NOS. 16-1436, 16-1540

In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,
Petitioners,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,
Respondents.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,
Petitioners,

v.

HAWAII, *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits

BRIEF OF IMMIGRATION LAW SCHOLARS AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF AMICI CURIAE

Amici are immigration law scholars. They teach immigration and refugee law, have written numerous scholarly articles on immigration and refugee law, and are familiar with the practical aspects of immigration law through client representation. They submit this brief to show that the Immigration and Nationality Act ("INA") as a whole constrains the authority delegated to the Executive Branch under 8 U.S.C. §§ 1182(f) and 1185(a)(1), rendering the Executive Order No. 13780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) ("EO"), *ultra vires*.[1]

SUMMARY OF THE ARGUMENT

While Congress has delegated broad powers over immigration to the Executive Branch, the INA's content, structure, and usage limit those powers. Viewing the INA in its entirety, as an integrated statute, undermines the Government's arguments that Congress imposed "*no constraints*" on the President's power to suspend the entry of classes of aliens under 8 U.S.C. §§ 1182(f) and 1185(a)(1). *See* Pet'r's Br. 40–42 (emphasis added).

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[1] Pursuant to Sup. Ct. R. 37.6, *Amici* state that no party's counsel authored the brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *Amici*—contributed money that was intended to fund preparing or submitting the brief. A Motion for Leave to File is not required pursuant to Sup. Ct. R. 37.2(a), because counsel for Respondents in Nos. 16-1436 and 16-1540 have consented in writing to the filing of this brief *amici curiae*, and Petitioners lodged their blanket consent to *amici* briefs with the Clerk.

First, Congress has carefully crafted the categories of aliens who may and may not be admitted to the United States, specifically addressing terrorism-related and foreign policy grounds of inadmissibility. *See* 8 U.S.C. § 1182(a)(3)(B)–(C). There would be no point in constraining the Executive's discretion through these inadmissibility grounds if Congress intended to grant unbridled power to the President under 1182(f) and 1185(a)(1). Second, the INA's nondiscrimination provision that Congress added in 1965, and the detailed refugee admissions process added in 1980, would be meaningless if the President had unchecked power to suspend entry under 1182(f) and 1185(a)(1).

The broad grant of authority under 1182(f) and 1185(a)(1) can only be reconciled with the rest of the statute if construed to apply in exceptional situations involving diplomacy and the President's Commander-in-Chief powers, where the President's authority is at its peak. This interpretation is consistent with past presidential usage of the provisions, such as suspending entry of Iranians during the 1980 hostage crisis and suspending entry of Cubans after Cuba violated an immigration agreement with the United States. In the present case, there is no evidence that the EO is related to an exigency involving diplomacy or military affairs. On the contrary, the EO was promulgated under unique and unprecedented circumstances, without any precipitating, urgent diplomatic or military trigger.

Since 1952, when 1182(f) and 1185(a)(1) were enacted, Congress has repeatedly amended the INA. One of the critical changes that occurred in 1965 involved abandoning a system rooted in national origin

discrimination and creating a much more equitable method for determining admission. Congress has also repeatedly constrained executive discretion over the past several decades to further prevent discriminatory practices. This historical trajectory underscores the importance of construing 1182(f) and 1185(a)(1) in the context of the contemporary INA, with its current structure, content, objectives, and purpose.

In this brief, we demonstrate how the INA *as a whole* unambiguously dooms the EO, making it unnecessary for the Court to reach the constitutional questions raised.

ARGUMENT

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

Primary responsibility over immigration lies with Congress. It is Congress that has the power to "establish an uniform Rule of Naturalization," "regulate Commerce with foreign Nations," "declare War," and, in a veiled reference to slavery, prohibit "[t]he Migration or Importation of such Persons as any of the States now existing shall think proper to admit" after the year 1808. U.S. Const. art. I, § 8, cl. 3, 4, 11 & § 9, cl.1. Based on these enumerated powers, combined with the Necessary and Proper Clause, this Court has long recognized that regulating immigration is primarily, if not exclusively, within Congress's domain.[2] *See, e.g.*, *Galvan v. Press*, 347 U.S. 522, 531

[2] While this Court has suggested in *dicta* that the President has some inherent power over immigration derived from the foreign

(1954) ("[T]hat the formulation of [immigration policy] is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government."); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 340 (1909) ("[T]he authority of Congress over the right to bring aliens into the United States embraces every conceivable aspect of that subject.").

Congress can, of course, delegate authority to the Executive Branch. *See Yamataya v. Fisher*, 189 U.S. 86, 97–98 (1903); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892). In the INA, Congress has delegated substantial authority to Executive Branch officials, including the President, Attorney General, Secretary of State, Secretary of Homeland Security, Secretary of Labor, and Secretary of Health and Human Services.[3] *See, e.g.*, 8 U.S.C. §§ 1103(a)

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

[3] The Homeland Security Act of 2002 transferred certain powers from the Attorney General to the Secretary of the Department of

(delegating authority to the Secretary of Homeland Security), 1104 (Secretary of State), 1182(a)(1)(A) (Secretary of Health and Human Services), and 1188(a)(2) (Secretary of Labor).

Part A below explains the main powers that Congress has delegated to the Executive Branch regarding immigration enforcement and the admission of individuals. Part B turns to the authority delegated under the two specific provisions at issue in this case: 8 U.S.C. §§ 1182(f) and 1185(a)(1). The brief explains that in this case the President's powers pursuant to these two provisions must be construed narrowly, in part, because the EO was not promulgated pursuant to exigent diplomatic or military concerns when the President's authority is at its peak. *See Youngstown Steel and Tube v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

A. Congress Has Delegated Significant Yet Restricted Powers Over Immigration to the Executive Branch.

The broadest delegations of authority to the Executive Branch pertain to enforcement and removal, rather than admission. Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 Yale L.J. 458, 464–65 (2009). Congress has charged the Secretary of Homeland Security with "[e]stablishing national immigration enforcement policies and priorities," and, even more generally, with "the administration and enforcement" of immigration law.

Homeland Security ("DHS"). Homeland Security Act, H.R. 5005, 107th Cong. (2002).

6 U.S.C. § 202(5); 8 U.S.C. § 1103(a). These powers allow the President, through the Secretary of Homeland Security, to prioritize certain classes of noncitizens for removal and provide guidance regarding the use of prosecutorial discretion. Although Congress has set forth detailed grounds of deportability, *see* 8 U.S.C. § 1227, decisions about who is actually placed in removal proceedings and who is ultimately deported remain largely in the hands of the Executive Branch.

In addition, the Executive Office for Immigration Review ("EOIR"), an agency within the Department of Justice, conducts immigration court proceedings and appellate review of most removal decisions. As part of this process, EOIR officials are authorized to make determinations about whether to grant certain forms of relief and protection from removal, once an individual satisfies the eligibility criteria in the INA. Decisions about whether to grant asylum, different types of cancellation of removal, voluntary departure, and adjustment of status require an exercise of discretion. *See* 8 U.S.C. §§ 1158, 1229b, 1229c, 1255(c).

Congress has also delegated authority to the Executive Branch concerning the admission of individuals into the country, including discretionary waivers of certain inadmissibility grounds in individual cases. One of the broadest, 8 U.S.C. § 1182(d)(3), allows DHS to waive almost any inadmissibility ground for an individual seeking a "nonimmigrant" (temporary) visa. Congress has not delegated any comparable waiver authority with respect to "immigrant" visas. Many other types of waivers may be granted only if the applicant satisfies specific statutory requirements. *See, e.g.*, 8 U.S.C. § 1182(a)(9)(B)(v) (waiver of three and

ten-year bars for unlawful presence), (a)(9)(C)(iii) (waiver for aliens unlawfully present after previous immigration violations), (d)(4) (waiver of requirement to have a valid entry document), (d)(11) (waiver for alien smuggling), (d)(12) (waiver for document fraud), (e) (waiver of two-year foreign residency requirement for educational exchange visitors), (g) (waiver of health-related inadmissibility ground), (h) (waiver of several inadmissibility grounds), and (i) (waiver for fraud and willful misrepresentation). For refugees, Congress has included a special provision that authorizes the Executive Branch to waive certain inadmissibility grounds "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." 8 U.S.C. § 1157(c)(3). The Executive Branch has also been authorized to grant "parole," which allows individuals to enter the country "on a case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A).

Furthermore, Congress has authorized the Executive Branch to determine the form and manner of processing "immigrant" and "nonimmigrant" visa applications. 8 U.S.C. § 1202(a), (c). For nonimmigrant visas, Congress has authorized the Executive Branch to decide what supporting documents must be presented to consular officers. 8 U.S.C. § 1202(d). For immigrant visas, on the other hand, the statute specifies what documents must be provided. 8 U.S.C. § 1202(b). Although the INA generally requires every individual aged 14 to 79 who is applying for a nonimmigrant visa to appear for an in-person interview, the Secretary of State may waive this requirement if it is "in the national interest of the United States" or "necessary as a result of unusual or

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

Compared to these specific delegations of authority pertaining to visa issuance and admission, the two statutory provisions on which the Government relies in this case—1182(f) and 1185(a)(1)—grant the President broad power in certain circumstances.[4] Contrary to the Government's arguments purporting unlimited power, however, the text of these provisions, their historical usage, and the INA as a whole constrain them.

B. The Delegations of Authority Under 1182(f) and 1185(a)(1) Give the President Broad Discretion in Exigencies Involving Diplomacy or Military Affairs, But Do Not Provide Unlimited Power.

The President may suspend the "entry" of classes of aliens under 1182(f) only if he "finds" that such entry would be "detrimental to the interests of the United States." 8 U.S.C. § 1182(f). In addition, any rules regulating entry prescribed by the Secretary of State under 1185(a)(1) must be "reasonable." Each of these terms must have some meaning to avoid being mere surplusage, as well as to avoid rendering the statutory

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[4] The boilerplate language in 1185(a)(1) has never been held by itself to authorize any particular Executive Branch restriction on entry; 1182(f) is the broader grant of authority, subsuming 1185(a)(1). *See Jean v. Nelson*, 727 F.2d 957, 966–67 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985).

admission scheme and its restraints on executive discretion surplusage. *See Marx v. General Revenue Corp.*, 133 S. Ct. 1166, 1178 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme."); *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 209 (1997) ("Statutes must be interpreted, if possible, to give each word some operative effect."); *INS v. Cardoza–Fonseca*, 480 U.S. 421, 432 (1987) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal quotation marks omitted)); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used.").

Yet the Government claims that these are not limiting words at all, arguing that "Congress placed *no restrictions* on which 'interests' count or what 'detriment[s]' would suffice for the President to invoke his suspension authority, *committing all of those matters to the President's judgment and discretion*." *See* Pet'r's Br. 41–42 (emphasis added). Under this interpretation, if the President decided to suspend the entry of aliens with bad table manners, asserting that it would be detrimental to the nation's interests, there would be nothing anyone could do. *See Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 622 (4th Cir. 2017) (Wynn, J., concurring) (finding that "an alien's race, nationality, or religion is as irrelevant to the potential for his entry to harm the interests of the United States as is the alien's addiction to baseball or

his poor table manners") (citing *United States ex rel. Kaloudis v. Shaughnessy*, 180 F.2d 489, 490–91 (2d Cir. 1950) (Hand, J.)).

The Government's interpretation conflicts not only with the plain language of the statute, but also with the delegation of authority canon, which prohibits "find[ing] in [a] broad generalized power an authority to trench so heavily on the rights of the citizen." *Kent v. Dulles*, 357 U.S. 116, 129 (1958); *see also INS v. St. Cyr*, 533 U.S. 289, 298–99 (2001) (holding that the Antiterrorism and Effective Death Penalty Act and Illegal Immigration Reform and Immigrant Responsibility Act of 1996 did not repeal habeas jurisdiction in the absence of "a clear indication that Congress intended that result"); *Zadvydas v. Davis*, 533 U.S. 678, 697 (2001) ("We cannot find . . . any clear indication of congressional intent to grant the Attorney General the power to hold indefinitely in confinement an alien ordered removed."). Here, the generalized power delegated in 1182(f) and 1185(a)(1) should not be construed as restricting the rights of Americans to meet with family, friends, and colleagues from six other nations, or as otherwise encroaching on fundamental rights or commitments, as with refugee resettlement, without any clear indication that Congress intended to delegate that kind of unbridled power.

Prior Presidents' usage of 1182(f) and 1185(a)(1) provides further assistance in interpreting the scope of delegated power. *See Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2090 (2015) (turning to "judicial precedent and historical practice" in interpreting the President's power to decide what foreign power is legitimate); *N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550,

2559–60 (2014) (putting "*significant weight upon historical practice*" in interpreting the President's powers under the Recess Appointments Clause, and explaining that "[t]he longstanding 'practice of the government' . . . can inform [the Court's] determination of 'what the law is'" in a separation-of-powers case (citations omitted)); *see also* Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 Colum. L. Rev. 1097 (2013) (addressing the importance of history in defining the scope of executive power).

Presidents have typically drawn on 1182(f) and 1185(a)(1) in emergency situations that implicate their Commander-in-Chief powers and their authority concerning international diplomacy. *See* U.S. Const. art. II, § 2, cl. 1–2. Such situations include suspending entry of classes of aliens after foreign coups or revolutions; putting pressure on a foreign government, often as part of broader sanctions; enforcing a treaty; and responding to an act of aggression or an emergency. *See* Kate M. Manuel, Cong. Research Serv., R44743, *Executive Authority to Exclude Aliens* 6–10 (2017) (listing all previous presidential suspensions). In these types of situations, the President's power is at its zenith. By contrast, when the President attempts to restrict entry of classes of aliens in situations that do not implicate specific diplomatic exigencies or military crises, he is intruding on Congress's undelegated power to establish the classes of persons who may and may not be admitted to the United States, and his power is at its lowest ebb. *See Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

In response to the 1980 Iranian hostage crisis, for example, President Carter invoked 1185(a)(1) and directed the Secretary of State to invalidate and suspend the issuance of visas to Iranians "except for compelling and proven humanitarian reasons or where the national interest of our own country requires." President's Announcement of Sanctions Against Iran, 16 Weekly Comp. of Pres. Doc. 611 (Apr. 7, 1980). Restricting the entry of Iranians was just one of several measures, including ending diplomatic relations, which President Carter used to increase pressure on Iran to release the hostages taken during the storming of the U.S. embassy. *Id.*

Perhaps the most sweeping use of 1182(f) was President Reagan's exercise of power to "suspend entry into the United States as immigrants by all Cuban nationals," subject to certain exceptions. Proclamation No. 5517, 51 Fed. Reg. 30,470 (Aug. 22, 1986). President Reagan issued this Proclamation in response to the Cuban government's refusal to honor an immigration agreement between the two countries and disruption of normal migration procedures. *Id.* Two years prior to the Proclamation, this Court upheld President Reagan's ability to restrict U.S. citizens' travel to Cuba citing "weighty concerns of foreign policy" as the justification for the ban. *Regan v. Wald*, 468 U.S. 222, 241–42 (1984).

Unlike these historical exercises of presidential authority, President Trump's order suspending the entry of nationals of six countries, as well as the admission of refugees, cannot fairly be characterized as an act related to exigent diplomatic or military affairs. There is no evidence, for example, that the President

suspended entry to negotiate or enforce a treaty with any of these six countries; or to respond to an act of aggression by or a coup or recent revolution in any of the six countries.[5]

The EO in this case was promulgated under unique and unprecedented circumstances. The initial version of the EO was issued on January 27, 2017, within days of the President's inauguration and corresponded only to his campaign promises—not to any identifiable, even classified, security review that could conceivably have been ordered in such a short time. There were therefore no "findings" to support either the initial or the revised EO, and no nexus to any identifiable U.S. interests. Furthermore, both the initial and the current EO include provisions indicating a discriminatory purpose by mandating the collection of information "regarding the number and types of acts of gender-based violence against women, including so-called 'honor killings.'" Executive Order No. 13780, 82 Fed. Reg. 13,209, 13,217 (Mar. 9, 2017); Executive Order No. 13769, 82 Fed. Reg. 8,977, 8,981 (Jan. 27, 2017).[6] As immigration

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[5] While the Government contends that the Visa Waiver Program provides a rationale for restricting entry from the six countries named in the EO, that argument ignores how Congress designed the Visa Waiver Program to *constrain* executive discretion. *See infra* Section II(D).

[6] In discussing the exercise of parole authority with respect to Haitians, the Supreme Court specifically found that the INA's prohibition of discrimination based on race or national origin limited the wide discretion given to executive officials. *See Jean v. Nelson*, 472 U.S. 846, 857 (1985) (requiring a "determination [regarding] whether the INS officials are observing this limit upon their broad statutory discretion to deny parole to class members in

scholars have emphasized, such a directive "has no conceivable relation to the alleged national security purpose of the travel ban." Gerald Neuman, *Neither Facially Legitimate Nor Bona Fide—Why the Very Text of the Travel Ban Shows It's Unconstitutional*, Just Security (June 9, 2017). Under these particular circumstances, the EO exceeded the authority delegated by Congress.

II. THE INA AS A WHOLE CONSTRAINS THE DELEGATION OF AUTHORITY IN 1182(f) AND 1185(a)(1).

The statutory provisions on which the Government relies must be interpreted in a manner that is consistent with the statute as a whole. *See, e.g.*, *Dada v. Mukasey*, 554 U.S. 1, 16 (2008) ("In reading a statute we must not look merely to a particular clause, but consider in connection with it the whole statute." (internal quotation marks omitted)); *Crandon v. United States*, 494 U.S. 152, 158 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.").

Indeed, the Court has cautioned that reading provisions of the INA in isolation could lead to "so much trickery, violating the cardinal rule that statutory language must be read in context." *Lopez v. Gonzales*, 549 U.S. 47, 56 (2006) (citations and internal quotation marks omitted). That is precisely "why our

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detention"). Similarly, President Trump's EO must be considered in light of the limits imposed by the nondiscrimination provision of the INA, discussed *infra* Section II(C).

interpretive regime reads whole sections of a statute together to fix on the meaning of any one of them . . . ." *Id.* As shown below, reading whole sections of the INA together fixes the meaning of 1182(f) and 1185(a)(1).

Congress has carefully determined the classes of aliens who may and may not be admitted to the country. In the sixty-five years since 1182(f) was added to the INA, Congress has also repeatedly legislated constraints on executive discretion in matters involving admission. The President is not free to ignore those constraints, except under highly limited circumstances involving exigent diplomatic and military affairs. Reading 1182(f) and 1185(a) in the context of the entire INA demonstrates that these isolated provisions do not authorize the unique and improper EO at issue in this case.

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

The INA provides detailed categories of aliens who may be admitted to the United States, which the President cannot unilaterally alter. For individuals seeking permanent residence, Congress has established three main ways to obtain an immigrant visa: family relationships, employment, and the diversity lottery. 8 U.S.C. § 1153(a)–(c). Family relationships are the most common way to obtain an immigrant visa. There are an unlimited number of visas available to spouses, children, and parents of U.S. citizens, known as "immediate relatives." 8 U.S.C. § 1151(b)(2)(A)(i). In addition, Congress has specified four preference categories based on other types of family relationships

to a U.S. citizen or permanent resident.[7] With respect to employment-based immigrant admissions, Congress has created five preference categories that take into account factors such as professional accomplishments, education, occupation, and investments.[8] For both the family and employment-based categories, Congress has devised an intricate method for calculating the number of visas available. *See* 8 U.S.C. § 1153(a)–(b).

The third route to obtaining an "immigrant" visa is the diversity lottery, which requires applicants to meet certain threshold conditions and then applies a complicated, statutorily-designated formula to determine the number of people who will be admitted in a random order from certain underrepresented geographical regions.[9] 8 U.S.C. § 1153(c)–(e).

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[7] The family-sponsored preference categories are: (1) unmarried sons and daughters over 21 years of age of U.S. citizens; (2A) spouses and children of permanent residents; (2B) unmarried sons and daughters over 21 years of age of permanent residents; (3) married sons and daughters of U.S. citizens; and (4) brothers and sisters of U.S. citizens. 8 U.S.C. § 1153(a).

[8] The employment-based preference categories are as follows: (1A) individuals with exceptional ability; (1B) outstanding professors and researchers; (1C) multinational executives and managers; (2) those with advanced degrees or exceptional ability; (3) individuals with bachelor's degrees or in shortage occupations; (4) special immigrants; and (5) investors. 8 U.S.C. § 1153(b).

[9] The threshold requirements are (1) a high school education or its equivalent; and (2) at least two years of experience in an occupation that requires at least two years of training or experience within five years preceding the application. 8 U.S.C. § 1153(c)(2).

For nonimmigrants, who comprise the vast majority of individuals admitted to the United States, Congress has created an equally elaborate system. *See* U.S. Dep't of State, Bureau of Consular Affairs, Immigrant and Nonimmigrant Visas Issued at Foreign Service Posts: 2012–2016, *available at* https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2016AnnualReport/FY16AnnualReport-TableI.pdf. This system includes an alphabet soup of nonimmigrant visa categories, including, but not limited to, visas for individuals coming to the United States for tourism, business, investment, study, training, agricultural or seasonal work, artistic performances, athletic events, and exchange programs. 8 U.S.C. § 1101(a)(15).

In addition to these carefully created categories for the admission of immigrants and nonimmigrants, Congress has provided a comprehensive scheme for admitting refugees. Congress has delegated to the President the authority to determine, after "appropriate consultation" with Congress, how many refugees should be admitted in the next fiscal year. 8 U.S.C. § 1157(a)(1)–(3), (d), (e). In the event of an "unforeseen emergency refugee situation" that justifies the admission of additional refugees, the President is authorized to determine, again after "appropriate consultation," the number of additional refugees that should be admitted in response to the emergency. 8 U.S.C. § 1157(b). The statute defines "appropriate consultation" to include a detailed list of information that should "be provided at least two weeks in advance" of discussions between "designated Cabinet-level representatives of the President" and members of Congress, as well as a hearing to review the President's plans, "unless public disclosure of the details of the

proposal would jeopardize the lives or safety of individuals." 8 U.S.C. § 1157(d)–(e).

Given the unambiguous statutory text of 1157, which requires that the President consult with Congress in setting the number of refugees to be admitted, the plain language of the statute must determine its meaning. *See Tankersley v. Almand*, 837 F.3d 390, 395 (4th Cir. 2016) ("When the words of a statute are unambiguous, then . . . judicial inquiry is complete." (internal citations and quotation marks omitted)). Congress's explicit grant of power to increase the pre-determined number of refugees and its silence regarding the power to decrease that number indicate that Congress did not provide the President with the latter. *See Hillman v. Maretta*, 133 S. Ct. 1943, 1953 (2013) (noting that where "Congress explicitly enumerates certain exceptions . . . additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent" (citations omitted)).

The President's EO directly contravenes the deliberate and systematic process for immigrant, nonimmigrant, and refugee admissions set forth in the INA.[10] By unilaterally suspending entry from six

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[10] The initial version of the EO explicitly stopped the *issuance of visas* to nationals of designated countries, while the current version stops the *admission* of individuals coming from the designated countries. Executive Order No. 13769, 82 Fed. Reg. 8,977, 8,977–78 (Jan. 27, 2017); Executive Order No. 13780, 82 Fed. Reg. 13,209 (Mar. 9, 2017). As a practical matter, the distinction is meaningless. Although the President can prevent a visa-holder from entering the country if that visa-holder fails to meet the INA's admission requirements, he cannot preemptively

countries, halting the refugee admissions program, and decreasing the number of refugees to be admitted without consulting Congress, the EO upends the statutory scheme Congress created and is thus "incompatible with the express or implied will of Congress." *Zivotofsky*, 135 S. Ct. at 2084 (quoting *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring)). Where, as here, the President's power is "at its lowest ebb," it "must be scrutinized with caution." *Id*.

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

Just as Congress has specified categories for admission, so too, has it specified categories of aliens who may *not* be admitted. 8 U.S.C. § 1182(a). These inadmissibility grounds render certain aliens "ineligible to receive visas and ineligible to be admitted to the United States." 8 U.S.C. § 1182(a). The inadmissibility grounds include, but are not limited to, categories based on: health, criminal convictions, conduct even without a conviction (e.g., trafficking in controlled substances, alien smuggling, and engaging in prostitution or commercialized vice), immigration violations (e.g., prior periods of unlawful presence and prior orders of removal), indigence (being a "public charge"), misrepresentation, national security, and foreign policy. 8 U.S.C. § 1182(a). Congress has

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stop the entry of all visa-holders from specified countries because to do so would render the visa worthless, undermining Congress's authority and the INA's eligibility requirements.

incorporated into this framework very specific exceptions to certain inadmissibility grounds, as well as discretionary "waivers" of certain grounds of inadmissibility. *See supra* Section I.A.

The two grounds of inadmissibility addressing national security and foreign policy are critical in interpreting the scope of the President's authority under 1182(f) and 1185(a)(1). First, the national security ground in 8 U.S.C. § 1182(a)(3)(B) provides very broad definitions of "terrorist activity" and "engag[ing] in terrorist activity," facilitating their use in a discretionary manner by consular officials and immigration officers. *See generally* Gerald L. Neuman, *Terrorism, Selective Deportation and the First Amendment After* Reno v. AADC, 14 Geo. Immigr. L.J. 313, 321–22 (2000). For example, the definition of "terrorist activity" includes any unlawful use of a weapon or dangerous device "other than for mere personal monetary gain," and "[e]ngag[ing] in terrorist activity" includes providing "material support" for any "terrorist activity" or organization. 8 U.S.C. § 1182(a)(3)(B)(iii)(V)(b), (B)(iv). Congress has also provided a mechanism for seeking an exemption from this inadmissibility ground. 8 U.S.C. § 1182(d)(3)(B). It would be pointless for Congress to legislate specific criteria for terrorism-related inadmissibility, as well as inadmissibility exceptions and exemptions, if Congress also authorized the President to exclude entire nations based on vague references to national interest. *See Abourezk v. Reagan*, 785 F.2d 1043, 1057–58 (D.C. Cir. 1986) (prohibiting the Executive Branch from using the general exclusionary authority conferred by Congress in one provision of the INA to circumvent a more

specific provision dealing with exclusion of aliens on the basis of organizational affiliation).

Second, the foreign policy inadmissibility ground applies to any alien "whose entry or proposed activities in the United States the Secretary of State has reasonable grounds to believe would have potentially serious adverse foreign policy consequences for the United States." 8 U.S.C. § 1182(a)(3)(C). Congress has carved out two exceptions to this inadmissibility ground that curb the Secretary of State's discretion, providing that a person generally should not be excluded based on "past, current, or expected beliefs, statements, or associations that would be lawful within the United States." 8 U.S.C. § 1182(a)(3)(C)(ii)–(iii). The conference committee report accompanying the 1990 Immigration Act, which introduced the foreign policy ground, provides:

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

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

consequences for the United States" before denying the admission of such an individual if the president had *carte blanche* authority to restrict entry under 1182(f) or 1185(a). *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) (construing a statute to avoid "the superfluity of a specific provision that is swallowed by the general one").

Construing 1182(f) and 1185(a)(1) as broadly as the Government suggests would allow the President to destabilize—and ultimately destroy—the detailed admission structure described above. The President would effectively be able to create new categories of inadmissible aliens by suspending entry of classes he defines, thereby also altering the categories of people admitted to the country. For example, the President would upend the statute if he invoked 1182(f) or 1185(a)(1) to suspend the entry of spouses of permanent residents or anyone without an advanced degree. The President could also influence the geographic allocation of visas that plays an important role in the diversity lottery by suspending entry based on nationality. Congress clearly did not intend to delegate such unlimited discretion under 1182(f) or 1185(a)(1).

C. The INA's Nondiscrimination Provision Constrains the President's Authority Under 1182(f) and 1185(a)(1).

Section 1152(a)(1)(A) of Title 8 of the U.S. Code prohibits discrimination on the basis of nationality and place of birth in the issuance of immigrant visas. Introduced as part of the Immigration Act of 1965, the INA's nondiscrimination provision was designed to remedy the "harsh injustice of the national origins

quota system." Remarks at the Signing of the Immigration Bill, Liberty Island, New York, 546 Pub. Papers 1037, 1038 (Oct. 3, 1965) (noting the national origins quota system "violated the basic principle of American democracy—the principle that values and rewards each man on the basis of his merit as a man"); *see also Olsen v. Albright*, 990 F.Supp. 31, 37 (D.D.C. 1997) (discussing enactment of the 1965 Amendments, including "[t]he legislative history surrounding the 1965 Act [which] is replete with the bold anti-discriminatory principles of the Civil Rights Era," and noting that visas may not be denied through applying prejudicial national stereotypes); Manuel, Cong. Research Serv., *supra*, 1–10. Congress even rejected a proposal to gradually transition away from national origin quotas, preferring instead to require their immediate abolition and to limit the Executive's discretion in the visa allocation process. S. 500/H.R. 2580, 89th Cong., 1st Sess. (1965) (Hart-Celler, Johnson administration bill); H.R. 8662, 89th Cong., 1st Sess. (1965) (Feighan bill).

Considering Congress's specific intent to repeal the national origin quota and its discriminatory foundation, it is unsurprising that the text of the nondiscrimination provision is succinct and unambiguous: "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a)(1)(A). That text is clear and should be interpreted in accordance with its plain meaning. *See Puello v. Bureau of Citizenship & Immigr. Servs.*, 511 F.3d 324, 327 (2d Cir. 2007). The nondiscrimination provision thus reflects a significant step by Congress to

end discriminatory immigration practices previously allowed by the INA. It is through that nondiscriminatory lens that the President's statutory authority must be construed.

Although the nondiscrimination provision is broadly applicable, it is not absolute. Congress did create some narrow statutory exceptions to the provision, none of which the EO satisfies. Most significantly, Congress can discriminate by assigning per-country caps on the number of family and employment-based visas that are issued. 8 U.S.C. § 1152(a)(1)(A), (a)(2).[11]

Notably, however, Congress did not exempt from the nondiscrimination provision the President's authority pursuant to 1182(f) and 1185(a)(1). *See Hillman*, 133 S. Ct. at 1953 ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." (citations omitted)). In addition, none of the exceptions to the nondiscrimination provision grant the President the authority to create his own exceptions. It is therefore unsurprising that the President's statutory authority is not exempt from the nondiscrimination provision. There would be no point to a law that proscribes the President from discriminating except when the President chooses to discriminate.

Presidential authority pursuant to 1182(f) and 1185(a)(1) must therefore be construed in conformance

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[11] Congress has also made clear that the Secretary of State can make determinations regarding the location of and procedures for immigrant visa application processing. 8 U.S.C. § 1152(a)(1)(B).

with the INA's nondiscrimination provision. Only then can both statutory provisions be given effect as Congress intended. *See Inhabitants of Montclair Twp. v. Ramsdell*, 107 U.S. 147, 152 (1883) ("It is the duty of the court to give effect, if possible, to every clause and word of a statute."); *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633 (1973) (holding that an interpretation of one statutory provision that renders another provision superfluous "offends the well-settled rule of statutory construction that all parts of a statute, if at all possible, are to be given effect").

Although the President has the authority to suspend the entry of immigrants "detrimental to the interests of the United States" via 1182(f), he cannot establish blanket prohibitions against immigrants based solely on their nationality or place of birth. *See Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. 442, 453 (S.D. Fla. 1980) ("[U]nder 8 U.S.C. § 1152(a), INS has no authority to discriminate on the basis of national origin, except perhaps by promulgating regulations in a time of national emergency."). To do so would undermine the visa allocation system over which Congress retains authority, and it would specifically run afoul of the INA's nondiscrimination provision.

D. The Overall Historical Trajectory of the INA Supports Interpreting the Statute as Constraining the President's Authority Under 1182(f) and 1185(a)(1).

Congress has repeatedly amended the INA to constrain executive discretion, and the restrictions on executive authority, described above, would be meaningless if the President had total and unreviewable discretion to ignore them. The overall

structure and historical trajectory of the INA thus reflect Congress's intent to limit the President's power over admissions.

In addition to the statutory provisions on inadmissibility and nondiscrimination, previously discussed, Congress has repeatedly amended the INA to curb what it saw as excessive executive discretion regarding refugee admissions. The purpose of the Refugee Act of 1980 was to reform the prior ad hoc and discriminatory approach to U.S. refugee admissions. *See, e.g.*, H.R. Rep. No. 96-781, at 1 (1980) (Conf. Rep.) (noting that the Refugee Act aimed to "establish a more uniform basis for the provision of assistance to refugees"); S. Rep. No. 96-590, at 1 (1980) (Conf. Rep.) (same); *see also* S. Rep. No. 96-2, at 3757 (1980) ("[T]he consultation process is now specifically outlined in the statute, ending the current parole process which is merely governed by custom and practice.") (statement of Sen. Kennedy). Dissatisfied with the use of administrative discretion, Congress passed the Refugee Act, adding sections 207 and 208 to the INA, now 8 U.S.C. §§ 1157 and 1158, to create orderly and nondiscriminatory procedures for individuals to be resettled as refugees and claim asylum. The Refugee Act of 1980, 96 Pub. L. No. 96-212, 94 Stat. 102 (1980). The legislative history of 1157 demonstrates that Congress enacted the Refugee Act of 1980 to provide itself with "much greater and more explicit power than it [] had before with regard to the numbers and nature of refugees to be admitted to this country." *See*

H.R. Rep. No. 96-2, at 4501 (1980) (statement of Rep. Holtzman).[12]

In deliberations leading up to the passage of the Refugee Act, members of the House expressed "extreme[] concern[] about assuring that Congress ha[d] a proper and substantial role in refugee admissions, given [its] plenary power over immigration." H.R. Rep. No. 96-1, at 35814 (1979) (statement of Rep. Holtzman); *see also Admissions of Refugees into the United States: Hearings before the Subcomm. on Immigr., Citizenship, and Int'l Law of the House Comm. on the Judiciary*, 95th Cong. 59 (1977) (statement of Rep. Eilberg) ("Our bill represents an attempt to restore [Congress's] authority [to regulate U.S. refugee admissions] and, at the same time, to establish a proper balance between the executive and the legislative branches of Government in establishing the appropriate procedures governing their admission."). Again, in light of this history, Congress could not have intended to give the President general authority to suspend refugee admissions and unilaterally cut the number of refugees to be admitted after it was set in appropriate consultation with

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[12] In the context of refugee admissions, 1157 supersedes 1182(f) because 1157 was enacted twenty-eight years after 1182(f) and is more specific. *Compare* Immigration and Nationality Act, 66 Pub. L. No. 66-414, 66 Stat. 163 (1952) *with* The Refugee Act of 1980, 96 Pub. L. No. 96-212, 94 Stat. 102 (1980). In 1157, Congress explained the process for determining the number of refugees to be admitted each fiscal year and provided a detailed, precise framework for the administration of the refugee admission process. Given these detailed, specific, and more recently enacted provisions, the President's general authority under 1182(f) cannot be interpreted to conflict with 1157.

Congress.[13] Rather, such presidential actions must be limited to emergencies within the President's power over diplomatic and military affairs.

The 1996 amendments to the INA also deleted the definition of "entry"—a term of art that was used in 1182(f)—and removed its significance as a marker of substantive rights in immigration law. Illegal Immigration and Immigrant Responsibility Act of 1996, PL 104-208, 110 Stat. 3009-546, § 308(f). Before 1996, any noncitizen who had made an "entry" (meaning physical entry) into the United States thereby acquired the right to the formality of a deportation proceeding in the language of the pre-1996 statute. It is this "entry"

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[13] While Congress did not give the President the power to suspend refugee admissions or unilaterally decrease the number of refugees that may be admitted, Congress understood the practical realities of refugee admission and resettlement. *See*, Cong. Research Serv., Refugees in the U.S. Laws, Programs, and Proposals (1979). Budgetary, logistical, and other practical constraints have meant that the number of refugees actually admitted often falls below the number set by the President and Congress. *See*, Refugee Processing Ctr., Bureau of Population, Refugee & Migration, U.S. Dep't of State, Cumulative Summary of Refugee Admissions (May 31, 2017); *see also* Migration Policy Inst., U.S. Annual Refugee Resettlement Ceilings and Number of Refugees Admitted, 1980–2016. Further, the President can amend refugee screening procedures at any time. *See*, Andorra Bruno & Katherine Bush, Refugee Admissions and Resettlement Policy, at 2 (2002); United States Committee for Refugees and Immigrants, *In the Aftermath of September 11: U.S. Refugee Resettlement on Hold*, 2 Refugee Report 9/10 (2001), *available at* http://www.refworld.org/docid/3c5809994.html (accessed Aug. 1, 2017). What the President cannot do is suspend refugee admissions entirely or decrease the number of refugees that may be admitted after it has been fixed in consultation with Congress.

that 1182(f) addresses. In 1996, this entire scheme changed. Physical entry into the United States no longer is associated with entitlement to any particular procedures for adjudicating claims. *See* Linda Bosniak, *A Basic Territorial Distinction*, 16 Geo. Immigr. L.J. 407, 408–10 (2002). This statutory change, too, has served to limit executive discretion.

A more recent rejection of executive discretion came in 2000, with the permanent adoption of a Visa Waiver Program for certain countries whose nationals rarely remain in the United States after a temporary visit. 8 U.S.C. § 1187. (The Government discusses this program in its brief but gets its significance backwards). As 1187(c) sets out in mind-numbing detail, designation as a program country reflects a mathematical calculation of a given country's immigration history. Only if a country meets the requirements set forth by Congress may the Attorney General, in consultation with the Secretary of State, designate a country for the program. And, when a country ceases to be eligible for the Visa Waiver Program (as is true of the countries affected by the EO), its nationals are still eligible to come to the United States if they apply for the relevant visa and go through the careful visa-vetting process. As described above, these visa processes are well defined under 8 U.S.C. § 1202 and cannot be changed at the whim of the Executive Branch.

These amendments to the statute indicate that Congress has moved away from a discriminatory immigration scheme to one that promotes equitable treatment and constrains executive discretion.

Construing 1182(f) and 1185(a)(1) in this context cuts against any notion of absolute power.

E. Given the Constraints Imposed by the INA, the Court Need Not Reach the Constitutional Issues in this Case.

The arguments set forth above show that the INA unambiguously constrains the President's authority under 1182(f) and 1185(a)(1), rendering the EO *ultra vires* and inconsistent with the statute. Therefore, there is no need to apply the canon of constitutional avoidance, which "comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible to more than one construction; and the canon functions as *a means of choosing between them.*" *Clark v. Martinez*, 543 U.S. 371, 385 (2005).

Like the Ninth Circuit, the Court may avoid the constitutional issues by disposing of the case on statutory grounds. *See Hawaii v. Trump*, 859 F.3d 741, 761 (9th Cir. 2017) (discussing the Supreme Court's "admonition that 'courts should be extremely careful not to issue unnecessary constitutional rulings,' '[p]articularly where, as here, a case implicates the fundamental relationship between the Branches'") (quoting *Am. Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153, 161 (1989)) (per curiam); *see also Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988) ("[J]udicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.").[14]

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[14] In ruling on the constitutional claims, the Fourth Circuit skipped over the statutory ones, mentioning only briefly that the

Accordingly, the Court need not determine whether the EO "raise[s] serious constitutional problems." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 586, 575 (1988); *see also* Adrian Vermeule, *Saving Constructions*, 15 Geo. L.J. 1945, 1948–49 (1997) (explaining the differences between "procedural," "classical," and "modern" avoidance). However, if the Court finds the INA ambiguous with respect to the authority delegated under 1182(f) or 1185(a)(1), then the Court would "construe the statute to avoid [constitutional] problems unless such construction is plainly contrary to the intent of Congress." *Id.*

At a minimum, the arguments set forth above demonstrate that construing the INA to constrain the President's authority is not "plainly contrary to the intent of Congress." *Id.* On the contrary, interpreting the INA to allow the unlimited executive discretion that the President claims to have flies in the face of congressional intent, given that Congress has repeatedly and expressly restricted the President's discretionary authority under the INA. *See Almendarez-Torres v. United States*, 523 U.S. 224, 238 (1998) (explaining that the constitutional avoidance doctrine serves the "basic democratic function of maintaining a set of statutes that reflect, rather than

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nondiscrimination provision in 8 U.S.C. § 1152(a)(1)(A) could not support a nationwide preliminary injunction because it applied only to the issuance of immigrant visas. *IRAP v. Trump*, 857 F.3d 554, 580–81 (4th Cir. 2017). The error in that analysis is that the Fourth Circuit considered the nondiscrimination provision in isolation.

distort, the policy choices that elected representative have made").

CONCLUSION

Based on the foregoing, *Amici* respectfully submit that the Court should find the EO *ultra vires*.

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