No. 17-965

IN THE

Supreme Court of the United States

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

Petitioners,

v.

STATE OF HAWAII, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* IMMIGRATION, FAMILY, AND CONSTITUTIONAL LAW PROFESSORS IN SUPPORT OF RESPONDENTS

ROBERT A. WIYGUL
Counsel of Record
MARK A. ARONCHICK
HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER
One Logan Square, 27th Floor
Philadelphia, PA 19103
(215) 568-6200
rwiygul@hangley.com

Counsel for Amici Curiae

March 30, 2018

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTEREST OF AMICI CURIAE	1
SUMMARY OF THE ARGUMENT	1
ARGUMENT	6
I. FEDERAL COURTS HAVE THE POWER AND DUTY TO REVIEW EXECUTIVE BRANCH IMMIGRATION POLICIES THAT ABROGATE THE CONSTITUTIONAL RIGHTS OF AMERICAN CITIZENS AND RESIDENTS	7
II. THE PRESIDENTIAL PROCLAMATION VIOLATES MODERN CONSTITUTIONAL COMMITMENTS TO FAMILY RIGHTS, AS WELL AS CONSTITUTIONAL RACIAL AND RELIGIOUS ANTI-DISCRIMINATION PRINCIPLES	12
A. The Supreme Court's current approach to balancing individuals' constitutional interests with the political branches' authority over immigration has evolved over time	12
B. This Court recognizes a broad array of modern family rights protected under the Due Process and Equal Protection Clauses of the Fourteenth Amendment	14

TABLE OF CONTENTS—Continued

Page

C. This Court has afforded broad constitutional protections to family relationships, especially when a Government policy violates multiple constitutional principles..... 20

D. This Court should invalidate the Proclamation because it infringes the constitutional family rights of American citizens and lawful permanent residents 22

III. THIS COURT SHOULD INVALIDATE THE PROCLAMATION BECAUSE IT INFRINGES THE STATUTORY INTERESTS OF AMERICAN CITIZENS AND LAWFUL PERMANENT RESIDENTS WHOSE FAMILY MEMBERS ARE BARRED FROM ENTRY ON RACIALLY AND RELIGIOUSLY DISCRIMINATORY GROUNDS..... 25

A. Federal courts routinely provide authoritative interpretations of the INA and require the Executive Branch to conform its policies and practices to the statutory scheme developed by Congress..... 26

B. The Proclamation infringes the statutory interests of American citizens and lawful permanent residents whose family members are barred from entry on racially and religiously discriminatory grounds 28

TABLE OF CONTENTS—Continued

Page

IV. THE WAIVER PROCESS SET FORTH IN THE PROCLAMATION DOES NOT CURE THESE STATUTORY AND CONSTITUTIONAL PROBLEMS 32

CONCLUSION 36

APPENDIX

APPENDIX A: List of Amici Curiae Law Professors 1a

TABLE OF AUTHORITIES

CASES Page(s)

Akram v. Holder,
721 F.3d 853 (7th Cir. 2013)..... 27

Armstrong v. Exceptional Child Ctr., Inc.,
135 S. Ct. 1378 (2015)..... 28

Boddie v. Connecticut,
401 U.S. 371 (1971)..... 19

Brown v. Bd. of Educ. of Topeka,
347 U.S. 483 (1954)..... 13

Chae Chan Ping v. United States (The Chinese Exclusion Case),
130 U.S. 581 (1889)..... 12, 14, 15

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993)..... 13

Clark v. Martinez,
543 U.S. 371 (2005)..... 32

Dep't of Agric. v. Moreno,
413 U.S. 528 (1973)..... 13

Eisenstadt v. Baird,
405 U.S. 438 (1972)..... 16

Fiallo v. Bell,
430 U.S. 787 (1977)..... 2, 9, 33

Fong Yue Ting v. United States,
149 U.S. 698 (1893)..... 13, 14, 15

Ginters v. Frazier,
614 F.3d 822 (8th Cir. 2010)..... 27

Griswold v. Connecticut,
381 U.S. 479 (1965)..... 16

TABLE OF AUTHORITIES—Continued

Page(s)

I.N.S. v. Chadha,
462 U.S. 919 (1983)..... 21

Jennings v. Rodriguez,
138 S. Ct. 830 (2018)..... 29, 32

Kerry v. Din,
135 S. Ct. 2128 (2015).....*passim*

Kleindienst v. Mandel,
408 U.S. 753 (1972).....*passim*

Landon v. Plasencia,
459 U.S. 21 (1982)..... 2, 7, 10, 23

Lawrence v. Texas,
539 U.S. 558 (2003)..... 16

Loving v. Virginia,
388 U.S. 1 (1967)..... 16, 18, 20, 23

M.L.B. v. S.L.J.,
519 U.S. 102 (1996)..... 19

Mathews v. Eldridge,
424 U.S. 319 (1976)..... 10

McGowan v. Maryland,
366 U.S. 420 (1961)..... 21

Medina-Morales v. Ashcroft,
371 F.3d 520 (9th Cir. 2004)..... 28

Meyer v. Nebraska,
262 U.S. 390 (1923)..... 15

Moore v. City of E. Cleveland,
431 U.S. 494 (1977)..... *passim*

TABLE OF AUTHORITIES—Continued

Page(s)

Obergefell v. Hodges,
135 S. Ct. 2584 (2015) ..... *passim*

Palmore v. Sidoti,
466 U.S. 429 (1984) 33

Plessy v. Ferguson,
163 U.S. 537 (1896) 3, 13

Planned Parenthood of Se. Pa. v. Casey,
505 U.S. 833 (1992) 16

Plyler v. Doe,
457 U.S. 202 (1982) 8, 20

Reno v. American-Arab Anti-Discrimination Comm.,
525 U.S. 471 (1999) 14, 23

Romer v. Evans,
517 U. S. 620 (1996) 19

Santosky v. Kramer,
455 U.S. 745 (1982) 19

Scialabba v. Cuellar de Osorio,
134 S. Ct. 2191 (2014) 27

Shaughnessy v. United States ex rel. Mezei,
345 U.S. 206 (1953) 15

Stanley v. Illinois,
405 U.S. 645 (1972) 16, 33

Town of Greece v. Galloway,
134 S. Ct. 1811 (2014) 13

Trimble v. Gordon,
430 U.S. 762 (1977) 34

TABLE OF AUTHORITIES—Continued

Page(s)

Troxel v. Granville,
530 U.S. 57 (2000) 3, 16, 24

United States v. Virginia,
518 U.S. 515 (1996) 13

United States v. Windsor,
133 S. Ct. 2675 (2013) 13, 19

United States ex rel. Knauff v. Shaughnessy,
338 U.S. 537 (1950) 14, 15

Zablocki v. Redhail,
434 U.S. 374 (1978) 16, 19

Zadvydas v. Davis,
533 U.S. 678 (2001) 2, 8

CONSTITUTION

U.S. Const. amend. I ..... *passim*

U.S. Const. amend. XIV ..... *passim*

STATUTES AND REGULATIONS

3 U.S.C. § 301 25

8 U.S.C. § 1101(a)(15) 31

8 U.S.C. § 1101(b)(1)(D) 9

8 U.S.C. § 1101(b)(2) 9

8 U.S.C. § 1151 30

8 U.S.C. § 1152(a)(1) 5

8 U.S.C. § 1152(a)(1)(A) 25, 29

8 U.S.C. § 1153 30

TABLE OF AUTHORITIES—Continued

Page(s)

8 U.S.C. § 1182(f) ..... *passim*

8 U.S.C. § 1185(a) 5

8 U.S.C. § 1185(a)(1) ..... *passim*

8 U.S.C. § 1229b 31

8 U.S.C. § 1229b(b)(1)(D) 30

8 U.S.C. § 1231(a)(6) 9

8 U.S.C. § 1401 31

8 U.S.C. § 1430 31

8 U.S.C. § 1431 31

8 U.S.C. § 1433 31

Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017) ..... *passim*

§ 2(d) 22

§ 2(f) 22

§ 3 33

§ 3(c) 32

§ 16(c) 33

OTHER AUTHORITIES

1 M. Farrand, *The Records of the Federal Convention of 1787* (1911) 21

Kerry Abrams, *Family Reunification and the Security State*, 32 Const. Comm. 247 (2017) 15

TABLE OF AUTHORITIES—Continued

Page(s)

Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. Rev. 1309 (2017)..... 21

Letter from Mary K. Waters, Assistant Sec'y, Legislative Affairs, U.S. Dep't of State, to The Honorable Chris Van Hollen, U.S. Senate (Feb. 22, 2018), http://fingfx.thomsonreuters.com/gfx/reuterscom/1/60/60/letter.pdf..... 34

Lyndon B. Johnson, Remarks at the Signing of the Immigration Bill (Oct. 3, 1965), http://www.lbjlibrary.org/lyndon-baines-johnson/timeline/lbj-on-immigration 30

Michael Price & Peter Keffer, *The Empty Promise of 'Waivers' from Trump's Muslim Ban*, Just Security (Mar. 8, 2018), https://www.justsecurity.org/53484/empty-promise-waivers-trumps-muslim-ban/..... 34

Office of Immigration Statistics, *Persons Obtaining Legal Permanent Resident Status, Lawful Permanent Residents (LPRS)*, https://www.dhs.gov/immigration-statistics/lawful-permanent-residents 30

TABLE OF AUTHORITIES—Continued

Page(s)

Yeganeh Torbati & Mica Rosenberg, *Visa Waivers Rarely Granted Under Trump's Latest U.S. Travel Ban*, Reuters, Mar. 6, 2018, https://www.reuters.com/article/us-usa-immigration-travelban-exclusive/exclusive-visa-waivers-rarely-granted-under-trumps-latest-u-s-travel-ban-data-idUSKCN1GI2DW..... 34

INTEREST OF AMICI CURIAE

Amici curiae are leading scholars of immigration, constitutional, and family law who are interested in the proper interpretation and application of U.S. laws as they concern Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017) [hereinafter "the Proclamation"]. This brief addresses issues specifically within amici's scholarly expertise. An appendix contains biographical information on the amici, who are participating as individuals and not as institutional representatives.[1]

SUMMARY OF THE ARGUMENT

Amici, experts in immigration, constitutional, and family law, write to explain how the Proclamation infringes the family relationships of American citizens and lawful permanent residents as protected by the U.S. Constitution and federal statutes. We agree with the Respondents' primary contentions: that the Proclamation violates the Immigration and Nationality Act's prohibition on discrimination based on religion and nationality; that it violates the Establishment Clause of the First Amendment; that the Proclamation has harmed noncitizens with and without family in the United States; and that it injures citizens within the United States who have a right to a government free from an established religion. This brief focuses on a key aspect of this harm: how the Proclamation injures American citizens and lawful permanent residents whose relatives' entry into the United States

---

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

has been restricted severely and indefinitely based on their race, religion, and nationality.

Notwithstanding the deference afforded to the Executive and Legislative Branches in immigration matters, this Court has made clear that American citizens' and residents' constitutional and statutory rights do not disappear in immigration cases. Rather, these individuals have justiciable rights and interests that can be violated by immigration restrictions, as this Court recognized in *Kleindienst v. Mandel*, 408 U.S. 753 (1972), *Landon v. Plasencia*, 459 U.S. 21 (1982), *Zadvydas v. Davis*, 533 U.S. 678 (2001), and other decisions. The federal courts must safeguard those rights, even as they recognize the Government's important interests in foreign affairs and national security.

Where, as here, constitutionally protected family relationships of American citizens and residents are at stake, *Mandel* instructs courts to defer to the Government's admissions decisions only if they are supported by a "facially legitimate and bona fide reason." 408 U.S. at 770. This Court has applied this vital check on the Government to protect constitutional and statutory interests in family relationships. In *Fiallo v. Bell*, while assessing an equal protection challenge to an Immigration and Nationality Act (INA) provision, this Court acknowledged "limited judicial responsibility under the Constitution" to ensure that immigration laws do not violate basic constitutional principles. 430 U.S. 787, 793 n.5 (1977). More recently, *Kerry v. Din* made clear that such judicial scrutiny carries with it a serious possibility that a Government policy will fail to meet the "facially legitimate and bona fide" standard and will be invalidated. 135 S. Ct. 2128, 2140 (2015).

The Government's attempt to evade review of the Proclamation is rooted in an outdated view of this Court's approach to judicial scrutiny in immigration cases, which has evolved to reflect modern understandings of equal protection and fundamental rights, including constitutional family rights. The Government relies upon decisions that predate this Court's recognition of constitutional family interests, such as the right to marry free from discrimination and the right to share a household with extended family members. It also relies on a conception of nonjusticiability that was originally developed in nineteenth-century rulings exempting immigration exclusions from judicial scrutiny, in part by incorporating racially discriminatory rationales prevalent in cases of that era, such as *Plessy v. Ferguson*, 163 U.S. 537 (1896). Finally, the Government relies on opinions that preceded this Court's modern First Amendment jurisprudence, which has evolved to invalidate laws motivated by "animosity" toward or "distrust" of particular religious identities and practices.

In the last fifty years, this Court has invalidated many laws motivated by hostility toward disfavored groups—especially where, as here, such laws also infringe upon the family rights of American parties. The Proclamation's broad sweep affects married couples, fiancés, parents, children, siblings, grandparents, aunts, uncles, and cousins of citizens and residents, implicating rights recognized by this Court in a long line of cases including *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), and *Troxel v. Granville*, 530 U.S. 57 (2000). Most recently, in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), this Court acknowledged the dignity inherent in choosing a life partner and in making autonomous decisions about family life. In these and other constitutional family law cases, the opportunity for mutual care and companionship, the

nurturing of children, and the exercise of responsible citizenship have supported recognition of a constitutional interest in family relationships.

The constitutional family interests recognized by the modern Court are particularly profound for transnational families. If marriage is generally "a keystone of our social order," *id.* at 2601, it is especially so for immigrants, who often rely on family for their integration into American society. Moreover, the possibility of long-term or even permanent separation poses a very real threat to family life, particularly in times of hardship and adversity. The central importance of the "two-person union" reaffirmed in *Obergefell*, 135 S. Ct. at 2589, is especially integral to families separated by distance, or riven by war, famine, or persecution. The reunification of parents and children not only facilitates Americans' exercise of their "rights of childrearing, procreation, and education," but "safeguards children and families" who are especially vulnerable. *See id.* at 2590.

This Court has been especially careful to protect individuals where, as here, Government action simultaneously infringes fundamental constitutional rights and discriminates based on unlawful animus. By targeting persons from six predominantly Muslim countries after making a series of statements expressing hostility to Muslims, the President has used race, religion, and nationality to discriminate unlawfully against the family members of certain American citizens and residents. By denigrating the religious identities, traditions, and practices of American Muslim families, the Proclamation violates the Establishment and Free Exercise Clauses. Further, the Proclamation violates the procedural due process rights of American citizens and residents whose family members seek

admission. For all of these reasons, the Proclamation should be invalidated.

These constitutional principles also provide the relevant background against which courts should interpret the various provisions of the complex INA and related federal legislation. These statutes prioritize family relationships, facilitating the reunification of nuclear and extended families by preferring relatives for permanent resident status, temporary visas, naturalization, derivative citizenship, and removal criteria. Though the Executive has authority delegated under 8 U.S.C. § 1182(f) to suspend immigration, and authority implied in 8 U.S.C. § 1185(a) to make "reasonable rules" governing the entry of aliens, that statutory authority is not absolute. The congressional purpose to support family reunification qualifies Executive authority and mandates serious scrutiny of Executive decisions for evidence of unconstitutional animus that conflicts with the INA.

Similarly, the statutory emphasis on family ties operates in concert with the INA's antidiscrimination provision, 8 U.S.C. § 1152(a)(1) ("no person shall ... be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence"). Section 1152(a)(1) reflects the constitutional commitment to nondiscrimination and thus qualifies previously enacted statutes, including Sections 1182(f) and 1185(a)(1), that grant the Executive some authority to regulate immigration.

In sum, the racial, religious, and nationality-based animus permeating the Proclamation is enough by itself to violate core constitutional principles. By targeting noncitizens on these invidious grounds, and then "slicing deeply into the family itself," *Moore*, 431 U.S. at 498, the Proclamation also violates the dignity

and integrity of family relationships as protected by the Constitution and federal statutes. The Proclamation offends established constitutional and statutory law and cannot survive meaningful judicial review.

ARGUMENT

The September 2017 Proclamation and the two Executive Orders that preceded it have disrupted the lives of many individuals and organizations, both in the United States and abroad. Many of those most directly affected are American citizens and lawful permanent residents whose interests in the companionship and care of their family members are protected by the Constitution and federal statutes.

The Proclamation's broad sweep cruelly separates families. It makes visas for the relatives of many thousands of citizens and permanent residents extraordinarily difficult, and often impossible, to obtain. The consequence will be the permanent separation of fiancés, spouses, children, parents, and other close relatives unable to live as a family in the United States.

The predicament of Respondent John Doe 1 and his family illustrates the gravity of this harm. Doe 1 is a Muslim American of Yemeni descent. Doe 1's daughter married a Yemeni national who fled to Malaysia during Yemen's civil war. Together they have a young child, also an American citizen. Doe 1's daughter petitioned for a visa to allow her husband to immigrate to the United States as the spouse of an American citizen in 2015. In 2017, she was informed that the visa application had passed through the clearance stage. Because of the Proclamation's indefinite ban on entry of Yemeni nationals, however, this family of American citizens faces the prospect of permanent

separation from the man who is their husband, father, and son-in-law. J.A. 285–87. The Proclamation also hurts many citizens and residents whose relatives seek temporary visas to join them to mark important life events, such as the birth of a child, a funeral, wedding, or graduation; to provide care to a new baby or a dying relative; or to receive medical care unavailable in their home country.

All of these citizens and residents share constitutional rights and statutory interests in having their family relationships recognized and respected by the Government. Running roughshod over those rights and interests, the Proclamation abrogates constitutional family law principles, divides families in contravention of the basic statutory scheme for immigration to the United States, and violates bedrock constitutional religious and racial equality principles.

I. FEDERAL COURTS HAVE THE POWER AND DUTY TO REVIEW EXECUTIVE BRANCH IMMIGRATION POLICIES THAT ABROGATE THE CONSTITUTIONAL RIGHTS OF AMERICAN CITIZENS AND RESIDENTS.

Federal courts have the power and the duty to enforce constitutional limitations on the political branches' power to regulate immigration. Congress and the Executive routinely regulate the flow of immigrants into the United States. But this power to regulate immigration does not allow violations of citizens' and lawful permanent residents' constitutional rights. Because of their ties to the nation, citizens and permanent residents have judicially recognized and enforceable constitutional interests. *See Landon v. Plasencia*, 459 U.S. 21, 33 (1982) (noting that "once an alien gains admission to our country and

begins to develop the ties that go with permanent residence his constitutional status changes accordingly"); *Plyler v. Doe*, 457 U.S. 202 (1982) (striking down Texas law discriminating against undocumented children).

Thus, contrary to the Government's assertions in this case, separation-of-powers principles require courts to scrutinize immigration laws and actions that implicate the constitutional rights of American citizens and lawful permanent residents. In *Kleindienst v. Mandel*, this Court recognized the constitutional interests of citizens in assessing the lawfulness of an immigration restriction. 408 U.S. 753, 762 (1972). There, the Court considered whether the Government's decision to deny admission to the Belgian Marxist scholar Ernst Mandel was unlawful because it violated the First Amendment rights of persons in the United States to meet and speak with him. On the facts of that case, the Court determined that Mandel's violations of the terms of admission in previous visits constituted a "facially legitimate and bona fide reason" sufficient to deny Mandel the temporary visa he sought. *Id.* at 769–70. Importantly, however, this Court recognized that the American scholars who had invited Mandel had a constitutionally protected interest in meeting and conversing with him. Though Mandel, "as an unadmitted and nonresident alien," had no constitutional right to admission, the American plaintiffs had constitutional claims that the courts must hear and adjudicate. *Id.* at 762.

More recently, in *Zadvydas v. Davis*, this Court invalidated the indefinite detention of noncitizens beyond six months absent a significant likelihood of removal in the reasonably foreseeable future. 533 U.S. 678, 701 (2001). This Court's analysis made clear first,

that well-established constitutional protections apply to lawful permanent noncitizen residents, even those who lose lawful status because of criminal convictions, *id*. at 693; and second, that the indefinite detention of former noncitizen residents raised a constitutional question serious enough, applying the doctrine of constitutional avoidance, to limit the duration of detention authorized by 8 U.S.C. § 1231(a)(6). *See* 533 U.S. at 694–95. This Court's constitutional reasoning in *Zadvydas* left no doubt that noncitizen residents may invoke the protections of the Constitution where, as here, a Government immigration decision impairs their interests. In short, this Court has recognized the constitutional interests of citizens and noncitizen residents alike, and—where those interests are or would be violated—provided a remedy.

Many of the cases in which an American citizen or lawful permanent resident has an interest in the visa status of a noncitizen are cases involving a family relationship between the citizen or resident and the noncitizen. In these cases, this Court has recognized the American party's interest when considering whether the Government acted lawfully in deciding to exclude or remove the noncitizen. For example, in *Fiallo v. Bell*, 430 U.S. 787 (1977), this Court reviewed a constitutional challenge to Congress's definition of "child" in 8 U.S.C. §§ 1101(b)(1)(D), 1101(b)(2). In reviewing, though ultimately upholding, these statutory provisions, the Court explicitly rejected the Government's argument that the plaintiffs' claims were nonjusticiable. Instead, the Court recognized its "limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and

exclusion of aliens." 430 U.S. at 793 n.5.[2] Similarly, in *Landon v. Plasencia*, this Court recognized that a lawful permanent resident has "without question" a "weighty" interest sufficient to invoke procedural due process protections: "She stands to lose the right 'to stay and live and work in this land of freedom,'" and "may lose the right to rejoin her immediate family, a right that ranks high among the interests of the individual." 459 U.S. at 34 (remanding exclusion case for application of *Mathews v. Eldridge,* 424 U.S. 319 (1976), procedural due process test).

More recently, in *Kerry v. Din*, 135 S. Ct. 2128 (2015), this Court reaffirmed the federal courts' authority to decide cases implicating constitutional family rights. This judicial prerogative exists even where Congress by statute has exercised its authority over immigration to empower consular officials to adjudicate individual visa applications. Therefore it most definitely exists when a Presidential Proclamation dispenses with such procedural protections altogether in favor of a categorical ban.[3] In *Din*, the State Department had denied an immigrant visa to the spouse of an American citizen, and that citizen subsequently petitioned this Court to require that Department to provide an explanation. The Court produced a fractured set of opinions, but six of the nine Justices acknowledged that a citizen's constitutional family rights warranted judicial protection, even when the issue is admission of a noncitizen to the United States. *See id.* at 2139–41 (Kennedy, J., concurring)

---

[2] Given this, the Government's citation to *Fiallo* in support of its contention that Respondents' claims are nonjusticiable is particularly misguided. *See* Gov't Br. 21.

[3] As argued in Part IV, *infra,* the waiver provisions are wholly inadequate to cure the Proclamation's constitutional defects.

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

In *Din*, like *Mandel*, this Court found that the Executive had satisfied the "facially legitimate and bona fide reason" requirement. *Id.* But this Court has also made clear that if the Government acts for a reason that is *not* "facially legitimate and bona fide," the challenge must be sustained and the denial of admission must be invalidated.

In sum, courts routinely scrutinize immigration laws and Executive Branch policies for unconstitutionality, and courts have authority to invalidate laws and actions that violate citizens' and residents' constitutional rights—especially where familial relationships are at issue.

II. THE PRESIDENTIAL PROCLAMATION VIOLATES MODERN CONSTITUTIONAL COMMITMENTS TO FAMILY RIGHTS, AS WELL AS CONSTITUTIONAL RACIAL AND RELIGIOUS ANTI-DISCRIMINATION PRINCIPLES.

To save the Proclamation from constitutional challenge, the Government cites precedents that appear to offer some insulation from judicial scrutiny. In the years since the Court issued those decisions, however, the constitutional landscape has changed fundamentally, both in the degree of deference that courts afford the political branches, and in the contours of the individual rights and interests that receive constitutional protection. Assessed against these now well-established principles, the Proclamation is clearly unconstitutional.

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

Early in our nation's history, this Court granted much more deference to the political branches in immigration cases than it does today. Much of this change reflects the transformation of this Court's jurisprudence on equal protection and fundamental rights, including constitutional family rights.

The earliest cases establishing congressional authority over immigration upheld the exclusion and deportation of Chinese immigrants by embracing racially discriminatory rationales. *See Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 606 (1889) (affirming Government's

power to determine that "foreigners of a different race" are "dangerous"); *Fong Yue Ting v. United States*, 149 U.S. 698, 729–32 (1893) (affirming Government's power to require "one credible white witness" for Chinese residents to obtain certificate necessary to avoid deportation). The Court decided these cases around the time it concluded that Jim Crow laws and racial segregation were constitutional. *See, e.g.*, *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding "separate but equal" railway cars for blacks and whites).

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

Even when applying a deferential standard of review, this Court has held repeatedly that a finding of "animus" or a "bare … desire to harm" a particular group is sufficient to invalidate a statute. *See, e.g.*, *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534–535 (1973)) (holding that the "Constitution's guaran-

tee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group").

Although this Court still gives Congress more latitude in immigration matters than in many other areas, the racially discriminatory immigration statutes in *Chae Chan Ping* and *Fong Yue Ting* would now not survive even the most deferential review, nor would a statute targeting religious minorities or using immigration law to establish religion. *See Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999) (noting that "discrimination" that is "outrageous" could require invalidation of Executive action in an immigration case); *cf. Din*, 135 S. Ct. at 2136 (Scalia J., concurring) (observing that "[m]odern equal-protection doctrine casts substantial doubt on the permissibility of [the] asymmetric treatment of women citizens" in nineteenth- and early-twentieth-century immigration statutes).

B. This Court recognizes a broad array of modern family rights protected under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

The Government attempts to evade judicial review of the Proclamation by relying on immigration decisions that predate this Court's recognition of American citizens' and lawful permanent residents' constitutional interest in the recognition of their family relationships. It was long before the emergence of a robust body of jurisprudence protecting the family that this Court rejected procedural due process challenges brought by the spouses of American citizens who had been barred from the United States. In *United States ex rel. Knauff v. Shaughnessy*, 338

U.S. 537 (1950), the German-born wife of an American citizen was excluded without a hearing on the ground that her admission would be "prejudicial to the interests of the United States." *Id.* at 539. In *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), a permanent resident of the United States left his wife and children in upstate New York to visit his dying mother abroad and was denied entry upon his return on suspicion of communist activity because of his trip behind the "Iron Curtain." In both cases, the Court held that it could not review a political branch's decision to exclude a particular noncitizen. *Knauff*, 338 U.S. at 543; *Mezei*, 345 U.S. at 212.

Just as it decided *Chae Chan Ping* and *Fong Yue Ting* before the emergence of modern equal protection doctrine, this Court decided *Knauff* and *Mezei* before this Court had developed its current constitutional approach to family rights. *See* Kerry Abrams, *Family Reunification and the Security State*, 32 Const. Comm. 247, 250–58 (2017). Thus, in *Knauff* and *Mezei*, the Court did not consider the constitutional interests of family members—to share a common residence, to marry unconstrained by racial discrimination—or the many other facets of constitutional family rights recognized by this Court today.

This Court's late-twentieth-century recognition that the Due Process and Equal Protection Clauses of the Fourteenth Amendment protect family relationships has deep historical roots. U.S. Const. amend. XIV; *see also Meyer v. Nebraska*, 262 U.S. 390 (1923) (recognizing parental interest in shaping child's education under the Due Process Clause). But crucially for today's understanding of how the Constitution applies to immigration cases involving family ties, this Court's conception of the constitutional status of familial

relationships expanded in the second half of the twentieth century to include the right of adults to marry where they live, *see Loving v. Virginia*, 388 U.S. 1 (1967); *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978); the right to choose whether to bear or beget a child, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); and the right to procedural due process in the termination of a legal parent-child relationship, *Stanley v. Illinois*, 405 U.S. 645 (1972).

The scope of family interests recognized by this Court extends far beyond rights to fair and equal treatment in the formation of family relationships, to encompass the rights enjoyed by family members by virtue of their legal relationships. These include the right to live in a shared household as a family, *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977), and the right of adult couples to privacy in intimate matters, *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Lawrence v. Texas*, 539 U.S. 558 (2003).

In addition to recognizing a wide array of interests grounded in constitutional family rights, the modern Court has defined family capaciously to include not only marriage and biological parent-child relationships, but also relatives beyond the nuclear family. In *Moore*, 431 U.S. 494, for example, Justice Powell observed, "Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition." *Id.* at 504 (plurality opinion); *see also Troxel v. Granville*, 530 U.S. 57, 64 (2000) (reaffirming importance of extended family ties, particularly for

children whose parents are unable to care for them); *id.* at 98 (Kennedy, J., dissenting).

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

The principles undergirding judicial recognition of constitutional family rights as articulated by this Court in *Obergefell* apply as strongly to transnational families. With the world increasingly interconnected and a significant number of multi-national and trans-national families within the United States, the "personal choice" regarding marriage and family formation "inherent in the concept of individual autonomy" does not stop at a national border, *see id.* at 2599. The importance of marriage is especially profound when a family faces potentially life-long separation as a result of this Proclamation; for these families the "universal fear" of living without loved

ones is especially acute. *See id.* at 2599–2600. The reunification of parents and children "safeguards children and families" and facilitates American citizens' and residents' exercise of their "rights of childrearing, procreation, and education." *See id.* And if marriage is "a keystone of our social order," *id.* at 2601, it is emphatically so in relationships involving immigrants, who often rely on family to facilitate their integration into American society. Our immigration laws recognize the crucial protective and stabilizing role of family by facilitating family reunification. *See* Part III.B, *infra*.

In some instances, American citizens and lawful permanent residents might be able to move to their relatives' countries of residence, but this Court's family law decisions make clear that a relocation option does not save a restrictive statute from constitutional infirmity. For one thing, many citizens and lawful permanent residents cannot relocate to another country without fear of persecution or other harm. Moreover, even if they could, forcing them do so would impose the same hardship that this Court declined to countenance in *Loving* and *Obergefell*. The Lovings traveled from Virginia to the District of Columbia to marry because Virginia would not allow it, but the state statute also barred their return to Virginia to live as a married couple. *Loving*, 388 U.S. at 2–4. The Court found this constitutionally impermissible. *Id.* at 11–12; *see also Obergefell*, 135 S. Ct. at 2595 (noting that nonrecognition of a marriage legally solemnized in another state creates a "substantial burden" on the right to travel).

To be sure, this Court has never viewed constitutional family rights as automatically overriding the Government's interests in regulating families. But

this Court has been careful to give solemn consideration to claims that a particular policy abrogates a family's practical and dignitary interests. For example, in assessing challenges based on discrimination or violations of fundamental rights protected by the Due Process or Equal Protection Clauses, this Court applied searching scrutiny. *See, e.g.*, *Zablocki*, 434 U.S. at 388 (holding that "[w]hen a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests"); *Windsor*, 133 S. Ct. at 2692 (quoting *Romer v. Evans*, 517 U. S. 620, 633 (1996)) (holding that "discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision"). In assessing procedural due process challenges, this Court has required a "clear and convincing" evidentiary standard for the termination of parental rights, *Santosky v. Kramer*, 455 U.S. 745, 748 (1982); the waiver of court fees for indigent litigants in divorce cases, *Boddie v. Connecticut*, 401 U.S. 371 (1971); and the waiver of transcript fees for indigent appellants in parental termination cases, *M.L.B. v. S.L.J.*, 519 U.S. 102, 128 (1996); *id.* at 128 (Kennedy, J., concurring) (state required to waive fee because case involved "the rights and privileges inherent in family and personal relations").

In sum, the Government relies on obsolete precedents that reflect an unduly narrow conception of courts' obligation to review immigration restrictions that interfere with constitutional rights to due process and equal protection of the laws.

C. This Court has afforded broad constitutional protections to family relationships, especially when a Government policy violates multiple constitutional principles.

This Court has been especially careful to protect individuals where Government action simultaneously infringes fundamental constitutional rights and discriminates based on unlawful animus. In *Loving*, for example, this Court struck down the discriminatory Virginia statute under both the Equal Protection and Due Process Clauses, declaring that "[t]o deny this fundamental freedom [to marry] on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law." 388 U.S. at 12. In *Obergefell*, this Court explained that "[r]ights implicit in liberty and rights secured by equal protection … are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other." 135 S. Ct. at 2603. Where there are two constitutional interests in family relationships at stake, such as equality and a fundamental right as in this case, those interests reinforce each other.

Sometimes, this mutual reinforcement is enough to require constitutional scrutiny of a claim that would otherwise receive none, or to heighten scrutiny of a claim that might seem at first to merit more deferential review. For example, in *Plyler v. Doe*, 457 U.S. 202 (1982), this Court applied intermediate scrutiny to strike down a law that effectively prevented undocumented children from attending public schools. It did

so, even acknowledging that prevailing doctrine did not view undocumented noncitizens as a "protected class," nor education as a "fundamental right." *Id.* at 223. *See generally* Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. Rev. 1309, 1338–39 (2017).

This Court has also applied heightened scrutiny when Government action infringes individual rights while also violating structural constitutional principles. For example, in *I.N.S. v. Chadha*, this Court declared unconstitutional an immigration statute that allowed one house of Congress to veto an Executive Branch decision, made under its delegated power, to allow a deportable noncitizen to remain in the United States. 462 U.S. 919, 923, 959 (1983). Although *Chadha* concerned the individual rights of a lawful permanent resident under the statute, the Court decided the case on structural constitutional principles. *Id.* at 950–52. It did so *despite* the "political" nature of the decision to deport a noncitizen, reasoning that the framers designed the Constitution to prevent both Congress and the Executive from succumbing to despotism, which the Court noted "comes on mankind in different shapes." *Id.* at 949 (quoting 1 M. Farrand, *The Records of the Federal Convention of 1787*, at 254 (1911)).

Other structural constitutional provisions also safeguard the individual rights of citizens and lawful permanent residents, including those protected by the Establishment Clause. U.S. Const. amend. I. As this Court has noted, the intent of the Establishment Clause "was to assure that the national legislature would not exert its power in the service of any purely religious end; that it would not ... make of religion, as religion, an object of legislation." *McGowan v.*

Maryland, 366 U.S. 420, 465–66 (1961). As the Respondents argue, the Proclamation establishes a disfavored religion, thus compounding its constitutional infirmity.

In summary, where the Government impairs fundamental family rights protected by the Constitution in ways that also violate equal protection, the Establishment Clause, or the Constitution's structural provisions, courts apply meaningful constitutional review even in contexts, such as immigration, where review is relatively deferential.

D. This Court should invalidate the Proclamation because it infringes the constitutional family rights of American citizens and lawful permanent residents.

The Proclamation infringes the constitutional family rights of American citizens and lawful permanent residents in two distinct but related ways. First, by targeting residents of predominantly Muslim countries for disparate treatment,[4] the Proclamation deploys invidious racial and religious discrimination to deny citizens and lawful permanent residents their fundamental constitutional family rights. Standing alone, this discrimination is enough to invalidate the Proclamation. Targeting particular noncitizens for

[4] The Proclamation also suspends the entry of all nationals of North Korea and certain classes of government officials from Venezuela. See Proclamation §§ 2(d) & 2(f). North Korea and Venezuela are not Muslim-majority countries, but their inclusion in the Proclamation is of minimal practical significance. Only a tiny number of North Koreans seek admission to the United States and the restriction on Venezuelan officials does not limit the entry of the vast majority of Venezuelans under the generally applicable admission criteria.

unfavorable treatment based solely on their religion, race, or nationality violates the Equal Protection, Free Exercise, and Establishment Clauses. This rank stereotyping of an entire people as undesirable is exactly the type of "rare case" of "outrageous" discrimination anticipated by this Court in *American-Arab Anti-Discrimination Committee*, 525 U.S. at 491.

Here, the Government has gone even further. The Proclamation targets noncitizens based on race, religion, and nationality *and* it "slic[es] deeply into the family itself," *Moore*, 431 U.S. at 498, in violation of the rights affirmed by this Court's long line of constitutional family cases, from *Loving* to *Obergefell*. The Proclamation uses impermissibly discriminatory means to interfere with the ability of citizens and lawful permanent residents to nurture and maintain close family relationships. As in *Loving*, this Court should recognize that the "denial of fundamental freedom on so unsupportable a basis as … racial classifications" deprives citizens and lawful permanent residents of their liberty and equality rights. *Loving*, 388 U.S. at 11.

Second, the Proclamation violates the procedural due process rights of citizens and residents whose family members seek admission to the United States by placing enormous and disproportionate obstacles to fair consideration of their admissibility. This Court has recognized that constitutional family interests are sufficiently grave to merit procedural due process when curtailed. *See Plasencia*, 459 U.S. at 23, 34 (recognizing the due process interests of a lawful permanent resident who "established a home in Los Angeles with her husband, a United States citizen, and their minor children" and finding the "right" of lawful permanent resident "to rejoin her immediate

family" sufficient to require procedural due process analysis); *Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring) (requiring that Government's specific finding of noncitizen's inadmissibility under the INA's terrorism bars satisfy procedural due process). Like the plaintiff in *Din*, the American family members of noncitizens affected by the Proclamation have a constitutional family interest in reunification with their relatives. This interest holds whether the relative is a spouse, *see Obergefell*, 135 S. Ct. 2584, a child, *see Troxel*, 530 U.S. 57, or an extended family member, *see Moore*, 431 U.S. 494.

Even under the relatively deferential standard that courts use in immigration cases, the Proclamation fails. Under *Din* and *Mandel*, this Court must determine whether the Executive had a "bona fide" and "facially legitimate" reason to exclude the specific individuals targeted by the Proclamation. In *Din*, the Court evaluated an agency decision about a *specific* individual's *specific* activities that allegedly made him inadmissible under the terrorism bars. 135 S. Ct. at 2141 (Kennedy, J., concurring). Here, however, the Government has made no specific findings as to any of the excluded individuals—including those with close family ties to American parties. Instead, the Proclamation presumptively excludes large classes of visa applicants from six predominantly Muslim countries, regardless of whether there is any evidence of their inadmissibility.

Governmental action that severs the familial relationships of Americans and their noncitizen relatives must be invalidated, especially where motivated by animus toward Muslims—including Muslim Americans. Unlike every other immigration case in which this Court has applied the "facially legitimate and bona

fide reason" test, the policies established under the Proclamation do not provide an individual assessment of an individual application for a visa, opting instead for the blunt and unconstitutional tool of excluding millions of people on the basis of religion, race, and nationality alone.

III. THIS COURT SHOULD INVALIDATE THE PROCLAMATION BECAUSE IT INFRINGES THE STATUTORY INTERESTS OF AMERICAN CITIZENS AND LAWFUL PERMANENT RESIDENTS WHOSE FAMILY MEMBERS ARE BARRED FROM ENTRY ON RACIALLY AND RELIGIOUSLY DISCRIMINATORY GROUNDS.

To support his Proclamation, the President cites two provisions of the federal immigration statutes—8 U.S.C. § 1182(f) and § 1185(a)(1).[5] Section 1182(f) delegates authority to the President to "suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants." 8 U.S.C. § 1182(f). Section 1185(a)(1) makes it unlawful for a noncitizen to enter

[5] The Proclamation also references 3 U.S.C. § 301 as authority. Section 301 authorizes the President to delegate authority to heads of departments or agencies to perform functions vested in the President by law. It does not authorize the President to authorize such officials to violate the Constitution or statutory protections of individual rights, such as that found in 8 U.S.C. § 1152(a)(1)(A) ("no person shall ... be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence"). Section 301 also does not authorize the President to direct Executive Branch officials to enforce restrictions on entry that radically diverge from the structure and function of the entire admissions portion of the INA. *See infra* discussion at pp. 29–31.

or exit the country except according to "reasonable rules" promulgated by the President. 8 U.S.C. § 1185(a)(1). Congress enacted both of these provisions in 1952. The Government contends that these statutory provisions give the President carte blanche to regulate immigration however he sees fit, regardless of how such regulation offends fundamental constitutional commitments and the statutory interests of American citizens and lawful permanent residents.

But other provisions of the INA operate more specifically and make clear that the Proclamation exceeds Executive Branch authority as defined by Congress in legislation. These provisions limiting Executive authority are supported by the many other INA provisions that emphasize—in terms both specific and general—the importance of family relationships in the admission of noncitizens to the United States. Because even the most expansive reading of this combination of INA provisions leaves the statutory authority for the Proclamation unclear, this Court should construe the INA to invalidate the Proclamation—especially in light of this Court's recognition of weighty constitutional interests in family relationships, as explained in Parts I and II above.

A. Federal courts routinely provide authoritative interpretations of the INA and require the Executive Branch to conform its policies and practices to the statutory scheme developed by Congress.

The Government argues that federal courts lack authority to review Respondents' statutory claims, or otherwise to evaluate the Executive Branch's interpretation of the relevant provisions of the INA. In

making this argument, the Government argues that nothing in the INA permits judicial review of the Executive's denial of a visa for an American citizen's or resident's family member. The apparent reasoning is that American citizens and residents may challenge only the initial classification of a family member as eligible for immigration, not the subsequent issuance of a visa. *See* Gov't Br. 25. Regardless of the merits of that distinction, the Proclamation renders the family members of many thousands of American citizens and residents presumptively ineligible for lawful entry. The harm caused by the Proclamation is profound, and directly abrogates the statutory interests of many thousands of citizens and residents. *See* Part III.B, *infra*. Those statutory violations are reviewable and remediable by the federal courts.

Federal courts routinely review claims that the Executive Branch has implemented the INA in a manner that harms the interests of citizens and lawful permanent residents. *See, e.g.*, *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014) (reviewing Government's interpretation of a statute regulating visa allocations for children of lawful permanent residents); *Ginters v. Frazier*, 614 F.3d 822, 827–28 (8th Cir. 2010) (collecting cases in which federal courts have reviewed denials of visa petitions filed for close family members by American citizens). In such cases, the federal courts do not hesitate to require the Executive Branch to implement the INA in a manner consistent with the best construction of that statute. *See, e.g.*, *Akram v. Holder*, 721 F.3d 853, 864 (7th Cir. 2013) (rejecting Government's interpretation of an immigration provision governing visa eligibility of child of lawful permanent resident, and observing that "[t]he executive branch cannot decide, by rule or by decision, to abandon a duty that Congress has

delegated to it."); *Medina-Morales v. Ashcroft*, 371 F.3d 520, 531–32 (9th Cir. 2004) (affirming longstanding rule that an American citizen stepparent could petition for a stepchild and reversing a Board of Immigration Appeals decision that required petitioner to show strength of his relationship to stepchild).

Judicial review of the Executive Branch's implementation of the INA is entirely consistent with the duty of federal courts to provide dispositive interpretations of federal law, and "to prevent an injurious act by a public officer." *Armstrong v. Exceptional Child Ctr., Inc.,* 135 S. Ct. 1378, 1384 (2015). So too, the Ninth Circuit's review of the Executive Branch's implementation—or, in this case, abrogation—of the INA was fully consistent with routine judicial practice of reviewing denials of visa petitions and determinations of immigration status challenged by American citizens and lawful permanent residents on behalf of their noncitizen family members.

B. The Proclamation infringes the statutory interests of American citizens and lawful permanent residents whose family members are barred from entry on racially and religiously discriminatory grounds.

The Government cites two statutory provisions in support of the Proclamation—8 U.S.C. § 1182(f) and § 1185(a)(1). Even if read expansively, these provisions fall short of congressional delegation of authority to the President to issue a Proclamation as far-reaching and overbroad as this one, much less to impose a restriction of indefinite duration. Each section includes conditions and requirements that limit the authority delegated. For example, Section 1182(f) provides that only where the President finds

that the entry of immigrants would be "detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry" of immigrants or "impose on the entry of aliens any restrictions he may deem to be appropriate." *See* 8 U.S.C. § 1182(f); *see also Jennings v. Rodriguez*, 138 S. Ct. 830, 842–44 (2018).

Other statutes limit presidential authority in ways that further counter the Government's argument that the Proclamation is authorized by, and consistent with, the INA. Most obviously, Congress limits the ability of the President and the agencies he oversees to issue visas in a way that discriminates on the basis of race or nationality among other grounds. *See* 8 U.S.C. § 1152(a)(1)(A).

The Respondents' brief explains more fully how multiple layers of statutory conditions combine to make clear that the INA does not confer authority to issue the Proclamation. But to understand the complete set of statutory provisions that limit the scope of presidential authority to issue the Proclamation, it is also essential to go one step further and consider the broader set of INA provisions that call for the admission of family members to the United States and otherwise recognize family relationships in a wide variety of circumstances.

Many statutory provisions limit Executive Branch authority by implementing Congress's decision to recognize family relationships as the basis for admission—and as the basis for decisions affecting deportability, naturalization, and other matters addressed throughout the INA. As a general matter, the 1965 amendments to the INA were intended to cure the "un-American" separation of families that had

been all too common under the racially and ethnically motivated national-origin quotas. As President Lyndon B. Johnson declared, after the 1965 Act was implemented, families would no longer be divided simply because "a husband or a wife or a child had been born in the wrong place." Lyndon B. Johnson, Remarks at the Signing of the Immigration Bill (Oct. 3, 1965), http://www.lbjlibrary.org/lyndon-baines-johnson/timeline/lbj-on-immigration.

Any reading of Sections 1182(f) and 1185(a)(1) that might seem to authorize the Proclamation would conflict with the clear congressional preference as set forth in the INA—a detailed statutory structure with many specific provisions that recognize the importance of family relationships and are designed to keep families together. The INA provides permanent residence for the immediate relatives of American citizens, for the immediate relatives of permanent residents, and for the adult and married children and siblings of citizens. 8 U.S.C. §§ 1151, 1153. In 2015, the most recent year for which data is available, over half of the "employment-based" and "diversity" permanent residency visas went to the spouses and children of primary beneficiaries, as did over a third of refugee and asylee admissions. Office of Immigration Statistics, *Persons Obtaining Legal Permanent Resident Status, Lawful Permanent Residents (LPRS)*, Table 7d, https://www.dhs.gov/immigration-statistics/lawful-permanent-residents. Moreover, some noncitizens within the United States may avoid removal and secure a green card provided they can show, among other things, that their removal would negatively impact an American citizen spouse, parent, or child. *See* 8 U.S.C. § 1229b(b)(1)(D). All told, the family members of American citizens or permanent residents accounted for about 80% of new immigrants to the United

States in 2015. *Id.* (at least 839,203 of the 1,051,031 are either family-preference, immediate-relative, or derivative-beneficiary grants of permanent residence).

These statutory provisions are designed to keep both nuclear and extended families together, and they extend far beyond the basic rules for permanent residence for family members. Reflecting the same statutory recognition of family relationships that this Proclamation tries to override, many noncitizens who hold temporary visas do so as the spouses or children of nonimmigrant temporary workers. 8 U.S.C. § 1101(a)(15). Further statutory recognition by Congress of family relationships include a shorter waiting period for eligibility to become a naturalized citizen for the spouses of U.S. citizens, 8 U.S.C. § 1430, derivative citizenship by birth and automatic naturalization for the children of American citizens, 8 U.S.C. §§ 1401, 1431, 1433, and cancellation of removal criteria that allow some otherwise removable immediate family members of American citizens and lawful permanent residents to remain in the United States. 8 U.S.C. § 1229b.

These statutes reflect Congress's respect for the dignity of families, help to protect children, and foster responsible citizenship. They also limit any authority that the Executive has been delegated under 8 U.S.C. § 1182(f) to suspend immigration, or that might be implied under 8 U.S.C. § 1185(a)(1) to promulgate "reasonable rules."

The most the Government can persuasively argue here is that the INA, with its pervasive emphasis on family reunification, provides only a very tenuous and unclear basis for its authority to issue this Proclamation. This is exactly the kind of case in which the canon of constitutional avoidance can and should

be employed. As this Court has explained, the canon of constitutional avoidance "comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction." *See Clark v. Martinez*, 543 U.S. 371, 385 (2005). Just this term, this Court clarified the conditions under which courts may construe statutes to avoid possible constitutional infirmities—namely, where the statutory provision at issue is ambiguous. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 843 (2018). After considering these statutory constraints on Executive power, the statutory basis for the Proclamation remains ambiguous. Hence, the constitutional considerations explained in Parts I and II above strongly support concluding that the Proclamation violates federal immigration statutes.

IV. THE WAIVER PROCESS SET FORTH IN THE PROCLAMATION DOES NOT CURE THESE STATUTORY AND CONSTITUTIONAL PROBLEMS.

The Government urges that the waiver process set forth in the Proclamation cures these statutory and constitutional problems. Proclamation § 3(c). It does not. The waiver provision in the Proclamation imposes new and distinctive burdens on individuals from the six Muslim-majority countries. They must demonstrate (1) "undue hardship" caused by denial of entry, (2) that their entry "would not pose a threat to the national security or public safety of the United States," *and* (3) that their "entry would be in the national interest." Hence, the Proclamation still targets individuals based on their religion, race, and nationality. Other noncitizen family members of American citizens and residents seeking admission who do not reside in one of the six predominantly

Muslim countries identified in the Proclamation need not make special showings regarding "undue hardship," security and safety, and "national interest."

By contrast, whenever this Court has applied the "facially legitimate and bona fide reason" test to evaluate individual determinations by immigration officials, the Court has used standards that treat equally persons of all races, religions, and nationalities. *Kerry v. Din*, 135 S. Ct. 2128 (2015); *Fiallo v. Bell*, 430 U.S. 787 (1977); *Kleindienst v. Mandel*, 408 U.S. 753 (1972). Hence, any reasons offered by the Government for a waiver denial cannot be *facially* legitimate. It is well established that the right to due process before a family relationship is substantially burdened or terminated may not be afforded in a manner that discriminates based upon poverty, marital/birth status, or sex, much less race, religion, or national origin. *See, e.g.*, *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (to "presum[e] rather than prov[e]" an unmarried father's unfitness while affording unmarried mothers and married parents a hearing before a child is removed from their custody "denied him equal protection of the laws"); *Palmore v. Sidoti*, 466 U.S. 429 (1984) (to remove a child from a mother's custody because of her interracial relationship violates equal protection).

Even if separate and unequal requirements were permissible, the waiver process does not provide a meaningful opportunity for individuals from the targeted countries to overcome the Proclamation's entry ban. Although the Government maintains that individuals "could" apply for "[c]ase by case" waivers under Section 3, Section 16(c) explicitly disclaims any "enforceable" right, "substantive or procedural." J.A. 1440. Nor does the Government provide any opportunity, enforceable or otherwise, to be notified of the

reasons underlying a waiver denial, much less to be heard or to appeal such a denial. As a practical matter, very few waivers have been granted. As of February 15, 2018, out of 8,406 visa applications from these countries, only two applicants received waivers. *See* Letter from Mary K. Waters, Assistant Sec'y, Legislative Affairs, U.S. Dep't of State, to The Honorable Chris Van Hollen, U.S. Senate (Feb. 22, 2018), http://fingfx.thomsonreuters.com/gfx/reuterscom/1/60/60/letter.pdf. The State Department subsequently indicated that approximately one hundred waivers have been granted, a tiny fraction of the waiver applications that the Government has summarily denied. *See* Yeganeh Torbati & Mica Rosenberg, *Visa Waivers Rarely Granted Under Trump's Latest U.S. Travel Ban*, Reuters, Mar. 6, 2018, https://www.reuters.com/article/us-usa-immigration-travelban-exclusive/exclusive-visa-waivers-rarely-granted-under-trumps-latest-u-s-travel-ban-data-idUSKCN1GI2DW. Even applicants whose visas the Government had already approved have been denied, most without explanation and without any opportunity to make an individualized showing of eligibility for a waiver. *See* Michael Price & Peter Keffer, *The Empty Promise of 'Waivers' from Trump's Muslim Ban*, Just Security (Mar. 8, 2018), https://www.justsecurity.org/53484/empty-promise-waivers-trumps-muslim-ban/.

The waiver provision could not cure the Proclamation's constitutional defects even if it provided a genuine path to entry for eligible applicants. *Cf. Trimble v. Gordon*, 430 U.S. 762 (1977) (holding that plaintiff need not show that state imposed "insurmountable barrier" to the recognition of a parent-child relationship in order to bring successful constitutional challenge); *Moore v. City of E. Cleveland*, 431 U.S. 494, 511–12 (1977) (Brennan, J.,

concurring) (the ability to seek a variance (waiver) from a zoning ordinance barring a grandmother from living with her grandchild "is irrelevant … because the municipality is constitutionally powerless to abridge … the freedom of personal choice of related members of a family to live together"). The waiver provisions' practical inefficacy for most applicants highlights the invidiously discriminatory nature of the entry ban. The Government's stingy implementation of the waiver provisions also suggests that these provisions are designed to disguise discrimination rather than to provide a genuine opportunity for entry by individuals who can satisfy the Government's requirements.

Discrimination based on animus toward a particular race, religion, or nationality is not a "bona fide" or "facially legitimate" reason to deny or revoke a visa, or to impose additional burdens on those seeking entry. Under the "bona fide and facially legitimate" test mandated by *Mandel* and *Din*, the Proclamation fails. The Proclamation also violates the core anti-discrimination commitments of the INA—a statute designed to unite not divide families. The waiver process does not resolve the fundamental defects of a Proclamation that so clearly abrogates the constitutional and statutory rights and interests of American citizens and lawful permanent residents.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

ROBERT A. WIYGUL
Counsel of Record
MARK A. ARONCHICK
HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER
One Logan Square, 27th Floor
Philadelphia, PA 19103
(215) 568-6200
rwiygul@hangley.com

Counsel for Amici Curiae

March 30, 2018

APPENDIX

APPENDIX

AMICI CURIAE LAW PROFESSORS*

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

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

Ann Laquer Estin holds the Aliber Family Chair in Law at the University of Iowa. Professor Estin teaches primarily in the area of family law, with a particular focus on international and comparative family law. She has written extensively in these areas, and is the author of the *International Family Law*

---

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

Desk Book (2d ed. 2016). Professor Estin is an elected member of the American Law Institute.

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

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

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

Hiroshi Motomura is the Susan Westerberg Prager Professor of Law at the School of Law,

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

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