No. 17-965

IN THE

Supreme Court of the United States

DONALD J. TRUMP, ET AL.,
Petitioners,

v.

STATE OF HAWAII, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR AMICI CURIAE SCHOLARS OF IMMIGRATION LAW IN SUPPORT OF RESPONDENTS ON THE HISTORY OF THE IMMIGRATION AND NATIONALITY ACT

PETER MARGULIES*
ROGER WILLIAMS UNIVERSITY
SCHOOL OF LAW
10 Metacom Avenue
Bristol, RI 02809

SHOBA SIVAPRASAD WADHIA*
PENN STATE LAW
Lewis Katz Building
University Park, PA 16802

* *Filed in an individual capacity; university affiliation listed for informational purposes only.*

ALAN E. SCHOENFELD
Counsel of Record
BEN GIFFORD
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 937-7294
alan.schoenfeld@wilmerhale.com

FRANCISCO UNGER
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

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INTEREST OF AMICI CURIAE[1]

Amici curiae are law professors who teach and publish scholarship about United States immigration law. Amici have collectively studied the implementation and history of the Immigration and Nationality Act (INA) for decades, and have written extensively on the topic. They accordingly have an abiding interest in the proper interpretation and administration of the Nation's immigration laws, particularly the INA.[2]

SUMMARY OF THE ARGUMENT

The third iteration of President Trump's travel ban (EO-3) dramatically exceeds the Executive's authority under the Immigration and Nationality Act (INA). Proclamation No. 9,645 (Sept. 24, 2017). It is irreconcilable with the INA's comprehensive framework and with past practice under the statute. When Congress enacted 8 U.S.C. § 1182(f) in 1952, it delegated to the President a cabined authority to enact restrictions on immigration in response to exigent geopolitical circumstances. It delegated this authority against a backdrop of exigent, wartime grants, which the President was to use only to restrict entry from hostile sovereign states and foreign subversive groups. Congress was fully aware of this backdrop when it passed § 1182(f). It did

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[1] No counsel for a party authored any portion of this brief, and no person other than amici or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Petitioners have filed a blanket letter of consent. Respondents have consented to the filing of this brief.

[2] A complete list of amici is set forth in the appendix to this brief. University affiliations are listed solely for informational purposes.

not intend to expand the President's peacetime powers beyond what his wartime authority had been.

Postwar invocations of § 1182(f) confirm that the statute authorizes only tailored restrictions on the entry of otherwise admissible foreign nationals. The vast majority of these invocations have targeted individuals who have been either complicit in, or associated with, human rights abuses or the subversion of exigent foreign policy goals. Moreover, the few uses of § 1182(f) that did impose nationality-based restrictions protected visa applicants who were close relatives of U.S. citizens or lawful permanent residents (LPRs)—a group targeted by EO-3. There is no precedent for EO-3's sweeping, indefinite ban, which targets otherwise admissible men, women, and children from a wide range of countries and lacks any discernible fit between means and ends.

The United States' unchecked interpretation of § 1182(f), moreover, would nullify multiple provisions in the INA that Congress carefully crafted to govern the exclusion of foreign nationals. Section 1182(a), for example, enumerates in detail categories of foreign nationals who are "ineligible for visas or admission," including those "engaged in … terrorist activity," § 1182(a)(3)(B)(i)(I), and those "whose entry … would have potentially serious adverse foreign policy consequences," § 1182(a)(3)(C)(i). Some of these inadmissibility grounds also include express exceptions. *See, e.g.*, § 1182(a)(3)(C)(ii). By granting to the President the authority to exclude any group of noncitizens, for any period of time, for any reason whatsoever, the United States' interpretation of § 1182(f) would render Congress's detailed scheme superfluous.

EO-3 is also irreconcilable with the INA's nondiscrimination provision, which prohibits "discriminat[ion] … in the issuance of an immigrant visa because of [a] person's race, sex, nationality, place of birth, or place of residence." § 1152(a)(1)(A). As the later-enacted and more specific statute, § 1152(a) controls and cabins § 1182(f). Yet under the United States' interpretation of § 1182(f), the President could invalidate § 1152(a), and reinstate a wholly discriminatory system of exclusion, so long as he "f[ound] that the entry" of those against whom he was discriminating "would be detrimental to the interests of the United States."

The nondiscrimination provision cannot be so easily circumvented. To the contrary, § 1152(a) was one of the centerpieces of the landmark 1965 amendments to the INA, which had as their "primary objective the abolishment of the national origins quota system for the allocation of immigrant visas." S. Rep. No. 89-748, at 11 (1965) ("Senate Judiciary Report"). In passing § 1152(a) and the 1965 amendments, Congress sought to achieve several key objectives, including the elimination of the quota system's fundamental unfairness, the prioritization of family reunification, the remediation of legislative inefficiency caused by the quota system, and the minimization of foreign relations costs imposed by a discriminatory immigration policy. EO-3 frustrates each of these objectives, and thereby undermines Congress's prerogative to orchestrate the nation's immigration policy.

ARGUMENT

I. RESPONDENTS' INA CLAIMS ARE REVIEWABLE

Under the Administrative Procedure Act (APA), a court shall "set aside agency action … found to be … in

excess of statutory … authority." 5 U.S.C. § 706(2)(C). While "the President's actions fall outside the scope of direct review, '[r]eview of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive.'" Pet. App. 19a (citations omitted). As this Court has recognized, "[t]he APA … creates a 'presumption favoring judicial review of administrative action.'" *Sackett* v. *EPA*, 566 U.S. 120, 128 (2012). There is no reason to depart from that presumption in this case.

When, as here, a provision is silent on the availability of judicial review, this Court looks to the "'statutory scheme as a whole.'" *Sackett*, 566 U.S. at 128. In addressing whether review is compatible with "long and complicated" legislation, *id.* at 129, this Court has asked whether Congress "designed" the law to rebut the presumption favoring judicial review, *id.* at 131; *see also Webster* v. *Doe*, 486 U.S. 592, 600 (1988) (consulting "overall structure" of statute in determining whether challenge was reviewable under APA). In this case, the INA's design does not rebut the presumption that EO-3 is reviewable.

As discussed below, the INA's groundbreaking 1965 amendments entailed two decisive departures from past practice. First, the amendments ensured that family unity would be the "foremost" factor in visa processing. Senate Judiciary Report 13; *see infra* p.28. Second, the amendments abolished the national origin quota system that had hamstrung U.S. immigration policy for decades. Senate Judiciary Report 13; *see infra* pp.25-27. To ensure that executive fiat could never reinstate the quota system, Congress barred discrimination in the issuance of immigrant visas. § 1152(a)(1)(A).

Judicial review of the President's attempts to revive the INA's discriminatory past reinforces the checks and balances that Congress sought to establish. Unconstrained by the courts, the Executive could flout the nondiscrimination provision that Congress added in 1965, ignore the INA's priorities on family unity, and institute a fresh regime of national origin quotas.

Under a separate provision of the APA, judicial review is made unavailable where "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). As this Court has explained, § 701(a)(2) is a "very narrow" exception to the general presumption of reviewability, and "it is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971), *abrogated on other grounds by Califano* v. *Sanders*, 430 U.S. 99 (1977); *see Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985) ("[R]eview is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.").

In contrast with having "no law to apply," this Court can measure EO-3 against Congress's "overall statutory scheme." *King* v. *Burwell*, 135 S. Ct. 2480, 2489 (2015) (citing *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). Just as the Court determined in *Brown & Williamson* that the Food, Drug, and Cosmetic Act did not delegate to the Executive the authority to regulate tobacco products, *see* 529 U.S. at 133, the Court can determine here whether the sweeping authority claimed by the United States under a single provision of the INA clashes with the comprehensive edifice of visa categories and inadmissibility grounds that Congress constructed. As-

sessing the fit of the President's claimed authority under § 1182(f) with the INA "as a whole," *Sackett*, 566 U.S. at 128, is precisely the kind of interpretive task that this Court has repeatedly performed. *See Brown & Williamson*, 529 U.S. at 133.

Finally, while the United States argues (at 19) that the doctrine of consular nonreviewability rebuts the presumption in favor of judicial review, courts have applied that doctrine to individual visa denials, not to sweeping assertions of executive power like EO-3. Individual visa denials, especially those based on grounds for inadmissibility, may turn on the application of expert judgment to specific facts provided by government sources and methods. *See United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 544 (1950); *see also Saavedra Bruno* v. *Albright*, 197 F.3d 1153, 1157 (D.C. Cir. 1999). Some measure of insulation from judicial review may be appropriate to avoid undue intrusion on government interests.

No such consequence attends judicial review of executive authority that, through categorical fiat, limits entry into the country for thousands of otherwise eligible and admissible visa applicants. In *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), this Court considered a statutory challenge to an Executive Order that embodied sweeping immigration "policy choices made by [the] President[]." *Id.* at 165. Instead of dismissing the case as nonreviewable—which the United States' position here would have required—the Court decided on the merits whether the Executive Order exceeded the limits of the INA. *Id.* at 158-159. The Court should take a comparable approach on reviewability when assessing the sweeping changes to past practice at issue here.

II. EO-3 Exceeds The Limits Of The Statute And Departs From Historical Applications Of § 1182(f)

To justify EO-3, the United States proposes an extreme view of executive power that exceeds the tailored authority § 1182(f) confers on the President. The origins of this tailored model lie in early grants of special wartime powers made by Congress to Presidents Wilson and Roosevelt. EO-3 has little in common with these grants, which were aimed not at general populations of men, women, and children, but at wartime enemies and saboteurs.

Nor can EO-3 be justified by comparison to postwar actions under § 1182(f). Historical invocations of § 1182(f) have ensured carve-outs for close relatives of citizens and LPRs. Additionally, historical invocations of § 1182(f) have generally imposed restraints on immigration only (1) in response to diplomatic emergencies with individual sovereign states, or (2) to curb the entry of individuals who had engaged in specific conduct, as well as those individuals' close associates. EO-3 departs conspicuously from these focused historical invocations, and lacks a means-end fit to justify its sweeping measures.

Moreover, EO-3 expressly controverts other provisions in the INA that make clear that the President's authority is not unbounded. It violates the nondiscrimination provision of § 1152(a), while substituting its own terms for § 1182's detailed sections addressing the grounds of visa ineligibility. In doing so, EO-3 exceeds the limits of the President's authority and undermines the INA's finely reticulated scheme.

A. Congress Enacted § 1182(f) Against The Backdrop Of Tailored Presidential Authority

1. World War I

Following the United States' entry into World War I, President Wilson sought authority to exclude persons "reasonably suspected of aiding Germany's purposes." H.R. Rep. No. 65-485, at 2-3 (1918). Congress empowered the President, for the duration of the war, to restrict the entry and departure of immigrants, enabling him to implement limitations whenever he "shall find that the public safety requires." Act of May 22, 1918, Pub. L. No. 65-154, 40 Stat. 559. Wilson's travel controls were "effective only in wartime," and they were not reprised until 1941, when Congress amended the 1918 Act to meet the national emergency of World War II. *Kent* v. *Dulles*, 357 U.S. 116, 124 (1958).

2. World War II

World War II activity of the political branches reflects the same tailored model of presidential authority. In the months before Pearl Harbor and America's entry into war, President Roosevelt sought authority from Congress to limit departure and entry "whenever … the President shall deem that the interests of the United States require" it. H.R. Rep. No. 77-754, at 1 (1941). As with the 1918 Act, the 1941 amendment was aimed directly at individual subversives. *See* S. Rep. No. 77-444, at 1-2 (1941) (noting threat of travel to the United States by "persons in and outside of the United States who are directly engaged in espionage and subversive activities in the interests of foreign governments").

In response, Senator Taft cautioned that codifying the broad language proposed by Roosevelt would add

"another statute which would give the President unlimited power, under any circumstances, to make the law of the United States and to prescribe the terms upon which any person—an American or any other person—might leave the United States." 87 Cong. Rec. 5325, 5326 (1941). Representative Jonkman similarly worried that the legislation might empower the President to "override the immigration laws." 87 Cong. Rec. 5026, 5050 (1941).

To assuage these concerns, Senator Van Nuys explained that the State Department had provided assurances that the wartime authority granted to the President would be used only to "suppress subversive activities." 87 Cong. Rec. 5381, 5386 (1941). The amended Act's lofty language about the "interests of the United States" would countenance executive action only "against those persons who were committing acts of sabotage or doing something inimical to the best interests of the" country, as was the case during World War I. *Id.* at 5049.

In view of these assurances, Congress enacted the Alien Visa Act, Pub. L. No. 77-113, 55 Stat. 252 (1941), and Roosevelt tailored the exercise of his new statutory authority to persons suspected of working on behalf of hostile foreign powers. 6 Fed. Reg. 5929, 5931-5932 (Nov. 22, 1941) (deeming "prejudicial to the interests of the United States" the entry of certain categories of persons, including foreign nationals "associated with or carrying out the policies of any foreign government opposed to the measures adopted by the Government of the United States in the public interest").

The classes of foreign nationals whose entry was deemed "prejudicial" by the Roosevelt Administration, far from being defined by executive overreach or ca-

price, comprised four groups: (1) statutorily inadmissible aliens; (2) spies, saboteurs, and subversives; (3) dangerous and enemy aliens; and (4) war criminals. 22 C.F.R. § 58.53 (1945).

Roosevelt's power, like Wilson's before him, was decidedly limited in scope, authorizing not sweeping bans on foreign nationals but only more targeted restraints leveled against subversive wartime actors. Congress understood that the special wartime immigration controls it authorized would not be subjected to executive overreach. The tailored powers entrusted in Presidents Wilson and Roosevelt during wartime formed the historical backdrop against which Congress crafted § 1185 and § 1182.

3. Post-War amendments

Congress was cognizant of the paradigm of tailored authority when it enacted the Immigration and Nationality Act of 1952. To provide the executive with control over immigration in wartime and emergencies, Congress enacted a precursor of § 1185(a)(1), rendering it unlawful for a foreign national to depart from or enter the United States in wartime except under rules prescribed by the President. Pub. L. No. 82-414, 66 Stat. 163, 190 (1952). Congress also enacted the present § 1182(f) to bolster the President's authority when global turbulence fell short of the armed conflict threshold. *Id.* at 188.

In passing § 1182(f), Congress should be understood as authorizing only limited exigent authority of the kind sought by Presidents Wilson and Roosevelt. Indeed, it would be anomalous to expand the President's *peacetime* power beyond the power that Congress granted to address the exigencies of war. Section

1182(f) of the INA drew on the template of the wartime statutes and regulations, permitting the President to exclude foreign nationals whose entry he found "detrimental"—instead of the earlier "prejudicial"—"to the interests of the United States." Hewing to the template of the wartime statutes, Congress transplanted into the postwar era those statutes' carefully prescribed model of executive authority.[3]

B. EO-3 Is Inconsistent With Post-War Invocations Of § 1182(f)

The United States cites (at 36-39, 41, 43, 53) past invocations of § 1182(f) to justify EO-3, but past practice has followed the tailored approach outlined here.

Most invocations of § 1182(f) have targeted groups of foreign nationals for specific conduct involving human rights abuses or threats to national security. *See* Manuel, Cong. Research Serv., *Executive Authority to Exclude Aliens: In Brief* 6-10 (2017) (listing prior § 1182(f) proclamations and orders). The only two instances of broader restrictions included robust safe-

[3] The United States argues (at 32-33) that Congress sought to expand the President's authority beyond the wartime context in a series of INA amendments made in 1978. This position is misguided for two reasons: First, as discussed above, the INA already authorized the President to restrict entry during peacetime, but this authority was understood to be used only in limited circumstances. *See* § 1182(f); *see also* 55 Stat. at 252-253 (allowing the President to impose entry and departure restrictions "whenever there exists a state of war between, or among, two or more states," even if the United States is not at war). Second, the 1978 amendments actually *constrained* executive authority in important ways, notably by barring the President from imposing categorical restrictions on citizens' travel abroad. *See* Pub. L. No. 95-426, § 124, 92 Stat. 963, 971 (1978); *see also* S. Rep. No. 95-842, at 14-15 (1978) (justifying curbs on executive discretion).

guards for otherwise qualified visa applicants, particularly close relatives of citizens and LPRs—the principal groups disadvantaged by EO-3. These past restrictions, moreover, involved responses to diplomatic emergencies between the United States and individual sovereign states. They do not support EO-3's sweeping, indefinite ban.

1. Peacetime invocations of § 1182(f)

The historical invocations of § 1182(f) on which the United States relies involved responses to diplomatic emergencies with individual sovereign states, and they included carve-outs for close relatives of citizens and LPRs—tailored exercises of authority that EO-3 drastically exceeds.

a. President Carter's response to the Iranian hostage crisis

In 1979, President Carter used his authority under the INA[4] to respond to Iran's illegal seizure and imprisonment of U.S. diplomatic personnel. Iran's unlawful act precipitated an emergency diplomatic dispute between the two countries, with Carter announcing an "unusual and extraordinary threat to national security." Exec. Order No. 12,211. Carter's response included suspending the issuance of new immigrant visas to Iranian nationals apart from those required for humani-

[4] President Carter invoked authority under 8 U.S.C. § 1185(a)(1) to regulate foreign nationals' entry into and departure from the United States. Advising President Carter, the Justice Department's Office of Legal Counsel cited § 1182(f) as authorizing executive action, adding a "*see also*" cite to § 1185(a)(1). *See* 4A Op. O.L.C. 133, 136 (1979). In this case, the United States has treated authority under §§ 1185(a)(1) and 1182(f) as interchangeable.

tarian reasons. *See* Pres. Carter, *Sanctions Against Iran Remarks Announcing U.S. Actions* (Apr. 7, 1980).

The United States cites Carter's steps (at 53), but it fails to acknowledge not only that Carter was responding to a unique diplomatic emergency, but also that his response retained broad humanitarian exceptions. The State Department categorically *exempted* close relatives of persons in the United States. *See U.S. Immigration Policy Regarding Iranian Nationals*, *Hearing Before the Subcomm. on Immigration, Refugees, and Int'l Law of the H. Comm. on the Judiciary*, 96th Cong., at 28 (1980) (testimony of Dep. Ass't Sec'y of State Elizabeth Harper). In contrast, EO-3 relegates these relatives to an ad hoc and largely illusory waiver process. *See infra* p.22-24. Carter's measures, moreover, did not target the whole populations of a diffuse group of countries. In motive and substance, Carter's response was radically more tailored than EO-3.

b. President Reagan's suspension of immigration from Cuba

Echoing President Carter, President Reagan invoked § 1182(f) in 1986 to suspend immigration from Cuba in response to a specific diplomatic emergency. As with Carter, Reagan protected family-based visa applicants. Proclamation No. 5,517 (Aug. 26, 1986).

President Reagan acted after Fidel Castro reneged on an agreement to accept the return of nearly 3,000 Cuban nationals among over 100,000 who had entered the United States without visas in the 1980 Mariel Boatlift. *See* Weinraub, *U.S. and Cuba Gain an Accord on Repatriation*, N.Y. Times, Dec. 15, 1984. Reagan's Proclamation was merely one salvo in a long-running conflict between the U.S. and the Castro regime, in

which travel by both U.S. and Cuban nationals was a perennial spark for controversy. *See Zemel* v. *Rusk*, 381 U.S. 1 (1965); *Regan* v. *Wald*, 468 U.S. 222 (1984).

Notably, even as Reagan sought to navigate this discrete bilateral crisis—by asserting pressure on the Castro regime to accept the return of some of its nationals—his Proclamation echoed President Carter's Iran policy in its carve-outs for Cubans with close family relationships in the United States. Reagan's Proclamation *expressly exempted* immediate relatives of U.S. citizens, as provided for in 8 U.S.C. § 1151(b), and family preference immigrants sponsored by citizens and LPRs, *id.* § 1153(a). *See* Proclamation No. 5,517, § 2.

EO-3's stark restrictions bear no resemblance to the exigent nature and conscientious tailoring that distinguished the policies of Presidents Reagan and Carter. Moreover, nearly every country covered by EO-3 faces restrictions that are markedly less tailored than those imposed by prior proclamations.[5]

2. President Reagan's high seas interdiction proclamation

Perhaps sensing that EO-3 is out of keeping with the historical antecedents discussed above, the United States cites a more anomalous use of § 1182(f) in its search for cover: Reagan's High Seas Interdiction of Illegal Aliens aimed at stemming the "illegal migration by sea of large numbers of undocumented aliens."

[5] Under EO-3, only Venezuela is subject to more fine-grained distinctions. *See* § 2(f) (denying entry to a small group of government officials and their families).

Proclamation No. 4,865 (Sept. 29, 1981).[6] But this tack by the government is fruitless, as Reagan's Proclamation applied only to persons who lacked a visa and were therefore *already inadmissible* under § 1182(a)(7)(A)(i)(I) (providing that foreign nationals who apply for admission to the U.S. without a "valid unexpired immigrant visa … or other valid entry document" are inadmissible).

In the episode involving those interdicted at sea, thousands of Haitians sought to escape political oppression and economic privation by securing passage to the United States, relying on smugglers and often unseaworthy vessels. This humanitarian crisis overwhelmed the U.S. Coast Guard and placed the lives of countless Haitian refugees at risk.

In response, Reagan ordered the Coast Guard to interdict any vessels engaged in carrying refugees towards American shores, but at no point did he suspend the granting of visas to Haitian nationals or any other class of persons. Indeed, Reagan's Executive Order was addressed only to "illegal migration … by sea" and to forestalling the "entry of undocumented aliens." Exec. Order No. 12,324. Moreover, Reagan did not single out Haitians by nationality—the High Seas Interdiction called simply for the interception of all "vessels trafficking in illegal migrants." Proclamation No. 4,865. Reagan's Proclamation thus lends no support to the Executive overreach at work in EO-3.

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[6] Although the United States cites Reagan's Proclamation only in a footnote in its brief, *see* Pet. Br. 37 n.11, it has relied on the example more heavily in the lower courts, *see* Pet. C.A. Br. 28.

3. Other invocations of § 1182(f)

EO-3 is also at odds with the most common use of § 1182(f): executive orders restricting the entry of otherwise admissible persons who have been complicit in human rights abuses or the subversion of foreign policy goals abroad. Of the 43 prior proclamations and orders issued under § 1182(f), 42 have targeted only government officials or other foreign nationals who engaged in specific conduct and their associates or relatives. *See* Manuel, *supra*, at 6-10. Only one, President Reagan's suspension of immigration from Cuba discussed above, suspended entry of one country's nationals.[7]

The use of § 1182(f) to bar the entry of known individuals who have engaged in specific harmful conduct and their close relatives and confederates underscores the bounded model of executive authority. This past practice supplements the work of consular officials, who apply inadmissibility grounds to a broad swath of visa applicants. In certain cases, presidents have invoked § 1182(f) in lieu of consular decisions about individuals who engaged in specific conduct (e.g., actions or policies that threatened the peace, security, or stability of their home country). In contrast, EO-3 levels its categorical ban at entire populations.

Examples of historic uses of § 1182(f) include: Executive Order No. 13,606, aimed at persons who facilitated cyber-attacks and human rights abuses by Syrian or Iranian governments; Proclamation No. 6,925, suspending entry of persons who impede Burma's transition to democracy, and their family members; Proclamation 7,249, imposing restrictions against perpetra-

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[7] President Carter cited § 1185(a), not § 1182(f), as authority for restricting immigration from Iran. Manuel, *supra*, at 11.

tors in the ethnic conflicts in the former Kosovo; and so forth.

EO-3 drastically exceeds these measures by imposing sweeping restrictions on persons who have not been deemed responsible for any wrongdoing. Armed with its uncabined view of executive authority, EO-3 subjects thousands of otherwise admissible persons to measures that prior administrations, under § 1182(f), have largely tailored to individuals inimical to U.S. interests and values.

4. Invocations of § 1182(f) require a means-end fit, which EO-3 lacks

In keeping with this tailored model of executive authority, and as demonstrated above, past invocations of § 1182(f) have always observed a careful fit between the means they enforce and the end at which they aim. In the absence of an adequate means-end fit, § 1182(f) becomes ripe for executive overreach. EO-3 commits just such overreach by virtue of its internal incoherence: the ostensible goals it lays out (combating other nations' information-sharing and identity-management deficiencies, and protecting the nation from terrorism) do not align with the restrictions that it seeks to enforce.

To illustrate, EO-3 purports to value states' identity-management protocols, such as their use of electronic passports and their reporting of lost or stolen passports. § 1(c)(i). Yet several countries on EO-3's list use identity-management protocols of the very kind EO-3 requires, while many not on the list do not. For example, Iran, Libya, Somalia, and Venezuela already utilize electronic passports, while almost 100 countries do not. Margulies, *Travel Ban 3.0*, Lawfare (Oct. 17, 2017).

And the same four countries (and Syria) share information on lost and stolen passports, while over 150 countries rarely or never do. *Id.*

Such considerations suggest that EO-3 does not even approach the means-end fit that § 1182(f) requires. *Cf.* Pet. App. 94a (emphasizing that "EO-3 'does not tie … nationals 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'").

C. EO-3 Is Inconsistent With Other Provisions In The INA

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.'"). The United States' interpretation of § 1182(f) would undermine the intricate latticework of inadmissibility grounds that Congress enacted in § 1182. EO-3 likewise exceeds the President's authority insofar as it is cabined by the nondiscrimination mandate of § 1152(a)(1)(A). Finally, EO-3's ad hoc waiver provisions highlight its rewrite of the INA and its clash with the comprehensive system Congress has already implemented.

1. Congress enumerated the grounds for inadmissibility in § 1182(a)

This Court has observed that "'over no conceivable subject is the legislative power of Congress more com-

plete than it is over' the admission of aliens." *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977). Although Congress has delegated broad authority in this area, the Executive Branch cannot "exercise that power in a manner that conflicts with the INA's finely reticulated regulatory scheme governing the admission of foreign nationals." Pet. App. 28a.

In § 1182(a), Congress enumerated an array of inadmissibility grounds, including ones pertinent to terrorism and crime. Section 1182(a)(3)(B), for example, provides for the exclusion of those "engaged in … terrorist activity," where "terrorist activity" is defined broadly to include any unlawful use of a "weapon or dangerous device (other than for mere personal monetary gain)." § 1182(a)(3)(B)(iii)(V)(b). And § 1182(a)(3)(C)(i) provides for the exclusion of any foreign national "whose entry or proposed activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States."

EO-3 undermines this meticulous framework by substituting the will of the President for that of Congress. Against Congress's carefully engineered inadmissibility scheme, EO-3 attempts to establish alternative issuance criteria. The United States has attempted to defend EO-3's intervention by arguing that "§ 1182(f) empowers the President to issue '*supplemental*' admission restrictions." Pet. App. 31a. Yet if the Executive possessed such unfettered power, it could rewrite the statute and undermine or abrogate § 1182(a)'s detailed scheme. What the United States construes as the President's power to "supplement" amounts to wholesale executive overreach. *Cf.*

Abourezk v. *Reagan*, 785 F.2d 1043, 1057 (D.C. Cir. 1986) (holding that the Executive may not "nullif[y]" the contours of existing inadmissibility grounds or "evade the limitations Congress" has imposed), *aff'd by equally divided Court*, 484 U.S. 1 (1987).

2. Section 1152(a) cabins § 1182(f)

Just as fatally, EO-3 violates the INA's prohibition on nationality-based discrimination. § 1152(a)(1)(A). As the district court emphasized below, EO-3, which "indefinitely and categorically suspend[s] immigration from … six countries … attempts to do exactly what Section 1152 prohibits." Pet. App. 100a.

Despite the United States' assertions that EO-3 is authorized under § 1182(f), traditional canons of statutory construction make clear that § 1152(a) cabins § 1182(f), as § 1152(a) is the more specific and later-enacted of the statutes. Pet. App. 52a. If the President enjoyed unconstrained authority under § 1182(f), he would have open license to engage in nationality-based discrimination, rendering § 1152(a) a nullity, along with the exceedingly narrow exceptions § 1152(a) does admit. *See* § 1101(a)(27)(D)-(G).

Explaining the reasoning behind the nondiscrimination provision, its principal sponsor, Rep. Feighan of Ohio, championed "checks and balances" that would deter unilateral executive action inconsistent with the statutory scheme. *See Immigration: Hearings on H.R. 7700 Before Subcommittee No. 1 of the House Committee on the Judiciary*, 88th Cong., at 99 (1964) ("*Hearings on H.R. 7700*"). EO-3 presents exactly the risk that Congress sought to curb.

To camouflage EO-3's lack of fit with § 1152(a), the United States tries (at 49-51) to distinguish between

visa issuance and entry. However, this argument fails to read § 1152(a) and § 1182(f) in light of the statute "as a whole." While it is true that immigration officials may decline to admit foreign nationals at a port of entry, they have for 125 years exercised that discretion in *individual* cases to address *new information* that has surfaced. *See Nishimura Ekiu* v. *United States*, 142 U.S. 651, 661 (1892) (noting that statute authorized immigration inspectors to refuse entry to those who were, *inter alia*, likely to become a "public charge"); *see also Knauff*, 338 U.S. at 543. Furthermore, the United States' implementation of EO-3 indicates that the order ultimately affects visa issuance, not merely entry. *See* U.S. Dep't of State, *Court Order on Presidential Proclamation on Visas* (Nov. 13, 2017) (stating that noncitizens who do not meet EO-3's terms and are "otherwise eligible for a visa … will be denied under the Proclamation"); Letter from Mary K. Waters, Ass't Sec'y of State, Legislative Affairs, to Sen. Chris Van Hollen 2 (Feb. 22, 2018) (tying "visa issuance" to meeting EO-3's terms).

Granting the President or immigration officials freewheeling power to exclude *any and all* noncitizens who are otherwise admissible would disrupt Congress's detailed scheme, and it would constitute a radical break from past practice. Congress could not have intended to authorize the President to undermine the INA's comprehensive structure simply by framing his actions in terms of "entry" rather than "visa issuance." *See Knauff*, 338 U.S. at 548 (Frankfurter, J., dissenting) (cautioning that "[l]egislation should not be read in such a decimating spirit unless the letter of Congress is inexorable").

3. EO-3's waiver provisions thwart Congress's plan

EO-3's waiver provisions are further evidence of incompatibility with the INA, as they add new obstacles to the demanding process that Congress already established. EO-3's waiver provisions require that nationals of any of the covered countries—in addition to showing visa eligibility and the inapplicability of the INA's copious exclusion grounds—satisfy three new criteria: they must demonstrate that (1) the bar to entry would result in "undue hardship," (2) they do not present "a threat to the national security or public safety of the United States," and (3) their "entry would be in the national interest." *See* § 3(c)(i).

Each of these criteria clashes with the INA's orderly scheme for visa eligibility and admissibility, which already sets out an exhaustive series of inadmissibility grounds, including those based on national security, criminal offenses, and public health. § 1182(a)(1)-(3). The INA has also expressly authorized waivers for overcoming some of these grounds, each of which imposes specific requirements on applicants. *See*, *e.g.*, § 1182(a)(9)(B)(v) (requiring proof of "extreme hardship" to the citizen or LPR "spouse or parent" of the immigrant); § 1182(h)(1)(B) (requiring "extreme hardship" to specific U.S. citizen or LPR relatives in conjunction with other showings); § 1182(i)(1) (requiring "extreme hardship" to U.S. citizen or LPR spouse or parent [or child for self-petitioners under the Violence Against Women Act]). EO-3's waiver scheme imposes new requirements that Congress has not authorized. Where Congress has specifically provided for waivers of certain inadmissibility grounds, canons of statutory interpretation suggest that Congress did not intend to impose additional hurdles on otherwise admissible visa

applicants. *Cf. Jennings* v. *Rodriguez*, 138 S. Ct. 830, 844 (2018) (inferring that an express INA exception to mandatory detention of certain noncitizens rules out implied exceptions to detention).

The summary process followed under EO-3's waiver provisions also clashes with the INA. Under the INA, waivers are typically sought in conjunction with an application for admission and accompanied by supporting documentation. Depending on the waiver type, a decision can be made by an official at the Department of Homeland Security, an immigration judge in the Department of Justice, or a consular officer at the Department of State. In all three settings, adjudicators are required to consider the evidence presented by a qualifying applicant *before* making a decision.[8]

While EO-3 purports to allow applicants a comparable chance to "demonstrate" facts justifying a waiver, *see* § 3(c), that opportunity has proven elusive in practice. Even if the waiver scheme were valid, EO-3's use of "demonstrate" places an affirmative responsibility on the immigration official to consider evidence and adjudicate the waiver *before* deciding whether to grant or deny a visa.

In contrast to waivers under the INA, where applicants receive a waiver decision based on a review of supplemental evidence and specific statutory factors, waiver denials under EO-3 have often been made without consideration of the evidence submitted by applicants. In many cases, officials have summarily denied waivers, even before applicants have had an *opportuni-*

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[8] *See, e.g.*, *In re N.Y. Dep't of Transp.*, 22 I. & N. Dec. 215, 220 (B.I.A. 1998) (discussing testimony from multiple witnesses in adjudication of waiver request).

ty to request relief. Levin, *Tears, despair and shattered hopes*, The Guardian, Jan. 8, 2018 (detailing story of U.S. citizen whose petition for immigrant visas for his wife and three daughters in Yemen was preliminarily approved, but then denied along with summary rejection of waiver eligibility); *see also* Penn State Law Center for Immigrants' Rights et al., *A View from the Ground: Stories of Families Separated by the Presidential Proclamation*, Center for Constitutional Rights (Feb. 20, 2018).

Recent reports illustrate the impact of the waiver provision's summary operation. Out of almost 7,000 visa-eligible nationals from listed countries in a recent 30-day period, as of February 15 the government had granted only two waivers. Torbati & Rosenberg, *Exclusive: Visa Waivers Rarely Granted Under Trump's Latest U.S. Travel Ban: Data*, Reuters, Mar. 6, 2018.[9] In this respect as well, EO-3 overrides the statutory framework and established practice under the INA.

III. EO-3 Runs Afoul Of The Purposes Behind The 1965 Amendments To The INA

Congress amended the INA in 1965 to eliminate the quota system and bar national-origin discrimination in immigration law. Congress had at least four goals in

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[9] *See also* Letter from Mary K. Waters, Ass't Sec'y of State, Legislative Affairs, to Sen. Chris Van Hollen 3 (Feb. 22, 2018) (stating that the State Department received 8,406 visa applications from listed countries between December 8, 2017 and January 8, 2018, with 1,723 being denied for "reasons unrelated" to EO-3, and two waivers granted for visa-eligible persons). The State Department said in early March that it had granted over 100 additional waivers. Torbati & Rosenberg, *supra*. In any case, the total waivers granted amounted to *no more than 1.5%* of otherwise visa-eligible and admissible persons.

mind when it amended the statute. EO-3 frustrates each of those objectives.

A. Eliminating The Unfairness And Discrimination Inherent In A Quota System

"During most of its history, the United States openly discriminated against individuals on the basis of race and national origin in its immigration laws." *Olsen* v. *Albright*, 990 F. Supp. 31, 37 (D.D.C. 1997); *see* Yee, *In Trump's Immigration Remarks, Echoes of a Century-Old Racial Ranking*, N.Y. Times, Jan. 13, 2018. Those laws were consolidated and codified in the Immigration and Nationality Act of 1952, which preserved preexisting quotas on immigration from particular countries. President Truman vetoed that Act, noting the regime's abiding unfairness, and observing that "the present quota system … discriminates, deliberately and intentionally, against many of the peoples of the world." 98 Cong. Rec. 8021, 8083 (1952).

Truman singled out for particular opprobrium the quotas that suppressed immigration by persons from Asia and of Asian ancestry. Until 1952, racial restrictions in the immigration statute had barred naturalization of most Asian noncitizens and suppressed immigration. *See* Senate Judiciary Report 14. The 1952 statute, while eliminating race as an absolute bar to immigration, subjected nationals from the Asia-Pacific triangle to particularly narrow and rigid quotas. *Id.* Only 2,000 visas per year were available to all countries in the entire region. *Id.* Truman denounced the impact of "this invidious discrimination" and lamented the dissonance between the quota system and "our national ideals." 98 Cong. Rec. at 8084-8085. Congress overrode Truman's veto.

President Eisenhower reiterated his predecessor's concerns, again observing that the quota system "operate[d] inequitably," Cong. Research Serv., *U.S. Immigration Law and Policy: 1952-1979*, at 115 (1979) (quoting Message from the President Relative to Immigration Matters, H.R. Doc. No. 85-85, at 1 (1957)) ("*CRS Report*"),[10] and advising Congress that "the present national-origins method of admitting aliens needs to be reexamined, and a new system adopted," *id.* at 112 (quoting Message from the President Transmitting Recommendations Relative to Our Immigration and Nationality Laws, H.R. Doc. No. 84-329, at 2 (1956)). Eisenhower urged a doubling in the number of immigrants granted admission under the quotas then in effect, explaining that this would "moderate the features of existing law which operate unfairly in certain areas of the world." Message from the President Relative to Urging the Liberalization of Some of Our Existing Restrictions upon Immigration, H.R. Doc. No. 86-360, at 2 (1960) ("Liberalization Message"). Eisenhower also strongly recommended the elimination of the ceiling of 2,000 annual immigrant visas from the Asia-Pacific Triangle. *Id.*

By the early 1960s, the national-origin quota system was "an anachronism … [that] discriminates among applicants for admission into the United States on the basis of accident of birth." Pres. Kennedy, Letter to the President of the Senate and to the Speaker of the House on Revision of the Immigration Laws (July 23, 1963) ("Kennedy Letter"). In his message to Congress in July 1963, President Kennedy noted that the

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[10] The report is reprinted at 3 Immigr. & Nat'lity L. Rev. 95 (1980).

quota system was "without basis in either logic or reason." *Id.*

President Johnson was just as forthright in his State of the Union message shortly after Kennedy's assassination. Echoing a well-known passage from Kennedy's Inaugural Address, Johnson observed that "a nation that was built by the immigrants of all lands can ask those who now seek admission: 'What can you do for our country?' But we should not be asking: 'In what country were you born?'" *Annual Message to the Congress on the State of the Union* (Jan. 8, 1964).

Congress finally responded to this presidential insistence in 1965, when it passed a set of amendments whose "primary objective [was] the abolishment of the national origins quota system for the allocation of immigrant visas." Senate Judiciary Report 11.[11] The centerpiece of Congress's efforts to address these concerns was the nondiscrimination provision, which prohibits discrimination "in the issuance of an immigrant visa because of [a person's] race, sex, nationality, place of birth, or place of residence." Pub. L. No. 89-236, 79 Stat. 911, 911 (1965). The exceptions to the provision are surpassingly narrow, *see, e.g.*, 8 U.S.C. § 1101(a)(27)(D)-(G), thereby reflecting an abiding commitment to nondiscrimination on the basis of national origin in the administration of the Nation's immigration laws. That commitment was critical to effecting Congress's purposes in removing the quota system.

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[11] Echoing Truman's concern on the subject, the 1965 Senate Judiciary Report stressed the particularly adverse impact of quota provisions governing the Asia-Pacific triangle. The Report declared that in the future, there would be "no differentiation in the treatment of" Asian immigrants. Senate Judiciary Report 15.

B. Prioritizing Family Reunification

The 1965 amendments provided a detailed structure for immigrant admissions that prioritized close family relationships.[12] As the Senate Judiciary Committee noted, the revisions to the statute included "a new system of allocation based on a system of preferences which extends priorities … to close relatives of U.S. citizens and [lawful permanent residents]," along with certain "members of the professions, arts, or sciences," whose skills or other attributes were needed in the U.S. economy, and refugees. Senate Judiciary Report 11. The Committee Report declared that "[r]eunification of families is to be the foremost consideration." *Id.* at 13.

The 1965 amendments decisively rejected the system of national-origin quotas because it lacked the "required degree of flexibility" to handle such factors as "the reuniting of families." Senate Judiciary Report 13. Because of this flaw—and as discussed in further detail below—Congress repeatedly resorted to "special legislation" to be appropriately "generous and sympathetic" to the needs of families and others. *Id.* In sparing Congress from this continual recourse to special legislation, the 1965 amendments replaced the quota system with a family-based visa program that was "fair, rational, humane, and in the national interest." *Id.*

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[12] 8 U.S.C. §§ 1151, 1153; *cf.* Margulies, *Bans, Borders, and Sovereignty: Judicial Review of Immigration Law in the Trump Administration*, 2018 Mich. St. L. Rev. 1, 58-59.

C. Remedying The Substantial Inefficiency That The Quota System Created In The Legislative Process

As noted, the United States' commitment to family reunification was complicated by the existence of the quota system. So too was the Nation's commitment to refugees and others who sought entry. As a result, in the period between the 1952 Act and the 1965 amendments, Congress repeatedly passed ad hoc legislation to admit relatives of U.S. citizens, refugees, and others over and above the quotas. These recurring ad hoc efforts drained legislative time, effort, and deliberation.

The Refugee Relief Act of 1953, Pub. L. No. 83-203, 67 Stat. 400 (1953), amended by Pub. L. No. 83-751, 68 Stat. 1044 (1954), provided for admission beyond the otherwise applicable quotas of a broad swath of foreign nationals, including refugees, escapees from Communist countries, persons expelled from such countries, and relatives of U.S. citizens. *CRS Report* 113.

In 1957, Congress, in a bill whose principal sponsor was then-Senator John F. Kennedy, Pub. L. No. 85-316, 71 Stat. 639 (1957), enacted another temporary expedient to mitigate the harshness of the quota system. *CRS Report* 115. The 1957 Act provided that foreign national visa applicants on whose behalf petitions had been filed by a certain date would qualify for visas without regard to national origin quotas. *Id.* at 116. This relief was the "first of a series" of ad hoc adjustments that Congress made to provisions for such nationals. *Id.* Along the same lines, on September 22, 1959, Congress again made ad hoc time-bound adjustments to certain petitions for foreign nationals who were relatives of United States citizens in service of "the recognized principle of avoiding separation of

families." *Id.* at 117 (quoting Auerbach, *Immigration Legislation, 1959*, Dep't of State Bull. 600 (Oct. 26, 1959) (quoting H.R. Rep. No. 86-582, at 2 (1959))).

Moreover, members of Congress compensated for the rigidity of national-origin quotas with what President Eisenhower, who strongly favored comprehensive reform of the quota system, called an "avalanche … of private bills." H.R. Doc. No. 84-329, at 3. In the 85th Congress, fully "[t]wenty percent of all legislation" stemmed from 4,364 private immigration bills providing relief to 5,282 persons who would otherwise have been caught up in delays attributable to the quota system. *CRS Report* 120. Because of Congress's persistence in fashioning continual ad hoc adjustments through special and private legislation, less than half of the over 2.5 million immigrants admitted between 1951 and 1960 entered under the quota system. *Id.*

This same exhausting regime of ad hoc adjustments continued through the early 1960s. In the Act of September 26, 1961, Pub. L. No. 87-301, 75 Stat. 650, Congress again enacted a program for the admission outside the quota system of certain foreign nationals. *CRS Report* 140. Since certain visa categories were severely backlogged because of the quota system, the 1961 Act authorized non-quota admission for a discrete cohort of petitions. *Id.* at 141. Legislation passed in 1962 accomplished the same result. *Id.* (citing Pub. L. No. 87-885, 76 Stat. 1247 (1962)). In overall terms, this legislation "reflect[ed] a gradual shift in focus, at least on an ad hoc basis," from national-origin quotas to "values" such as the "reunification of families." *Id.*

In crucial testimony before the House Judiciary Committee in 1964, Secretary of State Dean Rusk acknowledged the adverse impact that the quota sys-

tem had on legislative efficiency. Rusk put a diplomatic spin on these extensive, iterative efforts, noting that Congress had repeatedly found it "desirable" to pass "special laws" allowing admission outside the quota system. *Hearings on H.R. 7700*, at 386. Rusk reminded Congress of the fitfully spinning wheels caused by the need for additional legislation, noting that from 1953 to 1962, only 34 percent of immigrants to the United States were quota immigrants. *Id.*

Congress enacted the 1965 immigration amendments' comprehensive framework to end national origin quotas and obviate the need for the frequent ad hoc adjustments required by the quota regime. Spasmodic interventions like those in EO-3 were precisely what the 1965 Congress sought to remedy.

D. Addressing The Foreign-Policy Implications Of American Immigration Law By Safeguarding Its Impartiality

In 1965, Congress recognized what presidents since Truman had noted regarding the 1952 Act's hardening of quotas: the "quota system [was] … unrealistic in the face of present world conditions … [and] a constant handicap in the conduct of our foreign relations." 98 Cong. Rec. at 8083. President Truman urged Congress to abandon quotas and enact "a decent policy of immigration—a fitting instrument for our foreign policy and a true reflection of the ideals we stand for, at home and abroad." *Id.* Indeed, Truman reiterated his contention that the need for a replacement of the quota system was nothing short of a national "emergency." *Id.*

President Eisenhower was equally vocal in noting the foreign policy costs of the quota system. Urging that Congress pass legislation that would result in

"[a]bandonment of the concept of race and ethnic classifications within our population," and an increase in the number of immigrants allowed and of refugee admissions, Eisenhower noted that victims of persecution who at that time had to wait long periods for admission "will become worthwhile citizens and will keep this Nation strong and respected as a contributor of thought and ideals." Liberalization Message 2.

President Kennedy continued this emphasis on liberalizing or eliminating quotas. In a July 1963 message to Congress, Kennedy denied that the quota system "satisfies a national need [or] accomplishes an international purpose." Kennedy Letter. Criticizing the quota system as counterproductive to American interests, Kennedy observed that "[o]ur investment in new citizens has always been a valuable source of our strength." *Id.*

In his testimony before the House Judiciary Committee, Secretary Rusk alluded to Presidents Kennedy and Johnson and added his own assessment of the foreign policy reasons for abolishing the quota system. As Rusk put it: "Since the end of World War II, the United States has been placed in the role of critical leadership in a troubled and constantly changing world. We are concerned to see that our immigration laws reflect our real character and objectives. What other peoples think about us plays an important role in the achievement of our foreign policies." *Hearings on H.R. 7700*, at 386. Rusk added that because America's immigration laws are "the basis of how we evaluate others around the world," we can readily detect "their effect on people abroad and consequently on our influence." *Id.*

Speaking about the Asia-Pacific Triangle quota, Secretary Rusk was even more pointed in his critique. He observed that, "[t]here have been times in the past when we have been accused of preoccupation with the peoples of the West to the neglect of Asian peoples in the Far East." *Hearings on H.R. 7700*, at 386. Rusk warned Congress that "the national origins system gives a measure of support and credence to these observations." *Id.*

Responding to committee members' questions, Rusk noted that perceptions of American discrimination in immigration policy were "picked up by people unfriendly to the United States and made an issue" in other countries around the world, "caus[ing] political disturbances in the good relations which we would hope to establish." *Hearings on H.R. 7700*, at 390. Rusk described this political blowback as a "matter of frequent discussion … with foreign ministers of other countries." *Id.* Summing up the tone and tenor of discourse with foreign officials occasioned by the quota system, Rusk described the quotas as creating an "unwholesome atmosphere." *Id.* Rusk thus echoed the calls of Presidents Truman through Johnson for the quota system's demise.

Faced with these concerns, the 1965 Congress accepted the view that the quota system undermined the Nation's foreign affairs objectives. The 1965 amendments abolished the quota system to heal the wounds inflicted by our discriminatory policies.

* * *

EO-3 would reopen these wounds. As the foregoing discussion makes clear, Congress carefully prescribed the terms that would allow an individual to qualify for an immigrant or nonimmigrant visa, outlined

grounds of inadmissibility, and identified the cases in which a waiver might apply. In 1965, Congress abolished national-origin quotas and prohibited nationality-based discrimination in the issuance of immigrant visas. Congress identified particular ills with the old system and viewed the elimination of national-origin discrimination as critical to remedying them.

EO-3, however, imposes an indeterminate bar on the entry of immigrants from designated nations, thus reprising the form of discrimination Congress eliminated in the 1965 amendments. EO-3 ignores the bounds of the statute and the importance of family reunification, which Congress in 1965 declared was the "foremost consideration" in the allocation of visas. Senate Judiciary Report 13. EO-3 indefinitely delays reunification of close relatives from listed countries with American citizens and lawful permanent residents, shifting the default position from the equitable visa allocation that Congress envisioned in 1965 back to the nationality-based system that President Kennedy declared to be an "anachronism" in 1963. Kennedy Letter.

Furthermore, as was the case with the national-origin quota system, congressional efforts to override or adjust EO-3 would create a sustained spectacle of inefficiency. So too would reliance on EO-3's ad hoc waiver provisions, which the United States has erroneously suggested are "a sufficient safety valve for those who would suffer unnecessarily." *Washington* v. *Trump*, 847 F.3d 1151, 1169 (9th Cir. 2017).

As discussed above, the waiver provisions require applicants to demonstrate that (1) denial of entry would result in "undue hardship," (2) they do not present a threat to the "national security or public safety," and

(3) their entry would be in the "national interest." *See* § 3(c)(i). But EO-3 does not actually define these criteria, and the Department of State has posted only minimal guidance. *See* U.S. Dep't of State, *New Court Orders on Presidential Proclamation* (Dec. 4, 2017). Applicants who are otherwise qualified for a visa but fail EO-3's "undue hardship," "national interest," or "national security or public safety" tests will thus seek relief through a smorgasbord of ad hoc remedies.

The recurring need to pass special legislation imposed substantial costs on pre-1965 Congresses, requiring time, effort, and deliberation that legislators could have devoted to other matters of public importance. The point of the 1965 amendments was to "eliminate the need for those special bills." *Hearings on H.R. 7700*, at 421. EO-3 would redouble that need.

Finally, EO-3 risks precisely the negative impact on foreign relations that the 1965 amendments sought to address. It singles out for adverse treatment the citizens of nations located in critical parts of the world, compromising "the good relations which we would hope to establish" with those nations and their neighbors and defenders. *Hearings on H.R. 7700*, at 390.

In sum, EO-3 rewrites the INA, exceeds or ignores specified terms in the statute, and undoes much of the progress Congress achieved in the 1965 amendments, which were decades in the making. Nothing in the INA gives the President the authority to so thoroughly undermine Congress's handiwork.

CONCLUSION

The Court should affirm the court of appeals' judgment and uphold the injunction.

Respectfully submitted.

PETER MARGULIES*
ROGER WILLIAMS UNIVERSITY
SCHOOL OF LAW
10 Metacom Avenue
Bristol, RI 02809

SHOBA SIVAPRASAD WADHIA*
PENN STATE LAW
Lewis Katz Building
University Park, PA 16802

ALAN E. SCHOENFELD
Counsel of Record
BEN GIFFORD
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 937-7294
alan.schoenfeld@wilmerhale.com

FRANCISCO UNGER
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

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APPENDIX

LIST OF AMICI CURIAE

This Appendix provides amici's titles and institutional affiliations for identification purposes only. The listing of these affiliations does not imply any endorsement of the views expressed herein by amici's institutions.

***

Linda Bosniak
Distinguished Professor of Law
Rutgers Law School

Richard A. Boswell
Professor of Law
UC Hastings College of Law

Jason A. Cade
Associate Professor of Law
University of Georgia Law School

Jennifer Chacón
Chancellor's Professor of Law
Senior Associate Dean for Administration
University of California, Irvine, School of Law

Marisa S. Cianciarulo
Associate Dean for Academic Affairs
Professor of Law
Chapman University Dale E. Fowler School of Law

Nora Demleitner
Roy L. Steinheimer Jr. Professor of Law
Washington and Lee University School of Law
Senior Fellow (2017-18), Baldy Center for Law & Social Policy
University of Buffalo

Maryellen Fullerton
Professor of Law
Brooklyn Law School

P. Gulasekaram
Professor of Law
Santa Clara University School of Law

Kari E. Hong
Assistant Professor
Boston College Law School

Margaret Hu
Associate Professor of Law
Washington and Lee University School of Law

Anil Kalhan
Associate Professor of Law
Drexel University Kline School of Law

Daniel Kanstroom
Professor of Law
Thomas F. Carney Distinguished Scholar
Co-Director, Center for Human Rights and
International Justice
Boston College Law School

Linda Kelly
M. Dale Palmer Professor of Law
Indiana University Robert H. McKinney School of Law

Stephen H. Legomsky
John S. Lehmann University Professor Emeritus
Washington University School of Law

Matthew Lindsay
Associate Professor of Law
University of Baltimore School of Law

Michael A. Olivas
William B. Bates Distinguished Chair of Law
Director, Institute for Higher Education Law & Governance
University of Houston Law Center

David Rubenstein
Professor of Law
Washburn University School of Law

Anita Sinha
Assistant Professor of Law
Director, International Human Rights Law Clinic
American University, Washington College of Law

Stephen Yale-Loehr
Professor of Immigration Law Practice
Cornell University Law School