct. 2584, 2603 (2015). It was not

until first in *Fiallo v. Bell* and then again in *Kerry v. Din*, discussed above, that the Court acknowledged its duty to adjudicate immigration cases that touch on constitutional family rights.

C. Executive action, like congressional lawmaking, in the immigration area is subject to judicial review

Although the primary authority over immigration recognized by the Supreme Court lies with Congress, the Court has consistently recognized that the executive performs an important function in enforcing the law and exercising authorities delegated to it by Congress. Indeed, many of the cases in which the Court has scrutinized government action have involved authority delegated to the executive. *See, e.g.*, *Din*, 135 S. Ct. 2128 (evaluating State Department's decision to deny noncitizen spouse admission to United States); *Mandel*, 408 U.S. 753 (evaluating Attorney General's decision to deny visa to noncitizen).

The President in this case cites as his authority to issue the Proclamation two such delegations in the field of immigration—8 U.S.C. § 1182(f) and § 1185(a)(1).[3] Section 1182(f) delegates authority to the President to "suspend the

[3] The Proclamation also references 3 U.S.C. § 301 as authority for the Proclamation. Section 301 authorizes the President to delegate authority to heads of departments or agencies to perform functions vested in the President by law. It does not authorize the President to authorize such officials to violate the Constitution or statutory protections of individual rights, such as that found in 8 U.S.C. § 1152(a)(1) ("no person shall . . . be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth,

entry of all aliens or any class of aliens as immigrants or nonimmigrants." 8 U.S.C. § 1182(f). Section 1185(a)(1) makes it unlawful for a noncitizen to enter or exit the country except according to "reasonable rules" promulgated by the President. 8 U.S.C. § 1185(a)(1). Congress enacted both of these provisions in 1952. Just as congressional lawmaking must be read in light of the equal protection and fundamental rights jurisprudence the Court has developed since 1952, so too must the executive's exercise of his delegated authority.

Indeed, Congress, like the Supreme Court, has evolved in its understanding of the importance of family reunification since the enactment of these provisions. To facilitate family reunification, Congress has enacted a complex statutory scheme designed to reunite U.S. citizens and residents with their family members abroad, in order to foster the dignity, autonomy, protection of children, and responsible citizenship the Court recognized as the purposes underpinning constitutional family rights in *Obergefell*. 135 S. Ct. at 2599–2603. The current Immigration and Nationality Act facilitates family reunification in many ways, including offering permanent residency to the immediate relatives of U.S. citizens,

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or place of residence"). Section 301 also does not authorize the President to direct executive branch officials to enforce restrictions on entry that radically diverge from the structure and function of the entire admissions portion of the Immigration and Nationality Act, which favors family reunification, not discriminatory separation of families. *See* discussion *infra* pp. 18–20.

as well as to the immediate relatives of U.S. permanent residents and to the adult and married children and siblings of U.S. citizens. 8 U.S.C. § 1153. These statutory provisions provide long-term family reunification for both nuclear and extended families. The statutory supports for family reunification, however, extend far beyond issuing permanent residency visas to family members. In 2015, the most recent year for which data is available, over half of the "employment-based" and "diversity" permanent residency visas went to the spouses and children of primary beneficiaries, as did over a third of refugee and asylee visas. Office of Immigration Statistics, *Persons Obtaining Legal Permanent Resident Status, Lawful Permanent Residents (LPRS)*, Table 7d, https://www.dhs.gov/immigration-statistics/lawful-permanent-residents.

All told, the family members of U.S. citizens or permanent residents received around 80% of the permanent resident visas allocated in 2015. *Id.* (at least 839,203 of the 1,051,031 are either family-preference, immediate-relative, or derivative-beneficiary visas). Similarly, many people holding temporary visas do so as the spouses or children of temporary visitors on many categories of work visas. 8 U.S.C. §1101(a)(15). Further preferences for family members include a shorter waiting period for eligibility to become a naturalized citizen for the spouses of U.S. citizens, 8 U.S.C. § 1430, derivative citizenship by birth and automatic naturalization for the children of American citizens, 8 U.S.C. §§ 1401, 1431, 1433,

and cancellation of removal criteria that allow some otherwise removable immediate family members of American citizens and lawful permanent residents to remain in the United States. 8 U.S.C. § 1229b.

The existence of congressionally approved family reunification provisions does not negate the executive's delegated 8 U.S.C. § 1182(f) authority to suspend immigration, or the implied power to promulgate "reasonable rules" found in 8 U.S.C. § 1185(a)(1). The congressional scheme, however, can help highlight the scope and consequences of, as well as motivations behind, a President's use of his power under these provisions. Where the executive's actions contravene not only accepted constitutional principles but also the structure and function of the entire admissions portion of the Immigration and Nationality Act, courts must scrutinize these actions for evidence of animus against the classes of noncitizens targeted by the executive. *See Romer v. Evans*, 517 U.S. 620, 633 (1996) (holding that "discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision").

This scrutiny is especially critical where the constitutional family interests of American citizens and residents are at stake, and where the government's motivation is tainted by invidious discrimination based on race, religion, or nationality. The next Part will explore the contours of these constitutional family interests and their intersection with equal protection.

II. The Supreme Court has afforded broad protections to the family under the Constitution, and these protections trigger strict scrutiny when their infringement is combined with invidious discrimination

Under the framework outlined above, courts must scrutinize allegations of constitutional deprivations under, at a minimum, rational basis review. Where, as here, the executive couples its abridgement of constitutional family rights with invidious racial and religious discrimination, an even higher standard of review is appropriate, even in the immigration context.

The Supreme Court has long recognized that the Due Process and Equal Protection Clauses of the Fourteenth Amendment protect family relationships. U.S. Const. amend. XIV; *see also Meyer v. Nebraska*, 262 U.S. 390 (1923) (recognizing parental interest in shaping child's education under the Due Process Clause); *Loving v. Virginia*, 388 U.S. 1 (1967) (recognizing right to marry under the Due Process Clause and right to racial equality in marriage laws under the Equal Protection Clause). The family interests recognized by the Court include the right of adults to marry, *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978); the right to choose whether to bear or beget a child, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); and the right to procedural due process in the termination of a legal parent-child tie, *Lehr v. Robertson*, 463 U.S. 248 (1983); *Stanley v. Illinois*, 405 U.S. 645 (1972).

The scope of family interests recognized by the Court extends far beyond rights to fair and equal treatment in the entry into and exit from family relationships to encompass the rights enjoyed by family members by virtue of their legal relationships. These include the right of family members to live in a shared household, *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977); the right of parents to make decisions about their children's education, *Meyer*, 262 U.S. at 399; *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925); and the right of adult couples to privacy in intimate matters, *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Lawrence v. Texas*, 539 U.S. 558 (2003).

In addition to recognizing a diverse array of interests under the broad umbrella of constitutional family rights, the Supreme Court has also defined family capaciously, to include not only marital relationships and biological parent-child relationships, but also relatives beyond the nuclear family. In *Moore*, 431 U.S. 494, for example, the Court embraced an expansive definition of constitutionally protected family relationships worthy of due process protection. As Justice Powell observed, "Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition." *Id.* at 504 (plurality opinion); *see also Troxel v. Granville*, 530 U.S. 57, 64 (2000)

(reaffirming the importance of extended family ties, particularly for children whose parents are unable to care for them); *id.* at 98 (Kennedy, J., dissenting).

Most recently, the Supreme Court recognized the importance of constitutional family rights in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). In affirming the right of same-sex couples to marry, the Court explained the principles underlying its previous constitutional family jurisprudence. *Id.* at 2598–2601. First, "personal choice regarding marriage is inherent in the concept of individual autonomy." *Id.* at 2599. Marriage "fulfils yearnings for security, safe haven, and connection that express our common humanity." *Id.* (quoting *Goodridge v. Massachusetts*, 798 N.E. 2d 941, 955 (Mass. 2003)). Second, the right to marry is "fundamental because it supports a two-person union unlike any other in its importance to the committed individuals .... Marriage ... offers the hope of companionship and understanding and assurance that while both [spouses] still live there will be someone to care for the other." *Id.* at 2599–2600. Third, marriage "safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education." *Id*. at 2600. Fourth, marriage is a "keystone of our social order." *Id.* at 2601.

The principles undergirding judicial recognition of constitutional family rights as articulated by the Court in *Obergefell* apply with equal, if not greater, force to transnational families, both nuclear and extended. Indeed, the increasingly

interconnected nature of the world means that multi-national and transnational families abound within the United States. The "personal choice" regarding marriage and family formation "inherent in the concept of individual autonomy" does not stop at a national border, *see id.* at 2599, a principle that our immigration laws recognize by facilitating family reunification. The importance of the "two-person union" is especially profound in instances where a family faces potentially life-long separation; it is for these families that the "universal fear" of living without loved ones is particularly acute. *See id.* at 2600. The reunification of parents and children "safeguards children and families" and facilitates American citizens' and residents' exercise of their "rights of childrearing, procreation, and education." *See id.* Finally, if marriage is generally "a keystone of our social order," *id.* at 2601, it is particularly so in relationships involving immigrants, who often rely on family to facilitate their integration into the polity.

The notion that American citizens and lawful permanent residents could simply relocate to their relatives' countries of legal residence would not cure a restrictive statute's or order's constitutional infirmity. Many American citizens and lawful permanent residents cannot safely relocate to another country. Even if, however, an American could relocate without fear of persecution or other harm, forcing a citizen to do so would result in the same constitutional deprivation suffered by the Lovings in *Loving v. Virginia.* There, the couple could have moved

from Virginia to Washington, D.C.—indeed, they traveled to the District of Columbia to marry because of Virginia's prohibition. The statute in question, however, prohibited them from returning to Virginia to live as a married couple, and the Court found that limitation constitutionally impermissible. *See also Obergefell*, 135 S. Ct. at 2595 (noting that nonrecognition of a marriage legally entered into in another state creates a "substantial burden" on a couple's right to travel).

Despite the broad protection the Supreme Court has recognized for family relationships, it has never viewed constitutional family rights as automatically overriding the government's interests in regulating members of families. Rather, the Court gives family members' claims the solemn consideration they deserve while also fairly weighing the government's interest. For example, in cases where individuals alleged that the government's action discriminated against them because of their group membership or violated their fundamental rights under the Due Process or Equal Protection Clauses, the Court applied the appropriate level of scrutiny to the government's actions. *See, e.g.*, *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978) (holding that "[w]hen a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests"). In cases involving procedural due process, the Court has read the

Due Process Clause to require, *inter alia*, a "clear and convincing" evidentiary standard for the termination of parental rights, *Santosky v. Kramer*, 455 U.S. 745, 748 (1982); the waiver of court fees and costs for indigent litigants in divorce cases, *Boddie v. Connecticut*, 401 U.S. 371 (1971); and the waiver of judicial transcript fees for indigent appellants in parental termination cases, *M.L.B. v. S.L.J.*, 519 U.S. 102, 128 (1996); *id.* at 129 (Kennedy, J., concurring) (state required to waive fee because case involved "the rights and privileges inherent in family and personal relations").

In immigration cases, courts take into account the competing priorities that Congress considers when regulating immigration. Immigrant families, for example, often endure long waiting periods for visas, because the Immigration and Nationality Act privileges some family relationships over others, and privileges the family relationships of citizens over those of lawful permanent residents. *See* 8 U.S.C. §§ 1151, 1153. The Supreme Court has acknowledged that although "it could be argued that the line should have been drawn at a different point[,] . . . these are policy questions entrusted exclusively to the political branches." *Fiallo*, 430 U.S. at 798. As discussed above, however, the relatively deferential review provided in immigration cases is not a rubber stamp. It does not insulate the government from judicial review where the "policy questions" involved infringe the due process rights of American citizens and lawful permanent residents, or

when the government regulates immigration in an invidiously discriminatory manner. Indeed, the Court has taken particular care to safeguard the constitutional interests of individuals where, as here, the government infringes upon fundamental rights through discriminatory action that contravenes several constitutional guarantees, including equal protection, due process, the Establishment Clause, and separation of powers. *See, e.g.*, *I.N.S. v. Chadha*, 462 U.S. 919 (1983) (invalidating INA provision allowing congressional veto of executive's decision, made under delegated power, to allow deportable noncitizen to remain in the U.S.); *McGowan v. Maryland*, 366 U.S. 420, 465–66 (1961) (observing that the intent of the Establishment Clause "was to assure that the national legislature would not … make of religion, as religion, an object of legislation"); *see also* Kerry Abrams & Brandon Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. Rev. 1309 (2017).

III. This Court should invalidate the Proclamation because it infringes, *inter alia*, the constitutional family rights of American citizens and lawful permanent residents

The Proclamation infringes the constitutional family rights of American citizens and lawful permanent residents in two distinct but related ways. First, by targeting the residents of predominantly Muslim countries for disparate treatment,[4]

[4] The Proclamation also suspends the entry of all nationals of North Korea and certain classes of government officials from Venezuela. *See* Proclamation §§ 2(d) & 2(f). North Korea and Venezuela are not Muslim-majority countries, but their inclusion in the Proclamation is of minimal practical significance. Only a

the Proclamation deploys invidious racial and religious discrimination to deny American citizens and lawful permanent residents their fundamental constitutional family rights.

This discrimination alone should be enough, even without the constitutional family interests discussed here, to invalidate the Proclamation. Targeting particular noncitizens for unfavorable treatment based solely on their religion, race, or nationality violates the Equal Protection, Free Exercise, and Establishment Clauses. This rank stereotyping of an entire people as undesirable is exactly the type of "rare case" of "outrageous" discrimination anticipated by the Supreme Court in *American-Arab Anti-Discrimination Committee*, 525 U.S. at 491; *see also Plyler v. Doe*, 457 U.S. 202 (1982) (invalidating law discriminating against undocumented children).

Here, however, the government has gone even further. The Proclamation targets noncitizens based on race, religion, and nationality *and* "slic[es] deeply into the family itself," *Moore*, 431 U.S. at 498, in violation of the rights affirmed by the Supreme Court's long line of constitutional family cases, from *Loving* to *Obergefell.* It uses impermissibly discriminatory means to interfere with the

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tiny number of North Koreans seek admission to the United States, and the restriction on Venezuelan officials does not limit the entry of the vast majority of Venezuelans under the generally applicable admission criteria.

ability of American citizens and lawful permanent residents to nurture and maintain their close family relationships. As in *Loving*, the Court should recognize that the "denial of fundamental freedom on so unsupportable a basis as … racial classifications" deprives citizens and lawful permanent residents of their liberty without due process of law.

Second, the Proclamation violates the procedural due process rights of American citizens and residents whose family members seek admission to the United States by placing enormous and disproportionate hurdles before the consideration of evidence of admissibility. Although the Supreme Court has never held that constitutional family interests provide American citizens and residents with a *substantive* right to reunification with their families, it has recognized that these interests are sufficiently grave to merit procedural due process when curtailed. *See Landon*, 459 U.S. at 34 (finding the "right" of lawful permanent resident "to rejoin her immediate family" sufficient to require procedural due process analysis); *Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring) (holding that government's specific finding of noncitizen's inadmissibility under the INA's terrorism bars satisfied procedural due process). Like the plaintiff in *Din*, the American family members of noncitizens affected by the Proclamation have a constitutional family interest in reunification with their relatives, whether the

relative is a spouse, *see Obergefell*, 135 S. Ct. 2584, a child, *see Troxel*, 530 U.S. 57, or an extended family member, *see Moore*, 431 U.S. 494.

Because this case arises in an immigration context, the standard of constitutional review is more deferential than in other contexts. *See Fiallo*, 430 U.S. 787. But even under that deferential standard, the Proclamation fails. Under *Din* and *Mandel*, the Court must determine whether the executive had a "bona fide" and "facially legitimate" reason to exclude the specific individuals targeted by the Proclamation. Unlike the Proclamation challenged here, the *Din* Court evaluated an agency decision about a *specific* individual's *specific* activities that allegedly made him inadmissible under the terrorism bars. 135 S. Ct. at 2141 (Kennedy, J., concurring). In contrast, here the government has made no specific findings as to any of the plaintiffs. Instead, the Proclamation presumptively excludes large classes of visa applicants from six predominantly Muslim countries, regardless of whether there is any evidence of inadmissibility under the statute.

The waiver process set forth in the Proclamation does not cure the problem. Proclamation § 3(c). Rather, it imposes new and distinctive burdens on individuals from the six Muslim-majority countries. They must demonstrate (1) "undue hardship" caused by denial of entry, (2) that their entry "would not pose a threat to the national security or public safety of the United States," *and* (3) that their "entry would be in the national interest." Hence, the Proclamation still targets individuals

based on their religion, race, and nationality; other noncitizen family members of American citizens and residents seeking admission who do not reside in one of the six predominantly Muslim countries identified in the Proclamation need not make special showings regarding "undue hardship," security and safety, and "national interest." Discrimination based on animus toward a particular race, religion, or nationality is not a "bona fide" or "facially legitimate" reason to revoke a visa, or to impose additional burdens on those seeking visas. Under the "bona fide and facially legitimate" test mandated by *Mandel* and *Din*, the Proclamation fails.

CONCLUSION

The District Court's injunction should be affirmed.

Respectfully submitted,

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HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER

/s/ Robert A. Wiygul

By: Robert A. Wiygul
Mark A. Aronchick
One Logan Square, 27th Floor
Philadelphia, PA 19103
(215) 568-6200

Counsel for Amici Curiae

ADDENDUM

ADDENDUM

AMICI CURIAE LAW PROFESSORS*

Kerry Abrams is Professor of Law at the University of Virginia School of Law, where she is the Co-Director of the Center for Children, Families, and the Law. Professor Abrams teaches courses on immigration law, citizenship law, family law, and the history of marriage law. She has written extensively on immigration and citizenship law in American history. Her articles have appeared in the *Columbia Law Review*, *California Law Review*, *Michigan Law Review*, and *Virginia Law Review*, among others.

Kristin Collins is the Senior Visiting Fellow at the Rothermere American Institute, Oxford University (2017-2018) and Peter Paul Career Development Professor at the Boston University School of Law. Professor Collins teaches courses on citizenship and immigration law, federal courts, civil procedure, family law, and legal history. She has written extensively on the legal history of the family, and in particular on the role of family law in the development of citizenship and immigration law. Her articles have appeared or are forthcoming in the *Harvard Law Review*, *Yale Law Journal*, *Duke Law Journal*, and *Law and History Review*, among others.

* Affiliations of amici curiae are listed for identification purposes only.

Ann Laquer Estin holds the Aliber Family Chair in Law at the University of Iowa. Professor Estin teaches primarily in the area of family law, with a particular focus on international and comparative family law. She has written extensively in these areas, and is the author of the *International Family Law Desk Book* (2d ed. 2016). Professor Estin is an elected member of the American Law Institute.

Brandon L. Garrett is the Justice Thurgood Marshall Distinguished Professor of Law and White Burkett Miller Professor of Law and Public Affairs at the University of Virginia School of Law. His research and teaching interests include constitutional law, civil rights, criminal law and procedure, and habeas corpus. Garrett's work, including several books and numerous articles, has been widely cited by courts, including the U.S. Supreme Court, lower federal courts, state supreme courts, and courts in other countries.

Stephen Lee is Professor and Associate Dean for Faculty Research and Development at the University of California, Irvine School of Law. He writes and teaches in the areas of immigration law, administrative law, and food law. Professor Lee has received grants from the National Science Foundation and the Russell Sage Foundation and is an elected member of the American Law Institute. His work has appeared or is forthcoming in the *Harvard Law Review, Stanford*

Law Review, California Law Review, and the *University of Chicago Law Review*, among others.

Serena Mayeri is Professor of Law and History at the University of Pennsylvania Law School, where she teaches and writes about family law, antidiscrimination law, and legal history. Her articles on constitutional family law have recently appeared in the *California Law Review*, the *Yale Law Journal*, and *Constitutional Commentary*. She is also the author of a prize-winning book, *Reasoning from Race: Feminism, Law, and the Civil Rights Revolution* (2011).

Hiroshi Motomura is the Susan Westerberg Prager Professor of Law at the School of Law, University of California, Los Angeles. He is the author of several pioneering law review articles on constitutional immigration law and two influential books: *Immigration Outside the Law* (2014), and *Americans in Waiting* (2006), and a co-author of two widely used law school casebooks: *Immigration and Citizenship: Process and Policy* (8th ed. 2016), and *Forced Migration: Law and Policy* (2d ed. 2013). He was selected as a Guggenheim Fellow in 2017.

Leti Volpp is the Robert D. and Leslie Kay Raven Professor of Law at UC Berkeley, where she is also the Director of the campus-wide Center for Race and Gender. She teaches immigration law and citizenship law, and has written extensively about the relationship between gender and these fields. Her work has appeared in the *Columbia Law Review*, *Harvard Civil Rights-Civil Liberties Law*

Review, *UCLA Law Review*, and the *Oxford Handbook on Citizenship*, among others. She is an elected member of the American Law Institute.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 6916 words, excluding the Addendum and other parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) because it has been prepared in a proportionally spaced typeface using the Times New Roman font in 14 point.

Dated: November 22, 2017

/s/ Robert A. Wiygul
Robert A. Wiygul

CERTIFICATE OF SERVICE

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

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/s/ Robert A. Wiygul
Robert A. Wiygul