No. 17-965

In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioners,

v.

HAWAII, ET AL.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* MICKEY EDWARDS AND EINER ELHAUGE IN SUPPORT OF RESPONDENTS

TADHG DOOLEY
Counsel of Record
BENJAMIN M. DANIELS
RICHARD LUEDEMAN
WIGGIN AND DANA LLP
265 Church Street
New Haven, CT, 06508
(203) 498-4400
tdooley@wiggin.com

Counsel for Amici Curiae

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QUESTION PRESENTED

This brief addresses Question 2 in the Petition for Certiorari: Whether the Proclamation is a lawful exercise of the President's authority to suspend entry of aliens abroad.

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INTERESTS OF AMICI CURIAE[1]

Mickey Edwards is a former member of Congress who served Oklahoma's 5th Congressional District from 1977 to 1993. As a member of Congress, Representative Edwards was committed to preserving the constitutional separation of powers and guarding against excessive concentration of power in the Oval Office, regardless of its occupant. After leaving Congress, Representative Edwards taught for eleven years at Harvard's Kennedy School of Government and then at Princeton's Woodrow Wilson School of Public and International Affairs. His teaching and scholarship has focused on Congress and the separation of powers, among other subjects.

Einer Elhauge is the Petrie Professor of Law at Harvard Law School.[2] A noted expert on antitrust, healthcare, and corporate law, Professor Elhauge has also written widely on statutory interpretation. His book *Statutory Default Rules: How to Interpret*

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *Amici* and their counsel made a monetary contribution for the preparation and submission of this brief. Petitioners have filed a blanket consent to the filing of amicus briefs. Respondents have consented to the filing of this brief.

[2] The views expressed here are by Professor Elhauge in his individual capacity and are not intended to reflect the views of Harvard University.

Unclear Legislation (2008) proposed a series of default rules for interpreting ambiguous statutes so as to maximize political satisfaction and reinforce principles of representative democracy. His scholarship has been cited with approval by both state and federal courts.

Amici have an interest in seeing that the Court decides this case in a manner that does not unduly bind Congress and preclude a legislative response. Representative Edwards believes, based on his experience in Congress, that this Court should generally construe statutory delegations of power narrowly in order to preserve the separation of powers, especially in light of the ratcheting effect the presidential veto has on the concentration of power in the executive branch. Professor Elhauge believes, based on his study of public law and principles of statutory construction, that the Court should generally decide close cases in the manner most likely to elicit clarification from Congress, which typically means construing a statute in favor of the party with less political power. In this case, *Amici's* views coalesce around a common argument: The Court should construe § 1182(f) narrowly, against the President.

SUMMARY OF THE ARGUMENT

Because the power to exclude aliens inheres in Congress, Proclamation No. 9645 can only withstand Respondents' challenge if the President issued it pursuant to authority properly delegated by Congress.[3] The President claims that Congress gave him the requisite authority in a provision of the Immigration and Nationality Act, 8 U.S.C. § 1182(f), which authorizes the President to suspend entry of an alien or class of aliens if he finds that such entry would be detrimental to the interests of the United States. *See* Pet. Br. at 31–40.[4] Respondents contend, and the Court of Appeals held, that—when read in context and with a view to its place in the overall statutory scheme of the INA—§ 1182(f) places limits on the President's authority, which Proclamation No. 9645 exceeds. *See* Resp. Br. at 30; *Hawaii v. Trump*, 878 F.3d 662, 683–97 (9th Cir. 2017); *see also Int'l Refugee Assistance Project v. Trump* ("*IRAP*"), 883

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[3] The President does not argue that the Proclamation is authorized by any inherent executive authority, independent of his purported statutory authority. *See* Pet. Br. 30–48.

[4] The Proclamation also invokes 8 U.S.C. § 1185(a), but that provision does not confer any independent power on the President. *See* Resp. Br. 35–36. Accordingly, the President's statutory authority to issue Proclamation No. 9645 turns on the scope of the statutory delegation of power in § 1182(f).

F.3d 233, 291–301 (4th Cir. 2018) (Gregory, C.J., concurring).

This case turns in large measure on which of these competing interpretations of § 1182(f) the Court adopts. There are many and sound arguments for adopting Respondents' narrow interpretation of § 1182(f). *See, e.g.* Resp. Br. at 42–44; Br. of William Webster, et al. at 13–16; Br. of Members of Congress at 8–20 (No. 16-1436); Br. of Am. Bar Ass'n at 18–27 (No. 16-1436). This brief will not add another voice to that chorus, but will instead propose a different reason for reading the delegation of power in § 1182(f) narrowly. Simply put, the Court should interpret § 1182(f) narrowly because, if it turns out the Court is "wrong"—that is, if its interpretation has "misperceived the political will," *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 216 (1979) (Blackmun, J., concurring)—it would be easier for Congress to "correct" a narrow construction than it would be for Congress to correct a broad construction.[5] In other

[5] As understood here, an "erroneous" or "wrong" statutory construction is not one that interprets a statute unreasonably or improperly. It is simply a construction that does not reflect the preferences of the enacting or current legislature. By the same token, "an ex post statutory override does not prove that [a] judicial interpretation was mistaken." Einer Elhauge, *Statutory Default Rules* 154 (2008). In a representative democracy, legislative overrides should not be lamented, but rather embraced.

words, the costs of an erroneous construction are asymmetrical. This is so for two complementary reasons.

The first reason for adopting a narrow construction of § 1182(f) relates to the President's veto power under Article I, Section 7 of the Constitution. *See infra* at 8–11. As Representative Edwards learned from experience, it is extremely difficult for Congress to override a presidential veto. Because the President (any President) has an institutional incentive to preserve executive power, in most cases it requires a two-thirds vote of both houses of Congress to override a veto and enact legislation clawing back power from the President. By contrast, if Congress wished to override a Supreme Court decision narrowly construing a statutory delegation of power to the President, it typically would require only a majority vote. In this sense, a narrow construction of § 1182(f) preserves the status quo and allows Congress the opportunity to decide whether to pass legislation expressly providing the President with the authority he purports now to have, or to approve of and acquiesce in the Court's narrow construction.

The second reason for a narrow construction also relates to the President's power over legislation, but is slightly different. As Professor Elhauge and other scholars have observed, this Court often adopts narrow constructions of statutes where a broad reading would favor parties with relatively great political power. *See infra* at 12–13. One explanation

for this relates to the Court's role in facilitating representative democracy and promoting political satisfaction. In close cases, where it is difficult to discern the meaning or scope of a statute, it is preferable to construe the statute *against* the party with greater political power, because that party is more likely to be able to elicit a legislative override of the Court's decision. This instinct explains many of the Court's decisions applying canons of construction that favor the politically powerless. And it also provides a reason for adopting a narrow construction of § 1182(f) here. The President has greater power to achieve legislative overrides than virtually anyone, and certainly has more political power than the aliens and their relatives and associates in the United States who would be adversely affected by a decision upholding Proclamation No. 9645 through a broad construction of § 1182(f).

The "preference-eliciting" approach *Amici* propose here is the most modest and deferential way of deciding this case. It serves both to reinforce norms of representative democracy and to preserve the separation of powers. *See infra* at 17–20. Though it is not always (or even often) appropriate for this Court to consider the relative potential of a legislative override of its decisions, *Amici* believe this case cries out for a modest approach. The President's interpretation of § 1182(f), if adopted, would mark a sudden and dramatic shift of traditionally legislative power from Congress into the hands of one man. *See infra* at 21–25.

If Congress truly wishes to give the President this unprecedentedly broad authority to admit or exclude aliens, a decision in favor of Respondents will not prevent it from doing so. It may pass a bill with a clear statement of delegation, and the President will no doubt sign it into law. But if the Court effectively transfers that authority to the President by adopting a broad construction of § 1182(f) in this case, then that sudden and dramatic shift of power will effectively be locked in, with little practical recourse for Congress to take it back. The Court should construe § 1182(f) narrowly to preserve the status quo and allow this consequential decision to be made by "those who write the laws, rather than . . . those who interpret them." *United States v. Gilman*, 347 U.S. 507, 513 (1954).

ARGUMENT

I. The costs of an erroneous construction of section 1182(f) are asymmetrical.

Any time this Court interprets a statute, there is some risk of error. *See supra* n.4. Therefore, the Court has long recognized—and occasionally taken comfort in—the ability of Congress to override its statutory-interpretation decisions. As Justice Blackmun put it in *United Steelworkers of America v. Weber*, "if the Court has misperceived the political will, it has the assurance that because the question is statutory Congress may set a different courses if it so chooses."

443 U.S. 193, 216 (1970) (Blackmun, J., concurring).[6] But that assurance may ring hollow in cases involving statutory delegations of power to the President, like § 1182(f).

The costs of an erroneous interpretation of § 1182(f) are asymmetrical—both because of the President's veto power and because of the relative disparity in political power between the parties. In light of the asymmetrical costs of error, *Amici* propose that, to the extent the Court finds the interpretive question in this case to be difficult—that is, to the extent there is a meaningful risk of error—the Court should err on the side of the construction that is most easily correctible: a delegation of less power to the President.

A. The cost of error is asymmetrical in light of the President's veto power.

Like the genie sprung from its lamp, it is nearly impossible to put power back where it belongs once it is unleashed. When that power is inherently

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[6] *See also, e.g.*, *Finley v. United States*, 490 U.S. 545, 556 (1989) ("Whatever we say regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress."); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 557 (2005) (noting that "Congress accepted the invitation" extended in *Finley* when it passed the Judicial Improvements Act).

legislative, but claimed and exercised by the President, the problem is made more intractable by a feature of the Constitution meant as a check against undue concentration of power, the presidential veto.

The Presentment Clause of the Constitution gives the President authority to veto legislation, subject to override by two-thirds vote of both houses of Congress:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise by reconsidered, and if approved by two thirds of that House, it shall become a Law.

U.S. Const. art. I, § 7, cl. 2. Today that means at least 67 Senators and 290 Representatives must agree to override a veto.

It should go without saying that getting 357 members of Congress to agree on something is no small feat. What's more, by convention if one house fails to override a veto, the other will not take a vote, even if more than two-thirds of its members wish to override. *See* CRS Report RS21750, *The Presidential Veto and Congressional Procedure* at 2 (Feb. 27, 2004), *available at* https://perma.cc/3UG5-ZTVW. Therefore, if the vetoed legislation originated in the Senate, it is theoretically possible that just 34 Senators could prevent an override favored by the other 501 members of Congress, frustrating the will of the people as expressed by 93% of their representatives.

It is no surprise, then, that veto overrides are historically rare. Since 1789, there have only been 111 veto overrides, compared to 1500 "regular" vetoes (about 7%). *See* United States Senate, *Summary of Bills Vetoed, 1789-Present*, https://perma.cc/7MDB-ZRF9. The problem is compounded by the President's (contested) ability to issue a "pocket veto" by returning a bill to Congress while it is adjourned. *See* U.S. Const. art. I, § 7, cl. 2 ("If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a law, in like Manner as if he had signed it, *unless the Congress by their Adjournment prevent its Return, in which case it shall not be a Law.*") (emphasis added). When pocket vetoes are included, Congress has overridden less than 5% of presidential vetoes since 1789. *See* United States

Senate, *Summary of Bills Vetoed,* 1789-Present, *supra.*[7]

The Presentment Clause, while an important safeguard against congressional encroachment on executive power, has tended to exacerbate the "one-way ratchet" effect of the expansion of presidential power over time. *See generally, e.g.*, Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. Chi. L. Rev. 123, 126 (1994) ("[I]n the post-nondelegation doctrine world, the presidential veto has served not only to prevent legislation the President deems unconstitutional or unwise, but also to entrench the President's own acts of lawmaking."). Simply put, a majority of Congress can (within broad constitutional limitations) always give the President *more* power, but it requires a historically rare supermajority to retract any of that power, once given.

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[7] Even this figure does not fully account for the veto's power, for the mere threat of a veto can often have the same effect as a veto, itself. *See, e.g.*, Charles M. Cameron, *Bargaining and Presidential Power*, *in Presidential Power: Forging the Presidency for the Twenty-First Century* 47, 61 (Robert Shapiro et al., eds., 2000) ("Broadly speaking, veto threats often enhance presidential power (relative to a world without veto threats), because they help the president and Congress strike bargains that they might not otherwise forge, for want of congressional concessions.").

This political and constitutional reality has repercussions for Supreme Court decision-making. As one preeminent scholar once observed, "Congress possesses neither the tools nor the incentives effectively to counter wrongful assertions of presidential authority," because it "cannot easily obtain the two-thirds vote in each house necessary (given the President's veto power) to overturn a presidential order." Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2350 (2001). Therefore, "a judicial decision upholding a sitting President's assertion of power, even where that assertion is beyond the enacting and current Congresses' preferences, still requires that Congress assemble a veto-proof supermajority to override the President's action." Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 Colum. L. Rev. 263, 321 (2006).

Accordingly, a judicial decision affirming a President's broad assertion of delegated power in an executive order effectively locks in a shift of the balance of power between the legislative and executive branches. Such an outcome is antidemocratic and undesirable. But it can be avoided.

B. The cost of error is asymmetrical in light of the disparity in political power between the parties.

As noted above, this Court has long recognized that it is capable of "misperceiv[ing] the political will" when construing a statute, and it has embraced the ability of Congress to "set a different course" in such cases. *Weber*, 443 U.S. at 216. But the ability, and incentive, of Congress to set a different course necessarily depends on the relative political power of those impacted by a particular Supreme Court decision. As numerous studies have shown, the President (and the executive branch more broadly) has unsurpassed political power in this regard, and has been uniquely successful in achieving legislative overrides of adverse Supreme Court decisions.

A comprehensive study published in 2014 showed that Congress overrode 275 Supreme Court decisions between 1967 and 2011. Matthew R. Christiansen & William N. Eskridge, Jr. *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 Tex. L. Rev. 1317, 1329 (2014). As the authors reported, "[t]he big override winners are governmental institutions." *Id.* at 1321.

> [W]hen the Court rejects a federal agency interpretation, that decision is much more likely to be overridden by Congress than the average Supreme Court decision, much less a decision

> supported by the agency. More generally, we found that the Department of Justice or another federal agency was noticeably involved in seventy percent of the 275 overrides reported in our study—and the agency view prevailed with Congress in three-quarters of those overrides.

Id.; *see also id.* at 1377 ("No group or institution enjoys the attention of Congress more than the Executive Branch of the federal government: its officials testified, in depth, in a large majority of overrides and supported the large majority of those overrides."). By comparison, individuals and politically marginalized groups are relatively incapable of persuading Congress to consider and pass legislation overriding adverse statutory-interpretation decisions. *See generally id.* at 1467; William N. Eskridge, Jr., *Dynamic Statutory Interpretation* 153 (1994).

II. In light of the asymmetrical costs of error, the Court should adopt a narrow construction of section 1182(f).

Respondents, and the Court of Appeals, have persuasively shown why § 1182(f) should not be read to provide the President with the power he purported to exercise in issuing Proclamation No. 9645. *See* Resp. Br. at 42–44; *Hawaii*, 878 F.3d at 683–97; *see also IRAP*, 883 F.3d at 291–301 (Gregory, C.J.,

concurring). *Amici* will not rehearse those arguments here. The point of this brief is to suggest that, even if the Court finds the President's interpretation of the statutes to be plausible—indeed, even if it finds that the competing interpretations are *equally* plausible—the Court should nevertheless adopt Respondent's narrow interpretation because the cost of erring in favor of the President is far greater than the cost of erring in favor of Respondents. Indeed, erring in favor of Respondents would promote democratic governance and would avoid the grave constitutional concerns that the President's interpretation raises.

A. This Court has often construed statutes narrowly statutes in favor of the politically marginalized.

The notion that the Court might adopt a narrow construction of a statute in order to elicit a legislative response is not without precedent. Although it does not always say so, the Court has often employed canons of construction that favor the politically powerless in ways that can be justified as preference-eliciting. *See generally* Christiansen & Eskridge, *Congressional Overrides*, *supra*, at 1466–67; Einer Elhauge, *Statutory Default Rules* 168–88 (2008); Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 Colum. L. Rev. 2162, 2192–2211 (2002); Eskridge, *Dynamic Statutory Interpretation*, *supra*, at 151–61.

The rule of lenity, for example, is often justified as preserving "the norm that legislatures, not executive officers, define crimes." *Whitman v. United States*, 135 S. Ct. 352, 353 (2014) (statement of Scalia, J., respecting denial of certiorari). "But preference-eliciting analysis [also] provides a ready justification for this counterintuitive canon." Elhauge, *Statutory Default Rules*, *supra*, at 169. As Professor William Eskridge has observed, "Congress often overrides rule of lenity cases and creates the clear statutory directive found lacking, though it rarely overrides criminal law decisions won by state or federal prosecutors." Eskridge, *Dynamic Statutory Interpretation, supra,* at 425 n.94. If the court adopted broad, or even neutral, interpretations of criminal statutes, those broad interpretations "would likely stick, because there is no effective lobby for narrowing criminal statutes." Elhauge, *Statutory Default Rules*, *supra*, at 169. But a narrow interpretation is far more likely to be corrected, "because prosecutors and other members of anti-criminal lobbying groups are heavily involved in legislative drafting and can more readily get on the legislative agenda to procure any needed overrides." *Id.*; *see also Eskridge, Dynamic Statutory Interpretation*, *supra*, at 295.[8]

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[8] Perhaps the best example of the rule of lenity being used for representation-reinforcing purposes is in connection with the mail-fraud statute. In 1987, the Court invoked the rule of lenity in refusing to extend the mail-fraud statute to the deprivation of intangible rights. *McNally v. United States*, 483 U.S.

The canon of constitutional avoidance also serves a democracy-reinforcing purpose. As the Court has explained, "this canon is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991). The canon, therefore, permits Congress to revisit a narrowly construed statute and either confirm that it intended the broader interpretation or redraft the statute to avoid constitutional doubt. As Professor Elhauge has explained, "when the canon against constitutional

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350, 360 (1987). In its decision, the Court expressly stated that "if Congress desires to go further, it must speak more clearly than it has." *Id.* Congress responded the following year by enacting 18 U.S.C. § 1346, which expressly overrode *McNally*, providing that "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." Pub. L. 100-690, 102 Stat. 4508 (Nov. 18, 1988). Later, in *Skilling v. United States*, the Court once again invoked the rule of lenity in declining to extend § 1346 still further to reach undisclosed self-dealing. 561 U.S. 358, 409–11 (2010). Once again, it invited Congress to "speak more clearly than it has" if it wished to extend the reach of the statute. *Id.* at 411. And once again, Congress responded with legislation, the Stop Trading on Congressional Knowledge Act, Pub. L. 112-105, 126 Stat. 291 (Apr. 4, 2012), which was in part a reaction to the Court's decision in *Skilling*.

doubts is used to protect [discrete and insular minorities], it serves an important preference-eliciting function without necessarily offering these groups any absolute normative protection from [the resulting] legislation." Elhauge, *Statutory Default Rules*, *supra*, at 185.[9]

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[9] *INS v. St. Cyr*, 533 U.S. 289 (2001), is a good example. Citing the constitutional-avoidance canon, as well as the canon against retroactivity, the Court held that neither the Antiterrorism and Effective Death Penalty Act nor the Illegal Immigration Reform and Immigrant Responsibility Act deprived federal courts of jurisdiction to review a resident alien's habeas petition. *Id.* at 301–08. But Congress doubled down with the REAL ID Act of 2005, which expressly stripped federal courts of habeas jurisdiction to entertain challenges to final orders of removal. *See* 8 U.S.C. § 1252(a)(5), (b)(9). By adopting the interpretation that favored the politically marginalized immigrant, the Court enabled Congress to respond with a clear statement of its intent. *See* Elhauge, *Statutory Default Rules*, *supra*, at 184–85 (showing that a number of recent cases involving whether a statute should be interpreted to deem aliens deportable or inadmissible could be explained on preference-eliciting grounds).

B. A narrow construction of section 1182(f) would promote representative democracy and increase political satisfaction.

Recognizing the preference-eliciting effects of these traditional canons of construction, scholars have proposed that the Court should decide close cases in favor of those with less political power. As Professor Elhauge put it in a 2002 article, "when enactable preferences are unclear, often the best choice is . . . a preference-eliciting default rule that is more likely to provoke a legislative reaction that resolves the statutory indeterminacy and thus creates an ultimate statutory result that reflects the enactable political preferences more accurately than any judicial estimate possibly could." Elhauge, *Preference-Eliciting Statutory Default Rules*, *supra* at 2165; *see also* Eskridge, *Dynamic Statutory Interpretation, supra,* at 294 (proposing that courts "decide close cases against politically salient interests and in favor of interests that have been subordinated in the political process. Congress can, of course, override the Court's decision, and indeed is more likely to do so if the loser is politically powerful."); *see also* Christiansen & Eskridge, *Congressional Overrides*, *supra*, at 1466.

Importantly, the reason the Court should (and does) favor the politically powerless in resolving statutory ambiguities is not that it agrees with their position on policy grounds or wishes to amplify their

voice. "[I]t is that doing so will produce a precise legislative appraisal of the weight the political process wishes to give [their] interests." Elhauge, *Preference-Eliciting Statutory Default Rules*, *supra*, at 2178. When there is a significant disparity in political power between the parties or interests affected by a statutory interpretation, the Court can reasonably assume that the party with more power is better able, and more likely, to provoke a legislative response to an adverse decision.

In this way, the preference-eliciting approach justifies construing § 1182(f) against the President. As Professor Eskridge has observed, within the context of immigration, "decisions favoring the rights of immigrants are more likely to be overridden than decisions favoring the government." Christiansen & Eskridge, *Congressional Overrides*, *supra*, at 1400. And the differential odds of override are even more pronounced here, where the President is so strongly invested in an expansive interpretation of § 1182(f). Because the President has superior political power relative to Respondents and others adversely affected by Proclamation No. 9645, "it is not politically unfair to place the burden on [the President] to procure statutory language" that more clearly favors his interests. Eskridge, *Dynamic Statutory Interpretation, supra,* at 295–96.

Construing statutory delegations of power to the President narrowly helps ensure that the law truly reflects the will of the people, as expressed through

Congress, rather than as deduced by this Court. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978) ("In our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.' Our constitution vests such responsibilities in the political branches."); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* at 349–50 (2012) (rejecting "false notion that when a situation is not quite covered by a statute, the court should reconstruct what the legislature would have done had it confronted the issue"). In this way, "a statutory override[] means that the preference-eliciting default rule [has] achieved its purpose: forcing explicit decisionmaking by the political process." Elhauge, *Statutory Default Rules*, *supra,* at 154.

A narrow, preference-eliciting approach also permits Congress to respond to Supreme Court decisions by clarifying the degree of power it wishes to delegate in a way that will generally be more carefully calibrated than the all-or-nothing choice that courts are typically presented with. As the Court has long recognized, "[t]he selection of that policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised. The function is more appropriate for those who write the laws, rather than for those who interpret them." *United States v. Gilman*, 347 U.S. 507, 511–13 (1954); *see also, e.g.*, *United States v.*

Jones, 565 U.S. 400, 429–30 (2012) (Alito, J., concurring) ("A legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way."). A preference-eliciting approach promotes such nuanced legislative solutions. *See* Elhauge, *Statutory Default Rules*, *supra*, at 154.[10]

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[10] For example, in *Zadvydas v. Davis*, the Court adopted a narrow construction of a "special statute" permitting the Attorney General to detain removable aliens beyond the 90-day "removal period" provided elsewhere in the INA. 533 U.S. 678, 682, 689 (2001). To avoid constitutional problems associated with indefinite detention, the Court read an implicit six-month limit on further detention into the special statute, thereby adopting an interpretation that disfavored the executive branch. *Id.* at 701. The preference-eliciting construction in *Zadvydas* prompted a swift override by Congress, but its response was more nuanced than the all-in construction the Attorney General had advocated before the Court. *See* USA PATRIOT Act § 412(a), Pub. L. No. 107-56, 115 Stat. 350 (Oct. 26, 2001) (partially abrogating *Zadvydas* and authorizing indefinite detention only for those aliens who present national security threats or are involved in terrorist activities); *see also Clark v. Martinez*, 543 U.S. 371, 386 n.8 (2005) (remarking on this partial override).

C. A narrow construction is necessary in this case to avoid constitutional doubts and preserve the separation of powers.

The preference-eliciting interpretive approach endorsed here is not necessary, or even desirable, in every case and should not be trotted out as an excuse to "punt" difficult questions of statutory interpretation to Congress. After all, it is not only the province, but also the "*duty* of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added). Nor should the preference-eliciting approach be invoked to place a thumb on the scales against every delegation of power from Congress to the executive branch. To the contrary, in most cases the Court should hew to the "practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta v. United States*, 488 U.S. 361, 372 (1989). However, in cases like this one, where the interpretive question is close and the President's interpretation would mark a sudden and dramatic shift in the balance of powers between the political branches, it is appropriate for the Court to take a cautious approach. *See, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).

The President's interpretation of the statutory delegation in § 1182(f) is virtually limitless. As accurately characterized by the Chief Judge of the

Fourth Circuit, the President contends that § 1182(f) authorizes him "to halt any and all foreign travel into the country at any time, from any and all countries, for any reason he decrees, for however long he wishes, notwithstanding any other provision of law." *IRAP*, 883 F.3d at 291 (Gregory, C.J., concurring); *see also* Pet. Br. at 31 (contending that § 1182(f) confers a "sweeping proclamation power" and "confirms the President's discretion at every turn"). It would also give him de facto power to suspend Congress's policy choices regarding exclusion, including its decision to ban nationality-based discrimination in the issuance of visas. *See* 8 U.S.C. § 1152(a).[11]

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[11] In this way, the authority the President claims here is analogous to the executive power that the Court and Justice Jackson rejected in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In that case, President Truman pursued a course of action that Congress had considered, but ultimately rejected, sparking Justice Jackson's maxim that presidential power "is at its lowest ebb" when "the President takes measures incompatible with the express *or implied will* of Congress." *Id.* at 637 (Jackson, J., concurring) (emphasis added). Superficial distinctions between entry and visas aside, it is difficult to imagine how barring entry to millions of people on the basis of their nationality is not incompatible with the express or implied will of Congress, as reflected in § 1152(a).

A delegation of this sort that would mark a sudden and dramatic reorganization of the balance of power between the political branches. The power to exclude aliens, after all, "is entrusted exclusively to Congress," *Galvan v. Press*, 347 U.S. 522, 531 (1954),[12] and this Court has described actions that have "the purpose and effect of altering the legal rights, duties and relations of persons," including aliens, as "essentially legislative in purpose and effect," *INS v. Chadha*, 462 U.S. 919, 952–53 (1983).

Congress can certainly delegate its legislative power over exclusion to the executive branch, so long as it provides an "intelligible principle" to which the executive must conform. *E.g. Mistretta*, 488 U.S. at 372.[13] But the sheer scope of the delegated authority that the President claims in this case should give the Court pause. *See also Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary

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[12] The Court has suggested, in dicta, that the President's inherent foreign-affairs power also gives him authority to exclude aliens, *see United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 357, 542 (1950). As Respondents point out, the *Knauff* dictum cannot bear the weight the President places on it in this appeal. *See* Resp. Br. at 52–53.

[13] *But see Gundy v. United States*, No. 17-6086 (cert. granted Mar. 5, 2018)?

provisions—it does not, one might say, hide elephants in mouseholes.").

The Court should be even more cautious here, where the President claims an expansive delegation of power to himself, as opposed to an executive agency. As Justice Kagan once observed, a "little noted oddity of the nondelegation doctrine" is that "[t]he Supreme Court has applied the doctrine only when Congress has delegated power directly to the President—never when Congress has delegated power to agency officials." Kagan, *Presidential Administration*, *supra*, at 2364 (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S.5 495 (1935); *Pan. Ref. Co. v. Ryan*, 293 U.S. 388 (1935)). While "[t]he small sample size, to be sure, cautions against reading too much into this history," it suggests "albeit tenuously, some special suspicion of the President as a policymaker." *Id*

This special suspicion is justified by the fact that actions of the President himself are more insulated from congressional oversight and judicial review than are agency actions. *See, e.g.*, *IRAP*, 883 F.3d at 292 (Gregory, C.J., concurring) (noting that "the President is not subject to the procedures that constrain legislative and administrative decision-making"). When Congress delegates rulemaking power to an administrative agency, the agency's decision-making is subject to a number of important constraints that are absent when power is delegated to the President himself. Unlike the President, an agency must solicit

feedback from affected stakeholders and then explain and defend its decision-making processes in court. *See* 5 U.S.C. § 553.[14] If its reasoning falls short, or if it cuts procedural corners, or fails adequately to address concerns from the public, the judiciary can invalidate its decisions as "arbitrary and capricious." *See, e.g.*, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Thus, congressional delegations to the President pose a greater risk of upsetting the constitutional balance of powers among the branches than do routine delegations of rulemaking authority to administrative agencies.

Transferring exclusionary power from Congress to the President, who need not justify his decisions, would be a dramatic departure from the constitutional baseline. For a delegation of this breadth—effectively ceding control over exclusion to the President—the Court ought to expect a clearer statement of congressional intent than can be found in § 1182(f). Adopting a narrow construction here, in

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[14] Courts still retain, of course, their ability to review Presidential action for illegality or unconstitutionality. And to the extent agencies carry out presidential directives, as is the case here, the APA itself grants a measure of review. *IRAP*, 883 F.3d at 283–87 (Gregory, C.J., concurring). But policy-making within the White House is not subject to the same standards of procedural regularity that the APA imposes on agency rule making.

recognition of the asymmetrical costs of error, preserves the status quo and gives Congress the freedom to act with deliberation, while a broad construction effectively locks in the President's expansive vision of executive power.

CONCLUSION

The Court should adopt Respondent's narrow interpretation of § 1182(f) because the cost of error in that event is relatively low. If Congress disagrees, it can pass a new law expressly delegating to the President the expansive power he seeks. More importantly, if Congress agrees with the Framers that it is folly to submit the "legal rights, duties, and relations" of millions to the "final arbitrary action of one person," *Chadha*, 462 U.S. at 951, it won't be too late. The judgment should be affirmed.

Respectfully submitted,

TADHG DOOLEY
Counsel of Record
BENJAMIN DANIELS
RICHARD LUEDEMAN
WIGGIN AND DANA LLP
265 Church Street
New Haven, CT, 06508
(203) 498-4400
tdooley@wiggin.com
Counsel for Amici Curiae

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