Case No. 17-1351

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.,

Plaintiffs and Appellees,

v.

DONALD J. TRUMP, ET AL.,

Defendants and Appellants.

Appeal from The United States District Court
for the District of Maryland, No. 17-cv-00361 (Chuang, J.)

BRIEF OF AMICI CURIAE CONSTITUTIONAL LAW PROFESSORS IN SUPPORT OF APPELLEES AND AFFIRMANCE

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INTEREST OF *AMICI CURIAE*

Amici curiae are scholars of constitutional law, federal court jurisdiction, and the law of immigration, national security, and citizenship.[1] Because of our areas of expertise, *Amici* write to provide an overview of the history and governing legal principles of judicial review over Executive Branch decisions related to immigration and national security. Given the jurisprudence, *Amici* believe that this Court should reach the merits of the claims that the Executive's actions were in excess of its statutory authority and violated the Constitution.

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[1] *Amici* certify that (a) no party's counsel authored any part of this brief, (b) no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief, and (c) no person other than *Amici* or their counsel contributed money that was intended to fund the preparation or submission of this brief. All parties have consented to the filing of this *amicus curiae* brief. *See* Fed. R. App. P. 29(a)(2).

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SUMMARY OF ARGUMENT

Amici make four points. First, *Amici* believe it essential to understand the history of American immigration law and policy before evaluating the Executive's assertions of unfettered discretion, plenary power, and non-reviewability of decisions related to immigration. This history demonstrates the harm of excessive deference to Executive Branch claims that national security requires the government to target groups based on nationality and race. The powerful exemplar is, of course, the evacuation and detention of more than 100,000 Japanese-American citizens and lawful residents during World War II, to which the courts acceded and for which both the Executive and Congress later apologized. After the Second World War, however, immigration law—as reflected both in legislation and in the jurisprudence of the Supreme Court—changed to reflect emerging norms guaranteeing racial equality and individual liberty.

Second, *Amici* detail the development of meaningful judicial constraints on the immigration authority of the political branches. While Congress and the President are entitled to deference on matters related to immigration and national security, they have no authority to ignore the Constitution, and the courts retain their critical responsibility to "say what the law is." Animated by concerns relating to individual rights, separation-of-powers, and federalism, courts have sought to

ensure that the political branches do not violate constitutional prohibitions on arbitrary decision-making or promote invidious discrimination.

Third, *Amici* explain the role of justiciability doctrines in the development of these constraints. Although petitioners in the array of litigated immigration cases have not always succeeded in overturning decisions on the merits, the Supreme Court and the lower courts have generally reached the merits rather than rely on justiciability doctrines such as ripeness and standing to avoid making decisions. Those merits decisions underscore that the refusal to permit entry to individuals affects not only persons outside the borders of the United States, but also citizen family members, legal permanent residents, employers, universities, States, localities and the public at large.

Fourth, when responding to claims related to immigration, courts have regularly sought to examine whether, under the doctrine of constitutional avoidance, statutes should be read to allow unfettered Executive Branch authority. Even in the face of text seeming to constrain judicial review, the courts have shouldered the responsibility of ensuring that America's rule of law applies to actions of American officials.

ARGUMENT

I. United States Law Once Condoned Immigration Exclusion Based On Race And Ethnicity But Has Since Rejected Such Invidious Actions

No student of United States history can ignore that our Nation's immigration policies once routinely employed notions of racial and cultural inferiority to exclude classes of noncitizens as threats to our safety and stability. And when these practices were challenged, the government regularly asserted that its authority was unconstrained—or "plenary." But the lesson to be drawn from this unhappy history is the importance of America's rejection of racial and ethnic restrictions on immigration. Just as Congress and the courts were once central in permitting such discrimination, so too Congress and the courts have been essential to the revision of those practices. Below, we sketch the rise and fall of overt discrimination in immigration based on race and ethnicity.

The starting point is the Naturalization Act of 1790, which restricted immigrant eligibility for citizenship to "free white person[s]." Ch. III, 1 Stat. 103 (1790). Beginning in 1875, Congress enacted a series of laws targeting and ultimately prohibiting virtually all Chinese immigration. Page Law of 1875, ch. 141, 18 Stat. 477 (1875); Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (1882); Scott Act of 1888, ch. 1064, 25 Stat. 504 (1888); Geary Act of 1892, ch. 60, 27 Stat. 25 (1892); Act of April 27, 1904, ch. 1630, 33 Stat. 428 (1904). According to a House Report accompanying one such enactment, these measures

were needed to remedy "a standing menace to the social and political institutions of the country." H. Rep. 45-62, 3 (1879). In 1917, Congress expanded the scope of excludability by creating an "Asiatic Barred Zone," stretching from Saudi Arabia to the Polynesian islands. *See* Act of February 5, 1917, ch. 29, § 3, 39 Stat. 874 (1917); *see generally* Hiroshi Motomura, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 103 (2006).

The 1924 Immigration Act went further, barring the entry as immigrants of all aliens unless they were eligible for citizenship, which by that time encompassed only "free white persons" and "aliens of African nativity and . . . persons of African descent." *See* Ch. 190, § 13, 43 Stat. 153, 161–62 (1924); H. Rep. 68-350, 6 (1924) (internal quotation marks omitted). Moreover, it imposed strict national-origin quotas. *Id.* Again, such measures were characterized as necessary to our national survival: "If therefore, the principle of individual liberty, guarded by a constitutional government created on this continent nearly a century and a half ago, is to endure, the basic strain of our population must be maintained." H. Rep. 68-350, 13 (1924).

As hostility emerged toward other groups, claims were made that they, too, would bring poverty, disease, alcohol, as well as competition in labor markets and challenges to America's identity. One Representative claimed that "hordes of undesirable aliens . . . [were] undermining [the] health, integrity, and moral fiber of

the forthcoming generations." 70 Cong. Rec. 4907 (1929) (statement of Rep. Jed Johnson). Another argued the need to stop foreigners from "poisoning the American citizen." 70 Cong. Rec. 3620 (1929) (statement of Rep. William Thomas Fitzgerald). Moreover, gender and racial stereotypes interacted, as legislation mandated that American women who married noncitizens lost their United States citizenship. Act of Mar. 2, 1907 (Expatriation Act), ch. 2534, § 3, 34 Stat. 1228–29.

This characterization of particular races and cultures as threats to our Nation persisted well into the twentieth century. Congress did not lift the prohibition on Chinese migration until World War II. *See* Chinese Exclusion Repeal Act of 1943, ch. 344, 57 Stat. 600. Other Asians remained barred until 1952. *See* Immigration and Nationality Act of 1952, ch. 477, § 403, 66 Stat. 163, 279–80. Indeed, Congress did not finally reject the notion that some ethnicities were more dangerous than others until 1965. *See* Pub. L. No. 89-236, 79 Stat. 911 (1965).

Starting in the late nineteenth century, the courts endorsed such invidious exclusions through references to the "plenary" power of the political branches over immigration. For example, in *Chae Chan Ping v. United States*, a unanimous Court reasoned that in light of the "Oriental invasion" posing a "menace to our civilization," if Congress "considers the presence of foreigners of a different race in this country . . . to be dangerous to its peace and security, their exclusion is not

to be stayed." 130 U.S. 581, 595, 606 (1889); *see also United States v. Ju Toy*, 198 U.S. 254 (1905) (denying habeas review over exclusion of individual claiming United States citizenship); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (sustaining expulsion of United States resident for failing to produce a "white" witness to testify to his lawful presence).

Such discrimination frequently conflated race with national origin and ethnicity. The conflation of Muslim and Arab identity and the discrimination against "persons who appear Middle Eastern, Arab, or Muslim" have been well chronicled. *See, e.g.*, Khaled A. Beydoun, *Between Muslim and White: The Legal Construction of Arab American Identity*, 69 N.Y.U. Ann. Surv. Am. L. 29 (2013); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. Rev. 1575, 1576 (2002); Ian Haney-Lopez, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 106 (1996); *see also Guessous v. Fairview Prop. Mgmt.*, 828 F.3d 208, 225 (4th Cir. 2016) (noting that anti-Muslim animus may constitute "race" discrimination).

Beginning in the middle of the twentieth century, however, both Congress and the Supreme Court moved decisively away from these attitudes. Congress, for example, enacted a series of statutes that, over time, abolished overt discrimination in the nationality laws. In 1943, Congress repealed the prohibition on Chinese

admissions. *See* Chinese Exclusion Repeal Act of 1943, ch. 344, 57 Stat. 600.[3] And Congress later guaranteed in the Immigration and Nationality Act of 1952 that the "right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race or sex." Ch. 477, § 311, 66 Stat. 163, 239 (1952).

What is known as the 1965 Hart-Celler Act marked the next step in Congress's repudiation of its previously discriminatory immigration policies. Congress responded to the history of racialized national exclusivity by abandoning the national-origin quota systems, replacing the restrictions on immigration from Asia and Africa and the severe limits on migrants from certain European countries with a uniform per-country limit of 20,000 in Europe, Africa, Asia, and the Pacific. *See* Immigration and Nationality Act, Pub. L. No. 89-236, sec. 202, § 2(a), 79 Stat. 911–912 (1965). Moreover, section 202 of the Act specifically stated that with regard to immigration admissions "[n]o person shall receive any preference or priority or be discriminated against . . . because of his race, sex, nationality, place of birth, or place of residence." *Id*. at 911.

Within the judiciary, the insistence on constitutional protections in the immigration context initially was uneven. On the one hand, *Kwong Hai Chew v.*

[3] Decades later, both the House and Senate apologized for the government's policies of Chinese exclusion. *See* H.R. Res. 683, 112th Cong., 2d Sess. (2012); S. Res. 201, 112th Cong., 1st Sess. (2011).

Colding rejected the contention that a lawful permanent resident could be excluded from the United States without being given notice of the charges justifying his exclusion and an opportunity to object. 344 U.S. 590 (1953). On the other hand, both *Knauff v. Shaughnessy*, 338 U.S. 537 (1950), which sustained exclusion of a war bride without any hearing, and *Shaughnessy v. Mezei*, 345 U.S. 206 (1953), which upheld the exclusion and indefinite detention of a returning noncitizen without a hearing, represented steps backwards.

Subsequent to those Cold War era decisions, however, the Supreme Court—while continuing to recognize the need for appropriate deference—retreated from the *Knauff/Mezei* licensing of unfettered government power in immigration decisions. *See generally* Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons From the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. Pa. L. Rev. 933, 938 (1995). A wealth of scholarship has chronicled this shift in doctrine as due process and equal protection norms came to be reflected—albeit with variations—in immigration law. *See, e.g.*, Peter H. Schuck, *The Transformation of Immigration Law*, 84 Colum. L. Rev. 1, 4 (1984); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 Yale L.J. 545 (1990); T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of* Zadvydas v. Davis, 16 Geo. Immigr. L.J. 365 (2002); Gabriel J. Chin, *Segregation's Last Stronghold: Race*

Discrimination and the Constitutional Law of Immigration, 46 UCLA L. Rev. 1, 54–58 (1998); Judith Resnik, *"Within its Jurisdiction": Moving Boundaries, People, and the Law of Migration*, 160 Proc. Am. Phil. Soc'y 117 (2016); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 Sup. Ct. Rev. 255 (1984).

The vision of law that supported judicial approval of such discriminatory legislation and produced pejoratives such as "the yellow peril," *Oyama v. California*, 332 U.S. 633, 658–59 (1948) (Murphy, J., concurring) (internal quotation marks omitted), have come to be seen as tragic moments in our Nation's history. As Professor Louis Henkin put it, the invidious discrimination sanctioned in *Chae Chan Ping* had become "an embarrassment"; indeed, *Chae Chan Ping* and cases like it represented "relics of a bygone, unproud era." Louis Henkin, THE AGE OF RIGHTS 137 (1990).

II. The Supreme Court Has Recognized Meaningful Limits On The Political Branches' Authority Over Immigration

Notwithstanding the deference afforded to immigration regulation by the political branches, the Supreme Court has repeatedly addressed an array of immigration decisions and imposed meaningful constraints on them. The Court's jurisprudence on immigration reflects its oversight of both individual constitutional rights as well as structural separation of powers norms. In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Court rejected the Executive's claim of authority indefinitely

to detain an alien who had been ordered deported but could not be repatriated to another country. The Court concluded that such an exercise of government power "would raise a serious constitutional problem." *Id.* at 690. Responding to the government's claim of "plenary power" over immigration, the Court admonished, "that power is subject to important constitutional limitations. In these cases, we focus upon those limitations." *Id.* at 695 (internal quotation marks and citations omitted).

Further, the Supreme Court has exercised review over immigration decisions to enforce structural norms designed to protect against "arbitrary" decisions by any single branch of government. In *I.N.S. v. Chadha*, 462 U.S. 919 (1983), for example, the Supreme Court held that a single house of Congress could not veto an Executive Branch decision to grant relief from removal to a deportable alien. In mandating adherence to bicameralism and presentment requirements, the Court emphasized that such procedures were necessary "to protect the whole people from improvident laws," to ensure that federal policymaking is subject to "full study and debate in separate settings," and to "preclud[e] final arbitrary action of one person." *Id*. at 951.

Similarly, the Court has exercised meaningful review over agencies' immigration decisions to protect separation-of-powers norms requiring careful deliberation, reasoned decision-making, and non-arbitrariness, just as it has over

administrative decisions outside of the immigration context. *See, e.g.*, Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 Colum. L. Rev. 479, 499 (2010).

Accardi v. Shaughnessy, 347 U.S. 260 (1954), illustrates this point well. There, the Supreme Court held that the Attorney General deprived a noncitizen of a fair hearing on an application for discretionary relief from removal when he circulated the alien's name on a list of "'unsavory'" characters who should be deported. *Id.* at 264. The Court concluded that, although the Attorney General retained the ultimate discretionary authority to grant or deny such relief, the Attorney General could not circumvent regulatory procedures requiring that the Board of Immigration Appeals first render an independent judgment on such applications. *Id.* at 267. The Court has similarly reviewed Executive Branch denials of asylum applications. *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (rejecting the Executive's interpretation of statutory term "well-founded fear of persecution"); *Negusie v. Holder*, 555 U.S. 511, 514 (2009) (rejecting Executive's interpretation of provision disqualifying individuals who were "coerced" into persecuting others from eligibility for asylum).

Further constraints on the political branches' immigration powers have come from the structure of "Our Federalism," illustrated by decisions applying—in the immigration context—the non-commandeering principle of *Printz v. United States*,

521 U.S. 898 (1997). *See, e.g.*, *Galarza v. Szalczyk*, 745 F.3d 634, 643 (3d Cir. 2014) ("[T]he federal government cannot command the government agencies of the states to imprison persons of interest to federal officials."). In sum, notwithstanding the discretion properly recognized in the political branches with respect to many aspects of immigration law, the courts remain responsible for ensuring that those powers are exercised consistently with constitutional norms.

To be sure, when reviewing the merits of particular immigration decisions, courts may sometimes defer to the Executive's judgments. For example, in *Kleindienst v. Mandel*, 408 U.S. 753, 769 (1972), the Court held that the denial of a nonimmigrant visa application would be sustained as long as the government provided a "facially legitimate and bona fide reason" for its decision. And subsequent courts generally have been unwilling to "look behind" the government's stated justification when the justification itself was facially legitimate and bona fide. *See, e.g.*, *Kerry v. Din*, --- U.S. ---, 135 S. Ct. 2128 (2015) (denial premised on terrorist activity); *Am. Academy of Religion v. Napolitano*, 573 F.3d 115 (2d Cir. 2009) (denial premised on material support for terrorism).

Such deference, however, does not amount to a judicial rubber stamp, and courts have been less deferential when the government's stated justifications raised constitutional concerns. For example, in both *Abourezk v. Reagan*, 785 F.2d 1043

(D.C. Cir. 1986), and *Allende v. Schultz*, 845 F.2d 1111 (1st Cir. 1988), the government denied visas to noncitizens based on their affiliation with groups deemed hostile to the United States. The government relied on 8 U.S.C. § 1182(a)(27), which barred the entry of aliens who "seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States." While acknowledging that *Kleindienst* required deference to the Executive's immigration decisions, the courts in both the First Circuit and the D.C. Circuit interpreted the statutory provision narrowly; the courts held that it barred an alien's entry only if the reason for the threat to public interest, welfare, safety, or security was "*independent of* the fact of membership in or affiliation with the proscribed organization." *Abourezk*, 785 F.2d at 1058 (emphasis in original); *see also Allende*, 845 F.2d at 1116 ("The government may not exclude Allende on the bare assertion that her presence in the United States at a given time may prejudice foreign policy interests.").

That approach is consistent with Justice Kennedy's concurrence in *Kerry v. Din*, which involved the denial of a visa to the spouse of a United States citizen. Justice Kennedy's opinion—joined by Justice Alito (thereby providing a majority to sustain the visa denial)—concluded that the government had provided a "facially legitimate and bona fide" reason for its decision based on its individualized

conclusion that Din's husband had been involved in terrorist activity. 135 S. Ct. at 2140. But *Din* did not involve allegations of invidious discrimination or arbitrary classifications, and Justice Kennedy noted that under the *Kleindienst* standard, an "affirmative showing of bad faith" *would* require a court to "look behind" the stated reasons for a decision. *Id.* at 2141 (internal quotation marks omitted); *see also Bertrand v. Sava*, 684 F.2d 204, 212 (2d Cir. 1982) (holding that "discretion may not be exercised to discriminate invidiously against a particular race or group or to depart without rational explanation from established policies," and that such exercise would fail *Kleindienst*'s standard). These cases reflect that the government's reasons must be *both* "facially legitimate" and "bona fide," and where the government's *stated* reasons rely on constitutionally suspect and arbitrary classifications, courts will exercise closer scrutiny.

Pursuant to such scrutiny, courts have sometimes sustained the use of suspect or quasi-suspect classifications in immigration decisions. In *Fiallo v. Bell*, the Court sustained a legislative provision denying preferential immigration status based on the relationship between an illegitimate child and his or her biological father, notwithstanding the "double-barreled" discrimination implicated by such a preference. 430 U.S. 787, 794 (1977); *see also Johnson v. Whitestone*, 647 F.3d 120 (4th Cir. 2011) (relying on *Fiallo* to sustain removal of alien claiming citizenship derivative of out-of-wedlock biological father's naturalization). And in

Rajah v. Mukasey, the circuit court upheld the special registration program implemented shortly after the 9/11 terrorist attacks requiring non-immigrant males over the age of 16 from a list of twenty-five countries, all but one of which was predominantly Muslim, to appear for registration and fingerprinting and to present immigration documents. 544 F.3d 427 (2d Cir. 2008).

But race and religion are no longer legitimate reasons for excluding aliens, and national-origin classifications are upheld only in narrow circumstances. Indeed, even in *Rajah*, which upheld national-origin classifications imposing additional reporting requirements on noncitizens, the court "agree[d] that a selective prosecution based on [] animus [toward Muslims] would call for some remedy." 544 F.3d at 438–39 (finding, however, no evidence of "improper animus toward Muslims"). As *Rajah* demonstrates, while the political branches may sometimes employ disfavored classifications to regulate immigration, courts will carefully scrutinize such classifications—especially where animus might be at issue.

III. Challenges To Immigration Decisions Are Justiciable

Doctrines of justiciability represent important concerns about when the federal judiciary should assess claims of violations of legal rights. The now-classic statement of the standing doctrine comes from Justice Scalia's plurality decision in *Lujan v. Defenders of Wildlife*: To establish standing, a plaintiff must allege "(1)

an injury that is (2) fairly traceable to the defendant's allegedly unlawful conduct and that is (3) likely to be redressed by the requested relief." 504 U.S. 555, 590 (1999) (internal quotation marks omitted). The Court has emphasized that the injury-in-fact must be both concrete and particularized. *See Spokeo v. Robins*, --- U.S. ---, 136 S. Ct. 1540, 1545 (2016). The concern animating this requirement is that federal courts resolve legal problems in a "factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). However, while standing and other justiciability doctrines enshrine important separation-of-powers principles, they should not be used to insulate large categories of political branch behavior from judicial review. *See generally* Vicki C. Jackson, *Standing and the Role of Federal Courts: Triple Error Decisions in* Clapper v. Amnesty International USA *and* City of Los Angeles v. Lyons, 23 Wm. & Mary Bill Rts. J. 127 (2014).

Supreme Court jurisprudence makes clear that even when noncitizens do not have a "right" to enter or to remain in the United States, they can be heard on the merits of their claims that they were treated unlawfully. *See, e.g.*, *Negusie*, 555 U.S. at 513–15 (discretionary denial of asylum); *Cardoza-Fonseca*, 480 U.S. at 424–25 (same); *Jean v. Nelson*, 472 U.S. at 853–54 (discretionary grants of parole for migrants without documents); *Accardi*, 347 U.S. at 266–68 (1954)

(discretionary suspension of deportation). In each case, the Court reached the merits rather than question whether, for example, noncitizens established a sufficient injury-in-fact. Indeed, the Supreme Court has addressed the merits of claims brought by noncitizens outside the territorial United States believed to have engaged in terrorism. *See Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). And there, the Court concluded that while Executive Branch claims based on national security are properly entitled to significant deference, that deference is not a "'blank check.'" *Id.* at 576–78, 636 (2006) (Breyer, J., concurring) (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion)); *see also Boumediene v. Bush*, 553 U.S. 723, 771–72 (2008).

Moreover, the Court has found that United States citizens and residents have standing to challenge the denial of a visa to a noncitizen when such a decision implicates their own constitutional interests. In *Kleindienst*, the Court held that the First Amendment interests of American professors who had invited Mandel to speak at their conferences made the case justiciable because the professors themselves suffered a constitutionally cognizable injury. The lower court provided a more extensive explanation of the professors' standing:

> Here the plaintiffs other than Mandel are directly involved with Mandel's entry because they have invited him, and they expect to participate in meeting with him or expect to be among his auditors. No more is required to establish their standing. . . . The special relation of plaintiffs to Mandel's projected visit gives them a specificity of interest in his admission, reinforced by the general

> public interest in the prevention of any stifling of political utterance, that abundantly satisfies 'standing' requirements.

Mandel v. Mitchell, 325 F. Supp. 620, 632 (E.D.N.Y. 1971). That approach is reflected in the law of various circuits. *See, e.g.*, *Hazama v. Tillerson*, 851 F.3d 706, 707 (7th Cir. 2017) (holding that district court improperly concluded it lacked jurisdiction to review visa denial); *Am. Academy of Religion*, 573 F.3d at 118 (exercising jurisdiction over visa denial).

In addition, where plaintiffs challenge a *policy* of visa denials rather than the application of a concededly legitimate policy to a particular individual, the case remains justiciable regardless of whether particular individuals have been denied or granted a visa pursuant to the policy. For example, in *Abourezk*, 785 F.2d at 1043, the government had denied visas to several groups of noncitizens on the basis of the applicants' membership with organizations or governments hostile to the United States. The government argued that there was no live case or controversy because the State Department considers each visa application on a case-by-case basis. Rejecting that contention, the Court of Appeals concluded that "the reasons for the visa denials offered . . . indicate that the prospect of future denials of applications . . . is a genuine, and not merely a theoretical, possibility." *Id.* at 1052. Similarly, in *Allende*, the court held that the case was not moot even though the applicant had ultimately obtained permission to enter:

> Plaintiffs seek a declaratory judgment that the current *policy* of excluding aliens . . . upon the mere allegation that entry at a given time would prejudice foreign policy exceeds the authority granted under the Immigration and Nationality Act. Although the specific application of that policy against Allende in March 1983 is moot, the validity of that policy in general remains a live controversy. And since the existence of the policy continues to effect [*sic*] the actions of the plaintiffs who may reasonably expect that the government will oppose future plans to extend speaking invitations to Allende, we find the Article III case or controversy requirement satisfied.

845 F.2d at 1115 & n.7. In both cases, then, the government's stated general policy of denying visas to members of particular organizations rendered the injury sufficiently likely even if the policy was not applied uniformly in every case.

Consistent with these approaches, all of the federal courts that have examined the Executive Order of January 27 have addressed it on the merits, and all but one found that questions of its constitutional infirmity warranted enjoining the Order's enforcement. In *Washington v. Trump*, 847 F.3d 1151, 1164 (9th Cir. 2017), a unanimous panel of the Ninth Circuit concluded that the State plaintiffs had established standing to challenge the Order and that they were likely to succeed on the merits of their due process claims. In *Aziz v. Trump*, --- F. Supp. 3d ---, No. 1:17-cv-116, 2017 WL 580855 (E.D. Va. Feb. 13, 2017), a Virginia district court found that the Commonwealth of Virginia had established standing; a likelihood of succeed on the merits of its Establishment Clause claim in light of the government's public statements regarding its policy; and that evidence of bad faith precluded deference to the government's stated rationale under the "facially

legitimate and bona fide reason" standard. *But see Louhghalam v. Trump*, --- F. Supp. 3d ---, 17-cv-10154, 2017 WL 479779 (D. Mass. Feb. 3, 2017) (denying extension of temporary restraining order).

In response to those decisions, President Trump issued a revised Executive Order on March 6, 2017. To date, all four of the district courts to consider the question of that Order's legality have reached the merits, and three of the four enjoined implementation of the revised Order. The courts found that the revised Order raises the same constitutional concerns as the original Order. *See Int'l Refugee Assistance Project v. Trump*, --- F. Supp.3d ---, No. 17-361, 2017 WL 1018235 (D. Md. Mar. 16, 2017) (finding likelihood of success on Establishment Clause claim); *Hawaii v. Trump*, --- F. Supp. 3d ---, No. 17-50, 2017 WL 1011673 (D. Haw. Mar. 15, 2017) (same); *Doe v. Trump*, --- F. Supp. 3d ---, No. 17-cv-112, 2017 WL 975996 (W.D. Wisc. Mar. 10, 2017) (finding plaintiff's claims "have at least some chance of prevailing for the reasons articulated by other courts" to warrant temporary restraining order). *But see Sarsour v. Trump*, --- F. Supp.3d ---, No. 1:17-cv-120, 2017 WL 1113305 (E.D. Va. Mar. 24, 2017). None of these courts have refused to consider the plaintiffs' claims on justiciability grounds.

IV. Sections 1182(f) And 1185(a), Like Other Statutory Provisions, Must Be Construed To Avoid Raising Serious Constitutional Questions

It is a "cardinal principle" of statutory interpretation that when an Act of Congress raises "a serious doubt" as to its constitutionality, the Supreme Court

"will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Zadvydas*, 533 U.S. at 689 (internal quotation marks omitted). The Supreme Court has repeatedly emphasized that it will "avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." *Gomez v. United States*, 490 U.S. 858, 864 (1989). Moreover, statutes in tension with basic constitutional values are construed in accord with strong "clear statement" presumptions, requiring that—in the absence of explicit language—a statute will not be interpreted to trench on those fundamental values. *See, e.g.*, *Webster v. Doe*, 486 U.S. 592, 603-05 (1988); *Johnson v. Robison*, 415 U.S. 361, 373–74 (1974).

Recognizing that the political branches' regulation of immigration "is subject to important constitutional limitations," *Zadvydas*, 533 U.S. at 695, the Supreme Court has repeatedly applied the canon of constitutional avoidance to limit immigration provisions that on their face appeared to confer unconstrained authority. In *I.N.S. v. St. Cyr*, 533 U.S. 289, 311 (2001), for instance, the Court rejected the government's claim that a statute providing "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" certain criminal offenses precluded judicial review over a habeas challenge. Concluding that such a reading would raise

serious constitutional questions under the Suspension Clause, the Court held that the denial of discretionary relief for a removable alien must be subject to judicial review. In *Zadvydas*, too, where the text of the immigration statute at issue contained no apparent time limit on the detention of certain aliens, the Court read the statute to include an implicit reasonableness limitation, and it emphasized that "[w]e have read significant limitations into other immigration statutes in order to avoid their constitutional invalidation." 533 U.S. at 689.

Likewise, in *Jean v. Nelson*, the Supreme Court rejected the Eleventh Circuit's *en banc* ruling that the Executive Branch may deny parole to arriving aliens on the basis of race or national origin notwithstanding Equal Protection guarantees. 472 U.S. 846 (1985). The Court held that the lower court had erred in failing to employ the doctrine of constitutional avoidance. Although Congress had delegated to the Executive broad discretion to "parole into the United States temporarily under such conditions as he may prescribe . . . any alien applying for admission into the United States," the Court concluded that such delegation did not authorize decisions on the basis of race or national origin. *Id.* at 855–56.

Like the provision at issue in *Jean v. Nelson*, the provisions relied upon by the government here—sections 1182(f) and 1185(a)—appear to grant unfettered discretion to the Executive Branch. Just as the Supreme Court did in *Jean v. Nelson*, this Court should read those broad delegations of authority in a manner to

avoid reaching thorny questions involving the constitutionality of excluding individuals from the United States arbitrarily on the basis of race, ethnicity, national origin, or religion. Such a reading is particularly warranted in this case in light of Congress' explicit prohibition against discrimination in section 1152(a). That provision, part of the Immigration Act of 1965 enacted *after* sections 1182(f) and 1185(a), guarantees: "[N]o person shall . . . be discriminated against in the issuance of an immigrant visa because of [the person's] race, sex, nationality, place of birth, or place of residence." Pub. L. No. 89-236, sec. 202, § 2(a), 79 Stat. 911 (1965), *codified at* 8 U.S.C. § 1152(a). Concededly, section 1152(a) does not on its face extend to the issuance of nonimmigrant visas, such as tourist visas, which were not the focus of the Immigration Act of 1965; nor does it prohibit discrimination on the basis of religion. Nonetheless, it reflects a congressional and constitutional norm disfavoring traditionally suspect classifications. The revised Order is also in tension with the specific statutory criteria for excluding persons believed to be involved in terrorist activity. *See* 8 U.S.C. § 1182(a)(3).

Finally, the revised Order is at odds with this Nation's leadership role in protecting religious freedom, in both domestic and international settings. In 1998, Congress mandated establishment of an Office of International Religious Freedom in the State Department, which prepares Annual Reports on International Religious Freedom. *See* 22 U.S.C. § 6411. This congressional directive is inconsistent with

the notion that Congress intended to authorize the President to discriminate on the basis of religion. Thus, sections 1182(f) and 1185(a) can and should be construed to avoid the many serious constitutional questions raised by the revised Order.

Given the seriousness of the constitutional issues raised by the Executive Order of March 6, 2017, the canon of constitutional avoidance compels reading sections 1182(f) and 1185(a) as complying with the anti-discrimination norms enacted by Congress and embedded in the Constitution.

V. The Risks Of Undue Deference: A Return To Lessons From History

Amici have set forth several constitutional doctrines that bear on the Executive Order and which require the careful and deliberate consideration of the judiciary. One final facet of constitutional history merits discussion, however, for this is not the first time that the government has pressed courts to defer to claims of national security and of threats identified with people from particular nationalities. The results of deference without factual support have been tragic, as exemplified by the hasty approval of Japanese internment. *Korematsu v. United States*, 323 U.S. 214 (1944), has rightly become part of an "anticanon"—deployed as an example of what United States law no longer accepts as constitutional. *See* Jamal Greene, *The Anticanon*, 125 Harv. L. Rev. 380, 396, 456–60 (2011).

A few of the details of *Korematsu* bear repeating. There, national origin stood as a proxy for national security risk. In the 1940s, the Court deferred to the

government's assertion that national security required the detention of over 100,000 people based on their ethnicity alone. *See Korematsu*, 323 U.S. at 218–219. A Congressional Commission later concluded that no evidence supported the claim of military necessity for internment, and that it was instead the result of "race prejudice, war hysteria and a failure of political leadership." *See* Report of the Commission on Wartime Relocation and Internment of Civilians, Personal Justice Denied 18 (Wash., D.C., 1982). In 1976, the order was formally terminated by President Gerald Ford, who called it a "setback to fundamental American principles" and urged the Nation "to resolve that this kind of action shall never again be repeated." Proclamation 4417–An American Promise, 41 Fed. Reg. 7,741 (Feb. 19, 1976). And in 1984, in granting Fred Korematsu a writ of *coram nobis*, the federal district court noted that, "[a]s historical precedent," *Korematsu* is a "constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees." *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).

One more aspect of *Korematsu* bears elaboration. The Court has come to invoke the decision for the proposition that strict scrutiny applies to racial classifications under the equal protection doctrine. "'All legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must

subject them to the most rigid scrutiny.'" *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 288 (1978) (quoting *Korematsu*, 323 U.S. at 216); s*ee also Fisher v. Univ. of Tex. at Austin*, --- U.S. ---, 133 S. Ct. 2411, 2422–23 (2013); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 214 (1995); *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

As the Court explained in *City of Richmond v. J.A. Croson Co.*, "[t]he history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." 488 U.S. 469, 501 (1989) (citing *Korematsu*, 323 U.S. at 235–40). By linking national origin discrimination with racial discrimination, as in *Jean v. Nelson*, 472 U.S. at 855–57, the Court has made plain how one noxious basis for classification leads to another. Indeed, as Justice Kennedy eloquently put it: the "identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution." *Obergefell v. Hodges*, --- U.S. ---, 135 S. Ct. 2584, 2598 (2015).

CONCLUSION

The Executive Order of March 6, 2017, like its predecessor, is properly before this Court to assess its legality as a matter of statutory and constitutional law.

Dated: April 19, 2017 Respectfully submitted,

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I certify that the attached Brief of Amici Curiae Constitutional Law Professors In Support of Appellees and Affirmance complies with the type-face requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-volume limitations of Rule 32(a)(7)(B). The brief contains 6,283 words, excluding the parts of the brief described in Rule 32(f).

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