Nos. 17-2231 (L), 17-2232, 17-2233, 17-2240 (Consolidated)

United States Court of Appeals for the Fourth Circuit

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.,
Plaintiffs-Appellees,

IRANIAN ALLIANCES ACROSS BORDERS, ET AL.,
Plaintiffs-Appellees,

EBLAL ZAKZOK, ET AL.,
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, ET AL.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND, SOUTHERN DIVISION
(8:17-CV-00361-TDC)

BRIEF FOR AMICI CURIAE SCHOLARS OF IMMIGRATION LAW IN SUPPORT OF PLAINTIFFS-APPELLEES

PETER MARGULIES
ROGER WILLIAMS UNIVERSITY
SCHOOL OF LAW
10 Metacom Avenue
Bristol, RI 02809
(401) 254-4564

ALAN E. SCHOENFELD
SCOTT MCABEE
WILMER CUTLER PICKERING
HALE AND DORR LLP
250 Greenwich Street
7 World Trade Center
New York, NY 10007
(212) 937-7294

Counsel for Amici Curiae Scholars of Immigration Law

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INTEREST OF AMICI CURIAE[1]

Amici curiae are law professors who teach and publish scholarship about United States immigration law. They accordingly have an abiding interest in the proper interpretation and administration of the Nation's immigration laws, in particular the Immigration and Nationality Act. Amici are:[2]

Richard Boswell, University of California, Hastings College of the Law

Gabriel J. Chin, University of California, Davis School of Law

Marisa S. Cianciarulo, Dale E. Fowler School of Law, Chapman University

Maryellen Fullerton, Brooklyn Law School

Pratheepan Gulasekaram, Santa Clara University

Alan Hyde, Rutgers Law School

Daniel Kanstroom, Boston College Law School

Stephen Legomsky, Washington University School of Law

Matthew Lindsay, University of Baltimore School of Law

Peter Margulies, Roger Williams University School of Law

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[1] Amici submit this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2) and state that all parties have consented to its timely filing. Amici further state, pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), that no counsel for a party authored this brief in whole or in part, and no person other than the amici curiae or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] Institutional affiliations are listed for purposes of identification only.

Michael A. Olivas, University of Houston Law Center

David Rubenstein, Washburn University School of Law

Bijal Shah, Arizona State University

Anita Sinha, American University, Washington College of Law

Shoba Wadhia, Penn State Law

SUMMARY OF ARGUMENT

By indefinitely suspending immigration from designated countries, President Trump's third iteration of his travel ban (the "Proclamation") engages in precisely the kind of discrimination that Congress prohibited in the landmark Immigration and Nationality Act ("INA") amendments of 1965 and runs roughshod over the carefully calibrated system of checks and balances Congress sought to impose on the President's exercise of discretion in administering immigration law. *See* Pub. L. No. 89-236, 79 Stat. 911 (1965). Prior to 1965, the INA supported a quota system that limited visa issuance based on national origin and ancestry. Over time, a political consensus formed that recognized that the quota system operated inequitably and inefficiently and that it undermined the foreign affairs objectives of the United States. Congress remedied these ills by abolishing the quota system in the 1965 amendments and by prohibiting discrimination on the basis of nationality in the issuance of visas. *See* 8 U.S.C. § 1152(a)(1)(A) (the "Nondiscrimination

Provision"). In furtherance of its goals, Congress also specifically sought to constrain executive discretion in the allocation of visas.

Despite these amendments, the Government claims in this case that a provision of the INA enacted in 1952, 8 U.S.C. § 1182(f) (the "Entry Provision"), supports the Proclamation's legality. The Government's unchecked interpretation of § 1182(f), however, discounts the 1965 amendments and incorrectly assumes that § 1182(f) is an uncabined source of executive authority. Instead, § 1182(f) authorizes executive action only on a temporary basis in emergency situations, not for indefinite periods. And while the Government claims that its statutory interpretation is consistent with past executive actions limiting immigration to the United States, *see* Appellants' Br. 31-32, the Proclamation in fact is unprecedented in nature and asserts executive authority far beyond the bounds of § 1182(f).

ARGUMENT

I. THE PROCLAMATION RESUSCITATES THE NATIONAL-ORIGIN DISCRIMINATION CONGRESS SOUGHT TO BAR IN THE 1965 AMENDMENTS

As Plaintiffs have explained, there are powerful textual and structural arguments why the President's authority under § 1182(f) is cabined by the Nondiscrimination Provision, which prohibits any executive action that would discriminate against immigrants on the basis of national origin. Appellees' Br. 26-27. The history of the Nondiscrimination Provision further demonstrates that

Congress enacted the provision to narrow the power that it delegated to the President under the INA.

A. The Proclamation Runs Afoul Of Congress's 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 mind when it amended the statute. The Proclamation frustrates each of those objectives.

1. 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). Those laws were consolidated and codified in the Immigration and Nationality Act of 1952, which preserved preexisting quotas on immigration from particular countries. In his message vetoing the Act, President Truman noted the regime's abiding unfairness, 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* S. Rep. No. 89-748, at 14 (1965) ("Senate Judiciary Report"). 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.* A total of only 2,000 visas per year were available to all countries in the entire region. *Id.* Moreover, the 1952 Act also provided that the immigration to the U.S. of persons of Asian ancestry anywhere in the world would count against the 2,000-person quota applicable to the Asia-Pacific triangle. *Id.* In other words, persons of Asian descent who were nationals of countries in other regions, such as Europe, Africa, the Caribbean, or Latin America, were nonetheless subject to the quota's parsimonious 2,000-person quota. 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*"),[3] 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)). In 1960, President Eisenhower noted that "[i]n the world of today our immigration law badly needs revision." *Id.* at 117 (quoting 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 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." Liberalization Message 2. Eisenhower also strongly recommended the elimination of the ceiling of 2,000 annual immigrant visas from the Asia-Pacific Triangle. *Id.* In addition, President Eisenhower proclaimed on May 19, 1959 a shortly ensuing twelve-month period as "World Refugee Year as a practical means of securing increased assistance for refugees throughout the world." Proclamation No. 3292, *in* H.R. Rep. No. 86-1433, at 4 (1960).

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

By the early 1960s, the political branches' consensus was that 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. John F. 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 highlighted the unfairness of national-origin quotas in stressing the urgent need for their abolition. President Kennedy noted that the national-origin 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 President Kennedy's assassination. Echoing a well-known passage from President 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).

Appearing before the House Judiciary Committee in 1964, Secretary of State Dean Rusk cited Presidents Kennedy and Johnson in reiterating the quota system's unfairness. Secretary Rusk explained: "We in the United States have learned to judge our fellow Americans on the basis of their ability, industry, intelligence, integrity and all the other factors which truly determine … value to society. We do

not reflect this judgment of our fellow citizens when we hold to immigration laws which classify … according to national and geographical origin." *Immigration: Hearings on H.R. 7700 Before Subcomm. No. 1 of the H. Comm. on the Judiciary*, 88th Cong., at 386 (1964) ("*Hearings on H.R. 7700*").[4]

The centerpiece of Congress's efforts to address these concerns was the Nondiscrimination Provision, which declares that no individual 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." The exceptions to the provision are surpassingly narrow. *See, e.g.*, 8 U.S.C. § 1101(a)(27)(D)-(G). The Nondiscrimination Provision accordingly reflects an abiding national 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 remaining purposes in removing the quota system.

[4] 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.

2. Prioritizing family reunification

The 1965 amendments provided a detailed structure for immigrant admissions that prioritized close family relationships.[5] 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 the system 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 the need for this continual recourse to special legislation, the Judiciary Committee pointedly praised

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[5] 8 U.S.C. §§ 1151, 1153; *cf.* Margulies, *Bans, Borders, and Sovereignty: Judicial Review of Immigration Law in the Trump Administration*, __ Mich. St. L. Rev. __ (forthcoming 2018), *available at* http://ssrn.com/abstract=3029655.

the 1965 amendments' replacement of the national-origin quota system with a family-based visa program that was to be "fair, rational, humane, and in the national interest." *Id.*

3. Remedying the substantial inefficiency 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 to the United States. 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 still more ad hoc adjustments within the overall structure of the quota system. *CRS Report* 115. First, the 1957 Act, as a temporary expedient to mitigate the harshness of the quota

system, provided that foreign national visa applicants on whose behalf petitions had been filed by a "specified date" would qualify for visas without regard to the quota system. *Id.* at 116. This relief, to a cohort of foreign nationals whose admission would otherwise have been severely delayed by the quota system's operation, 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 118 (quoting Auerbach, *Immigration Legislation, 1959*, Department of State Bulletin 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 (1956). 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 to the quota system 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 (1961), Congress again enacted a temporary program for the admission outside the quota system of specified cohorts of foreign nationals. *CRS Report* 140. Since certain visa categories were severely backlogged because of the quota system, the 1961 Act authorized temporary 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, all of 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 Rusk acknowledged the adverse impact that the quota system had on the efficiency of the legislative process. Secretary 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. Secretary Rusk reminded Congress of the fitfully spinning wheels caused by the need to regularly pass additional legislation, noting

that from 1953 to 1962, only 34 percent of immigrants to the United States were quota immigrants. *Id.*

4. Addressing the foreign-policy implications of American immigration law

In 1965, Congress explicitly recognized what presidents since Truman had noted regarding the 1952 Act's hardening of quotas: that 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 the quota system 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, President 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, President 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, President Kennedy denied that the quota system "satisfies a national need[] or accomplishes an international purpose." Kennedy Letter. Critiquing the quota system as counterproductive to American interests, President Kennedy observed that "[o]ur investment in new citizens has always been a valuable source of our strength." *Id.*

In hearings before the House Judiciary Committee in 1964, Secretary of State Rusk alluded to Presidents Kennedy and Johnson and added his own assessment of the foreign policy reasons for abolishing the quota system. As Secretary 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. Secretary 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, observing 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. Secretary Rusk warned Congress that "the national origins system gives a measure of support and credence to these observations." *Id.* Responding to committee members' questions, Secretary Rusk further noted that perceptions of United States 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." *Id.* 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.* Secretary Rusk thus echoed the calls of Presidents Eisenhower through Johnson for the quotas' demise.

Faced with these concerns, the 1965 Congress chose to accept the political branches' shared view that the quota system undermined the foreign affairs objectives of the United States. The 1965 amendments abolished the quota system to permanently heal the wounds inflicted by our discriminatory policies.

* * *

The Proclamation, if allowed to take effect, would reopen these wounds. As the foregoing discussion makes clear, Congress very specifically intended the Nondiscrimination Provision to prohibit the formulation of immigration policy that

turned on national origin. Congress identified particular ills attributable to the old system and viewed the elimination of national-origin discrimination as critical to remedying them. The ban, however, imposes an indeterminate bar on the entry of immigrants from designated nations, thus reprising precisely the form of national-origin discrimination Congress eliminated in the 1965 amendments. It does so without regard to the goal of family reunification, which Congress in 1965 declared was the "foremost consideration" in the allocation of visas. Senate Judiciary Report 13. The Proclamation indefinitely delays reunification of close relatives from listed countries with United States citizens and lawful permanent residents, and it shifts 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 and that Congress rejected in 1965. Kennedy Letter.

As was the case with the national-origin quota system, congressional efforts to override or adjust the Proclamation would create a sustained spectacle of legislative inefficiency. The recurring need to pass special legislation imposed substantial costs on pre-1965 Congresses, requiring time, effort, and deliberation that legislators could otherwise have devoted to other matters of public importance. The point of the 1965 amendments was to "eliminate the need for th[e]se special bills." *Hearings on H.R. 7700*, at 421. But the Proclamation would redouble that

need. Finally, the Proclamation risks precisely the adverse impact on foreign relations that the 1965 amendments were meant 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. *Id.* at 390.

In sum, the Proclamation undoes much of the work Congress accomplished 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 in a domain over which it has plenary power. *See Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972).

B. The Proclamation Asserts The Kind Of Unbridled Discretion That The 1965 Amendments Sought Specifically To Constrain

In enacting the 1965 amendments—including the Nondiscrimination Provision—Congress sought specifically to constrain executive power. More to the point, it sought specifically to prevent the President from making immigration decisions based on national origin. Indeed, a review of the legislative history reveals that members of Congress were gravely concerned with the executive's encroachment upon the legislature's authority to regulate immigration. The Chair of the House Immigration Subcommittee, Rep. Michael Feighan of Ohio, repeatedly expressed his desire to cabin administrative discretion that might perpetuate vestiges of the quota system.

As originally drafted, the bill that reached Rep. Feighan's subcommittee provided for an Immigration Board that could recommend funneling visas in a "quota reserve" to particular countries. *See Hearings on H.R. 7700*, at 387-388, 392 (testimony of Secretary of State Rusk). Representative Feighan resisted leaving such discretion with the Executive Branch (either the presidential administration or the proposed board), arguing that the best approach was to enact comprehensive legislation. *Id.* at 392-393.

Skeptical about the proposed deference to executive discretion, Rep. Feighan probed Secretary Rusk's defense of the "Immigration Board" concept, inquiring whether "Congress is inadequate for the task of establishing a clear and all-inclusive immigration policy." *See Hearings on H.R. 7700*, at 392. And Secretary Rusk conceded that "[b]oth under the Constitution and under the practices of our system of government, it is for the Congress to establish the basic policy and the basic legislation" regarding immigration. *Id.*

Rep. Feighan also objected to the administration's proposal of establishing an Immigration Board due to the absence of "checks and balances" on administrative discretion in the draft proposal of the bill. *See Hearings on H.R. 7700*, at 99. Because of the absence of such safeguards in the draft bill, Rep. Feighan suggested that the Immigration Board would be "subject to all sorts of charges as well as pressures, thus creating more problems than we already have."

Id. at 422. Rep. Feighan also resisted the proposal to lodge in the executive branch "broad authority … to allocate quotas, to actually set preferences and priorities … to admit 10 percent per country by Presidential determination, and similar discretionary authority." *Id.* at 423.

The President's assertion of authority to promulgate the Proclamation, regardless of its conflict with the Nondiscrimination Provision, runs roughshod over Congress's very clear intent to cabin executive discretion in the administration of the immigration laws. As the evolution of the 1965 amendments makes plain, the nondiscrimination mandate in 8 U.S.C. § 1152(a)(1)(A) ensured that administrative discretion would not backslide to the discredited practices of the quota system. *See Russello v. United States*, 464 U.S. 16, 23 (1983) (using the "evolution of … statutory provisions" as evidence of congressional intent).

II. THE PROCLAMATION'S INDEFINITE BAR IS AN IMPROPER EXERCISE OF EXECUTIVE DISCRETION

In imposing a ban of indeterminate duration on the entry of immigrants from particular countries, the Proclamation not only runs afoul of the Nondiscrimination Provision, but it also breaches the very prescribed limitations of Section 1182(f), the ban's purported source of statutory authority. The Entry Provision allows the President to act quickly and decisively when situations require an exigent response, but it does not authorize actions of indefinite duration, which require a more

substantial justification as they are more likely to interfere with the INA's overall plan—including the Nondiscrimination Provision.

The Government's invocation of § 1182(f) to justify the Proclamation's indefinite alteration of Congress's reticulated immigration scheme lacks a coherent limiting principle. Extended to the "limit of its logic," *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting) (quotation marks omitted), the government's reading would render superfluous the Nondiscrimination Provision. It would also strain the entire structure of visa allocation that Congress sought to erect in 1965 and in subsequent amendments to the INA. Fortified merely by a thin claim that admission of immigrants from countries X, Y, and Z would be "detrimental to the interests of the United States," 8 U.S.C. § 1182(f), the President would be able to sweep aside Congress's commitment to a uniform system of per-country visa allocation and its prohibition on discrimination in the issuance of immigrant visas. The result would be a de facto return to the national-origin-based system that Congress decisively rejected in 1965 and to the broad discretion that Congress sought to combat by insisting on the Nondiscrimination Provision.

Similarly, the government's interpretation of § 1182(f) would undermine the intricately constructed latticework of inadmissibility grounds that Congress has enacted in § 1182 of the INA. Armed with an unchecked reading of § 1182(f), the President could unilaterally add revisions of indefinite duration to § 1182's list of

inadmissibility grounds. Supplementing that list in exigent circumstances may be permissible. However, an executive decree of an indefinite ban on otherwise admissible individuals from several countries is not.

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

The statutory pedigree of § 1182(f) illustrates its limited scope. *See generally* Resp. Br. 31, *Trump v. Hawaii*, No. 16-1540 (U.S. filed Sept. 11, 2017). Following the United States' entry into World War I, President Wilson sought authority to exclude persons "reasonably suspected of aiding Germany's purposes." Proclamation No. 1473 (1918). In recognizing the need to limit the entry and departure of immigrants during wartime, Congress empowered the President to implement such limitations "if the President shall find that the public safety requires." Travel Control Act and the Entry & Departure Control Act, Pub. L. No. 65-154, 40 Stat. 559, 559 (1918).

The legislation also contained provisions regarding authority to set rules governing passports issued to Americans for travel abroad. Pub. L. No. 65-154, §§ 1(b)-(g), 2. President Wilson issued a proclamation restricting entry and departure of persons whose admission would be "prejudicial to the interests of the United States," including persons acting as German agents. Proclamation No. 1473, § 2.

The political branches' activity during World War II reflected the same tailored model. In the months before the Pearl Harbor attack and America's entry into World War II, President Roosevelt sought authority from Congress to limit both 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). This time, Congress pushed back. Senator Robert Taft, presaging concerns about executive discretion raised by Rep. Feighan almost twenty-five years later, cautioned that codifying the broad language proposed by the White House 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—any American or any other person—might leave the United States." 87 Cong. Rec. 5286, 5326 (1941). Senator Taft warned about the prospect that the "extreme" power granted to the President under the proposal would apply not only during wartime, but also to "any time that war exists anywhere in the world and the President desires to exercise the power." *Id.* at 5386. Addressing Senator Taft's warning, Senator Van Nuys explained that the State Department had provided assurances that the wartime authority granted to the President would be used only to deter "subversive activities." *Id.*

Congress enacted the bill with no material changes, *see* Alien Visa Act, Pub. L. No. 77-113, 55 Stat. 252 (1941), and President Roosevelt tailored exercise of his

new statutory authority to persons suspected of working on behalf of hostile foreign powers. *See* 6 Fed. Reg. 5929, 5931-5932 (1941) (deeming "prejudicial to the interests of the United States" the entry of certain categories of persons, including foreign nationals "affiliated with … a political organization 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," or who possessed "unauthorized secret information concerning … the national defense of the United States," or conducted "activities designed to obstruct, impede, retard, delay, or counteract the effectiveness of the measures adopted by the Government of the United States for the defense of the United States or any other country").

Congress was aware of this backdrop when it enacted the Immigration and Nationality Act of 1952. To provide authority in wartime and emergencies, Congress enacted a precursor of 8 U.S.C. § 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. *See* Pub. L. No. 82-414, § 215, 66 Stat. 190 (1952). Congress also enacted the present § 1182(f) in 1952 as a supplement to that wartime authority.

Reading these provisions as a "harmonious whole," *see FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000), Congress must be

understood to have authorized nothing more than the limited exigent authority successfully sought by presidents Wilson and Roosevelt, *see Kent v. Dulles*, 357 U.S. 1, 130 (1958) (declining to hold that executive branch "has been silently granted" a "larger, more pervasive power" to restrict travel). Indeed, it would have been particularly odd to expand the President's *peacetime* power *beyond* the power that Congress had granted the President to address the exigencies of war.

B. The Proclamation Is Inconsistent With Past Invocations Of § 1182(f)

Defenders of the Proclamation have pointed to purported historical precedent to buttress the President's claim to authority under § 1182(f). But none of the cited precedents lends any credence to the government's claim of authority here. Rather, historical invocations of § 1182(f) demonstrate that past presidents have used this authority to address discrete bilateral diplomatic disputes or control the migration of persons who were already inadmissible under the INA. In marked contrast to the tailored nature of these historical invocations, the Proclamation's indefinite ban sweeps far more broadly.

President Carter used authority under the INA[6] in response to Iran's illegal seizure and imprisonment of U.S. diplomatic personnel in 1979. *See Narenji v.*

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[6] President Carter invoked authority under 8 U.S.C. § 1185(a)(1) to regulate foreign nationals' entry into and departure from the United States. In this case, the government has treated authority under §§ 1185(a)(1) and 1182(f) as interchangeable.

Civiletti, 617 F.2d 745, 747-748 (D.C. Cir. 1979). The measures taken by President Carter to respond to this illegal act included requiring Iranian students in the United States to report to a government office with updated information showing compliance with the terms of their visas, *id.* at 746, and suspending issuance of new immigrant visas to Iranian nationals, apart from those required for humanitarian reasons, *see* Pres. Jimmy Carter, *Sanctions Against Iran Remarks Announcing U.S. Actions* (Apr. 7, 1980).

In upholding the first measure, the D.C. Circuit cited the INA's requirement that student visa-holders maintain their nonimmigrant status and comply with conditions pertinent to that status. *Narenji*, 617 F.2d at 747. The second measure, suspending issuance of new immigrant visas apart from those issued on humanitarian grounds, was a tailored response to the Iranian regime's violation of international law regarding protection of diplomats. *Cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004) (describing "infringement of the rights of ambassadors" as a core violation of international law that was universally acknowledged during the days of the "early Republic").

President Reagan's invocation of § 1182(f) in 1986 to suspend immigration from Cuba stemmed from a diplomatic dispute regarding inadmissible foreign nationals. *See* Pres. Ronald Reagan, Proclamation 5517: *Suspension of Cuban Immigration* (Aug. 22, 1986). President Reagan's action was one salvo in an

extended dispute between the United States and Cuba with wide effects on immigration and travel between the two countries. In a policy repeatedly upheld by the Supreme Court, the United States had for a quarter-century limited travel of U.S. nationals to Cuba, to deprive the Castro regime of resources for foreign incursions that endangered U.S. interests. *See Zemel v. Rusk*, 381 U.S. 1, 12 (1965); *Regan v. Wald*, 468 U.S. 222 (1984). Cuba had contributed to this longstanding dispute by alternating rigid control of immigration to the United States with episodes, such as the Mariel Boatlift of 1980, in which Cuban officials knowingly facilitated the migration to the United States of over 130,000 persons, including individuals with criminal records or other conditions that rendered them inadmissible. *See Benitez v. Wallis*, 337 F.3d 1289, 1290 n.1 (11th Cir. 2003), *rev'd & remanded on other grounds sub nom. Clark v. Suarez Martinez*, 543 U.S. 371 (2005); Maddux, *Ronald Reagan and the Task Force on Immigration*, 74 Pac. Hist. Rev. 195, 202 (2005).

President Reagan issued the 1986 proclamation in response to Cuba's repudiation of a 1984 agreement curbing this confounding pattern. In that agreement, Cuba had committed itself to accept the return of almost 3,000 of its nationals with known criminal records or other disqualifying conditions. *See* Weinraub, *U.S. and Cuba Gain an Accord on Repatriation*, N.Y. Times, Dec. 15, 1984, at A1. To persuade Cuba to accept return of these individuals and exercise

future due diligence in its immigration policy, the Reagan Administration had agreed to issue immigrant visas to an additional cohort of Cuban nationals who had close relatives in the United States. *Id*. When Cuba reneged on the agreement, President Reagan proclaimed that the United States would also return to the pre-agreement status quo. In taking this step, President Reagan hoped to exert some leverage over Cuba to promote compliance with the 1984 agreement's terms.

President Reagan's action was both tailored and transactional, responding in a measured way to a discrete problem with a single foreign state. This tailored approach was entirely consistent with the INA's overall scheme. In contrast, the Proclamation's indefinite ban is programmatic, not transactional. No country subject to the ban has emulated Cuba by knowingly engineering the migration to the United States of inadmissible foreign nationals. Indeed, with the exception of Iran, the countries designated in the Proclamation cooperate with the United States on immigration, while many countries *not* on the list do *not* cooperate with the United States. *See* Bier, *Travel Ban is Based on Executive Whim, Not Objective Criteria*, Cato at Liberty (Oct. 9, 2017). Far from responding to a particularly exigent crisis, the Proclamation appears untethered to any emergent foreign policy issue. Moreover, unlike President Reagan's 1986 Proclamation, which targeted only one country, the Proclamation is an indefinite ban on immigration from several countries.

Deterrence of the "attempted mass migration" of inadmissible foreign nationals played a role in another prominent use of § 1182(f) by President Reagan. *See Haitian Centers Council v. Sale*, 509 U.S. 155, 187-188 (1993) (discussing Proclamation 4865: *High seas interdiction of illegal aliens* (Sept. 29, 1981)). Addressing efforts by thousands of Haitians who sought to escape political oppression and economic privation by securing passage to the United States from smugglers—often on unseaworthy vessels—President Reagan "suspended" the entry of undocumented persons from the high seas and ordered the Coast Guard to interdict vessels engaged in this activity. President Reagan's proclamation did not suspend the granting of visas to Haitian nationals or other persons. Any foreign national with a close family relationship with a U.S. citizen or lawful permanent resident could still apply for and receive a visa if she had a qualifying relationship with a citizen or lawful permanent resident and did not fall within any of the INA's express exclusion grounds, such as those concerning health, criminal history, or national security. *See* 8 U.S.C. § 1182(a)(1)-(3).

President Reagan's proclamation, subsequently followed by Presidents George H.W. Bush and Bill Clinton, applied only to persons who lacked a visa and were therefore *already inadmissible* under 8 U.S.C. § 1182(a)(7)(A)(i)(I) (current version) (providing that foreign national who applies for admission to the United States without "valid unexpired immigrant visa … or other valid entry document"

is inadmissible).[7] President Reagan's order had no effect *at all* on the issuance of immigrant visas in Haiti or elsewhere. The contrast is marked with the Proclamation, which expressly restricts issuance of immigrant visas for nationals of the countries named.

In sum, past practice under § 1182(f) and related statutory authority has been limited to resolution of discrete bilateral diplomatic disputes or other exigent matters such as the Iranian hostage crisis and efforts to deter or redress entry of persons who were *inadmissible* under the INA. *Cf.* Manuel, Cong. Research Serv., *Executive Authority to Exclude Aliens: In Brief*, 7-12 (Jan. 23, 2017) (discussing background and past practice regarding § 1182(f)). In contrast, a presidentially decreed *indefinite* ban on otherwise *admissible* individuals from several countries threatens Congress's carefully wrought structure. It also defies the "checks and balances" that Chairman Feighan and his fellow legislators sought to inscribe in the INA. This Court should reject the government's invitation to so undermine the statutory scheme.

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[7] Under the procedure provided for in the proclamation, U.S. State Department and immigration officials would interview foreign nationals interdicted under the proclamation who alleged that they had a well-founded fear of persecution if they were returned to their country of origin. Those who made this showing were transported to the United States. Cox & Rodríguez, *The President and Immigration Law*, 119 Yale L.J. 458, 495-496 (2009).

CONCLUSION

The district court's order preliminarily enjoining the Proclamation should be affirmed.

Respectfully submitted,

/s/ Alan E. Schoenfeld
ALAN E. SCHOENFELD
SCOTT MCABEE
WILMER CUTLER PICKERING
HALE AND DORR LLP
250 Greenwich Street
7 World Trade Center
New York, New York 10007
(212) 937-7294

PETER MARGULIES
ROGER WILLIAMS UNIVERSITY
SCHOOL OF LAW
10 Metacom Avenue
Bristol, RI 02809
(401) 254-4564

Counsel for Amici Curiae Scholars of Immigration Law

November 17, 2017

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the type-volume limitation established by Fed. R. App. P. 32(a)(7)(B), because it contains 6,439 words, excluding the portions of the brief exempted by Fed. R. App. P. 32(f). I also certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface, 14-point Times New Roman, using Microsoft Word 2016.

/s/ Alan E. Schoenfeld
ALAN E. SCHOENFELD
WILMER CUTLER PICKERING
HALE AND DORR LLP
250 Greenwich Street
7 World Trade Center
New York, New York 10007
(212) 937-7294

Counsel for Amicus Curiae Scholars of Immigration Law

November 17, 2017

CERTIFICATE OF SERVICE

I, Alan E. Schoenfeld, hereby certify that on this 17th day of November, 2017, I served true and correct copies of the foregoing on all counsel of record via ECF.

/s/ Alan E. Schoenfeld
ALAN E. SCHOENFELD

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPEARANCE OF COUNSEL FORM

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COUNSEL FOR: Scholars of Immigration Law in Support of Plaintiffs-Appellees

(see attached Addendum for list of individual scholars) as the

(party name)

☐ appellant(s) ☐ appellee(s) ☐ petitioner(s) ☐ respondent(s) ☑ amicus curiae ☐ intervenor(s) ☐ movant(s)

/s/ Alan E. Schoenfeld
(signature)

Alan E. Schoenfeld
Name (printed or typed)

(212) 937-7924
Voice Phone

Wilmer Cutler Pickering Hale and Dorr LLP
Firm Name (if applicable)

(212) 230-8888
Fax Number

250 Greenwich Street, 7 World Trade Ctr.

New York, New York 10007
Address

alan.schoenfeld@wilmerhale.com
E-mail address (print or type)

CERTIFICATE OF SERVICE

I certify that on 11/17/17 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Alan E. Schoenfeld
Signature

11/17/17
Date

ADDENDUM TO APPEARANCE OF COUNSEL FORM

Counsel For:

- Richard Boswell, University of California, Hastings College of the Law
- Gabriel J. Chin, University of California, Davis School of Law
- Marisa S. Cianciarulo, Dale E. Fowler School of Law, Chapman University
- Maryellen Fullerton, Brooklyn Law School
- Pratheepan Gulasekaram, Santa Clara University
- Alan Hyde, Rutgers Law School
- Daniel Kanstroom, Boston College Law School
- Stephen Legomsky, Washington University School of Law
- Matthew Lindsay, University of Baltimore School of Law
- Peter Margulies, Roger Williams University School of Law
- Michael A. Olivas, University of Houston Law Center
- David Rubenstein, Washburn University School of Law
- Bijal Shah, Arizona State University
- Anita Sinha, American University, Washington College of Law
- Shoba Wadhia, Penn State Law