No. 17-965

IN THE

Supreme Court of the United States

DONALD J. TRUMP, 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 FOR WILLIAM WEBSTER, THOMAS KEAN, JOHN DANFORTH, PETER KEISLER, CARTER PHILLIPS, BRACKETT DENNISTON, MICHAEL CASTLE, RAY LAHOOD, CONNIE MORELLA, CHRISTOPHER SHAYS, CHRISTINE TODD WHITMAN, STANLEY TWARDY, AND RICHARD BERNSTEIN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a President has statutory authority to continue a nationality-based suspension by proclamation of "entry on grounds beyond those the INA itself prescribes," Pet. Br. 46, *after* the President has completed investigation of those grounds and decided to forgo proposing any statutory change? This is part of the second question presented by Petitioners.

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INTEREST OF AMICI

Amici include five former Republican members of Congress, lawyers who worked in the executive branch during Republican administrations, and others. *See* Appendix A.[1] *Amici* have an interest in seeing that, based on statutory text, neutral principles of construction, and separation of powers, Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017) ("EO-3"), does not improperly shift congressional power over indefinite nationality bans to Presidents. *Amici* speak only for themselves personally, not for any entity or other person.

SUMMARY OF ARGUMENT

This brief addresses only whether the statutory text and neutral canons of construction warrant invalidating EO-3's travel bans on a narrow duration ground. For multiple reasons, the President lacks statutory authority to continue a unilateral "suspen[sion]" "*by proclamation*" of entry by all nationals of a country *after* the President has investigated a ground that the Immigration and Nationality Act ("INA") concededly does *not* prescribe as a basis for inadmissibility and has decided *not* to propose any continuation to Congress.

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[1] No counsel for any party authored the brief in whole or in part, and no person or entity other than *amici* made a monetary contribution to its preparation or submission. Petitioners have filed a blanket letter of consent. Respondents have consented to the filing of this brief. All emphases are added except where otherwise noted.

First, subsection 1182(f) requires the President to determine the "necessary" period for a temporary unilateral suspension "*by proclamation.*" Once a President has investigated, the remaining "necessary" "period" for a suspension "*by proclamation*" is the period for ample congressional consideration of whether to continue the suspension. Here, the President has proposed amendments to the INA, but they *omit* EO-3's bans.

Second, in a different provision in the same 1952 statute that enacted § 1182(f), Congress limited to periods of war or declared national emergency the President's power to determine *unilaterally* that denying entry continues to be required, without ever seeking additional legislation. This other provision's limits to war and declared national emergency would have been meaningless if, in the same statute, § 1182(f) gave Presidents the same unilateral power *at all times.*

Third, and independently, Congress specifically and repeatedly has addressed the matter at hand in numerous statutory provisions that narrowly confine nationality restrictions based on terrorism deterrence, foreign policy, or foreign information sharing, to two circumstances that everyone agrees do not encompass EO-3. These specific provisions control over the more general § 1182(f). At a minimum, the harmony canon requires construing § 1182(f) so that its "necessary" "period" for a suspension "by proclamation" that overrides prior statutory limits on nationality restrictions is the time necessary for Presidential investigation and

congressional consideration of a President's proposed continuation.

Fourth, the pertinent text is at least ambiguous, and the government's limitless interpretation raises serious issues of separation of powers. It would both give Presidents a line-item veto by expunging limits on nationality bans in more specific statutory provisions, and constitute an improperly unconstrained delegation.

EO-3 is invalid because the Administration's investigation of foreign information problems was completed before EO-3 was promulgated, and EO-3 did not determine *any* time to give Congress ample opportunity to consider *any* Presidential proposal to continue the suspension. In such a narrow ruling, this Court has no reason to decide what range of "necessary" "period" a President could permissibly set, much less address the prudence or motives of EO-3's bans. Under such a limited ruling, Presidents would retain powers to suspend entry during a war with a foreign nation and, even absent such a war, for a period necessary to investigate a problem and attempt to persuade Congress to continue the suspension.

BACKGROUND

A. EO-3's Bans Have an Indefinite Duration

Unlike the 90-day bans in Executive Order 13780, 82 Fed. Reg. 13209 (Mar. 6, 2017) ("EO-2"), the bans in EO-3 are of unlimited duration. Although section 4 of EO-3 mentions reports to the

President every 180 days, EO-3 does *not* provide that, if future reports show that the "required" criteria in section 1(c)(i)–(iii) have been satisfied, any portion of the travel bans will terminate. Indeed, as section 2(h) admits, one nation is included in EO-3's bans even though it satisfied the section 1(c) criteria. In addition, section 9(c) provides that EO-3 "does not . . . create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies or entities, its officers, employees, or agents, or any other person."

B. The Ninth Circuit's Narrow Rulings

This brief addresses four narrow rulings of the Ninth Circuit: (1) The language in 8 U.S.C. § 1182(f) "heavily disfavors" permitting a "President to impose entry suspensions of unlimited and indefinite duration." *Hawaii v. Trump*, 878 F.3d 662, 684–85 (9th Cir. 2017). (2) As the more specific subsection, 1182(f) controls over the general subsection 1185(a)(1). *Id.* at 694. (3) The government's interpretation of § 1182(f) "nullifies rather than 'supplement[s]' the existing statutory scheme" by "overrid[ing] Congress's legislative responses to the same concerns the Proclamation aims to address." *Id.* at 687. (4) Avoiding serious constitutional issues of separation of powers supports a plausible narrow reading of the statute. *Id.* at 690–92. The concurrence of Judge Keenan, joined by Judge Thacker, in *International Refugee Assistance Project v. Trump*, 883 F.3d 233 (4th Cir. 2018), made similar points.

ARGUMENT

I. EO-3's Indefinite Bans Violate 8 U.S.C. § 1182(f)

A. The "Necessary" "Period" for a Suspension "*By Proclamation*" Ends When a President Has Completed an Investigation and Decided Not To Propose Any Statutory Continuation

The first sentence of 8 U.S.C. § 1182(f) provides that, when the President makes the required finding, the President may "*by proclamation*, and for such *period* as he *shall deem necessary*, *suspend* the entry of all aliens or any class of aliens as immigrants or nonimmigrants." The usual meaning of "suspend" is "to interrupt, to cause to cease for a time; to postpone; to stay, delay, or hinder, to discontinue *temporarily*, but with an expectation or purpose of resumption." *Black's Law Dictionary* 1615 (4th ed. 1951); *see also* James A. Ballentine, *Law Dictionary with Pronunciations* (1948 ed.) (defining "suspended" as "meaning temporarily inactive or inoperative; held in abeyance").

Subsection 1182(f) further limits a suspension "by proclamation" to "such *period* as [the President] shall deem *necessary*." The singular "period" means a "point, space, or division of time." *Black's Law Dictionary* 1297 (4th ed. 1951). As the United States told the Supreme Court in 1930, "the word 'period' connotes a *stated* interval of time commonly thought of in terms of years, months, and days." *United States v. Updike*, 281 U.S. 489, 495 (1930). Indeed,

on a page of legislative history cited by the government, Pet. Br. 42–43, the House sponsor assured members concerned about the breadth of the President's unilateral authority that § 1182(f) permits a suspension "for a *certain time*." 98 Cong. Rec. 4423 (1952) (statement of Rep. Walter).

"Necessary" is "susceptible of various meanings" and therefore highly contextual. *Black's Law Dictionary* 1181–82 (4th ed. 1951). The context here is the "necessary" "period" for a temporary suspension "by proclamation" when the President "suspend[s] entry . . . on grounds beyond those the INA itself prescribes." Pet. Br. 46.

The most natural reading of the "necessary" "period" for such a "suspen[sion]" "*by proclamation*" is the period needed for a President to investigate the extra-statutory ground for denying entry and have an ample opportunity to persuade Congress to continue the suspension. For example, President Trump could have proposed legislation that authorized EO-3's specific bans until, for each country, the President finds that the facts have changed and there are no more "deficiencies in information sharing." Pet. Br. 37. In our system, after Congress had an ample opportunity to accept or reject such a proposal, an additional period for a suspension "by proclamation" is unnecessary.

Subsection 1182(f) mandates that the President "*shall* deem" the "necessary" "period." "Deem" here means "determine." *Black's Law Dictionary* 504 (4th ed. 1951). EO-3 is invalid because it did not determine *any* necessary period either for

investigation—indeed, EO-3, §§ 1 (c)–(i) shows the investigation already had been completed in the ninety days set by EO-2—or for congressional consideration of *any* proposed legislation. There is accordingly no reason for this Court to address what range of necessary period a President could set.

Presidents often assess appropriate periods for congressional consideration. Indeed, on September 5, 2017, President Trump partially delayed rescission of the Obama Administration's DACA memorandum so that "current DACA recipients generally will not be impacted until after March 5, 2018, *six months* from now. *That period of time gives Congress the opportunity to consider appropriate legislative solutions*." White House, *President Donald J. Trump Restores Responsibility and the Rule of Law to Immigration* (Sept. 5, 2017), https://goo.gl/wRtf94.

Not only did EO-3 not determine any period for congressional consideration of any proposal, President Trump has decided *not* to propose any legislation concerning EO-3's bans to Congress. In the President's "proposed new legislation that will fix our immigration laws," the proposed entry limits linked to deterring terrorist attacks have been limited to ending "the visa lottery" and "chain migration." Donald Trump, President of the United States, State of the Union Address (Jan. 30, 2018), http://bit.ly/2E649id. The President has pursued those *other* statutory proposals since "[l]ast fall" of 2017. Press Briefing by White House Press Secretary (Jan. 24, 2018), https://goo.gl/gQVm27.

The government argues that EO-3's suspensions determined a "necessary" "period" because they "'may be relaxed or removed'" when the President decides that foreign "deficiencies in information sharing" are "redressed." Pet. Br. 37, 40–41 (quoting EO-3, § 1(h)). For five reasons, that is not the necessary period that § 1182(f) authorizes. First, § 1182(f) authorizes only the "necessary" "period" for a "suspension" "*by proclamation,*" not for a suspension in the abstract.

Second, the government's interpretation would render the "necessary" "period" requirement surplusage. When the President finds that the information deficiencies have been redressed, then the suspension no longer meets the separate requirement in § 1182(f)'s *first* clause, as the President no longer "finds that the entry [of nationals] . . . *would be* detrimental."

Third, "when deciding whether the language is plain, [the Court] must read the words in their context and with a view to their place in the overall statutory scheme. [Its] duty, after all, is to construe statutes, not isolated provisions." *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (quotations and citations omitted). Indeed, "while the meaning of [a] phrase . . . may seem plain when viewed in isolation, such a reading [sometimes] turns out to be untenable in light of the statute as a whole." *Id.* at 2495 (quotations and citations omitted; brackets in original removed).

The pertinent portion of subsection 1182(f) was enacted in 1952 as then-subsection 212(e) of the

Immigration and Nationality Act ("1952 Act"). 66 Stat. 163, 188 (June 27, 1952). Subsection 215(a) of the same 1952 Act provided that the President may impose (a) "restrictions and prohibitions *in addition to those provided otherwise than by this section*" on the "entry into" this Nation of "aliens," (b) when "the President shall find that the interests of the United States *require*"—*but only* (c) "[w]hen the United States is at war," there is a "national emergency proclaimed by the President," or "there exists a state of war between . . . two or more states." *Id.* at 190.

If in 1952, Congress had intended to authorize the President *at all times* to deny entry as long as he unilaterally considered that a threat still "require[d]" denial, without *ever* seeking additional legislation, subsection 215(a) would not have limited that authority to times of war and national emergency. To paraphrase a question this Court has asked: "If there is a big hole in the fence for the big cat [the government's interpretation of subsection 212(e)], [would] there be a small hole for the small one [subsection 215(a)]?" *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) (quotations and citations omitted). The answer is no. To the contrary, subsection 215(a) expressly stated that subsection 215(a)'s time-limited exclusions were "*in addition to* those provided" by subsection 212(e).

"It would be illogical to conclude that Congress, having" narrowed when a President may unilaterally bar entry without ever seeking additional legislation to times of war and national emergency in subsection 215(a), "would turn around and nullify its own choice in subsection" 212(e). *Dep't of Revenue of*

Oregon v. ACF Indus., Inc., 510 U.S. 332, 343 (1994). Instead, for times outside war and declared national emergency, subsection 212(e) limited the suspension to a "necessary" "period." Subsection 215(a) contained no similar phrase. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) (quotations and citations omitted).

The government argues that the 1978 amendment of subsection 215(a) of the INA, by then codified at 8 U.S.C. § 1185(a), extended § 1185(a) to peacetime. Pet. Br. 32–33. But the government ignores that the same 1978 amendment also *struck out* from 8 U.S.C. § 1185 the authority to make "restrictions and prohibitions in addition to" those in other statutory sections, and retitled the provision, "Travel Documentation of Aliens and Citizens." Pub. L. 95-426, § 707(a), 92 Stat. 992–93.

Fourth, Congress in 1952 knew how to prescribe that the executive branch's unilateral "satisfaction" was the boundary for executive action. It expressly did that in § 212(a)(28)(I) of the 1952 Act. 66 Stat. 186. But subsection 212(e) used the much narrower boundary of the "necessary" "period" for a suspension "by proclamation."

Fifth, this Court "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic

and political magnitude . . . ." *F.D.A. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). The power claimed here is of enormous magnitude—maintaining ongoing *extra*-statutory nationality bans or even a world-wide ban for *extra*-statutory reasons. Pet. Br. 31, 34, 40–41, 46. Common sense dictates that such a power would be delegated only until Congress has appropriate time to consider a proposed legislative change. Indeed, Article II, Section 3 of the Constitution requires that the President "from time to time . . . recommend *to their [Congress's] consideration such measures* as he shall judge *necessary* and expedient." Congress's "deliberative process was viewed by the Framers as a valuable feature, not something to be lamented and evaded." *Dep't of Transp. v. Ass'n of Am. Railroads*, 135 S. Ct. 1225, 1237 (2015) (Alito, J., concurring) (citation omitted). That fundamental premise supports reading § 1182(f) to enable a "necessary" "period" that enables Presidents to seek a statutory continuation, rather than a period that evades Congress's deliberative process altogether.

The government also misplaces reliance on the *absence* of any amendment of § 1182(f) after a 1988 executive order tied to nationality did not limit its duration to investigation and congressional deliberation. Pet. Br. 41. Although this Court has "recognized congressional acquiescence to administrative *interpretations* of a statute in some situations, [the Court] ha[s] done so with extreme care." *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169 (2001); *cf.* Scalia & Garner, *Reading the Law* 326 (2012) ("The mere failure of a legislature to correct extant lower-

court, intermediate-court, or agency interpretations is not, in our view, a sound basis for believing that the legislature had 'adopted them.'"). Here, no executive order has contained an *interpretation* of "suspend," "period," "necessary," or "by proclamation," much less their interaction, in subsection 1182(f).

At a bare minimum, construing the statute as a whole, it is reasonable that "necessary" "period" "by proclamation" in 8 U.S.C. § 1182(f) means the period necessary for a President to investigate and attempt to persuade Congress to continue a ban where, as here, the INA itself does not prescribe the ground used in the proclamation to ban entry. In that case, as Parts II and III show, this narrower meaning of "necessary" "period" is certainly correct under the applicable canons of construction and separation of powers.

B. Subsection 1185(a)(1) Does Not Authorize EO-3's Suspension of Entry for a Class of Aliens

When a "comprehensive scheme" includes "a general authorization and a more limited, specific authorization," the "terms of the specific authorization must be complied with" to avoid "the superfluity of a specific provision that is swallowed by the general one." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). Since 1978, subsection 1182(f) has been more specific than subsection 1185(a)(1) concerning a multi-person suspension of entry. Unlike subsection 1182(f), the current subsection 1185(a)(1) uses the singular

"alien" but not "class of aliens," never uses the word "suspend," and applies to "depart[ure] and entry." Moreover, the 1978 amendment to subsection 1185(a)(1) *removed* the prior authorization for the President to impose on "aliens . . . restrictions and prohibitions in addition to" those imposed by other sections. *See supra*, at 10. Because "[w]hen Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect," *Stone v. I.N.S.*, 514 U.S. 386, 397 (1995), § 1185(a) cannot be the basis for a suspension of entry that the government admits is "on grounds beyond those the INA itself prescribes." Pet. Br. 46.

II. Independently, EO-3 Improperly Overrides the Specific Statutory Limits on Nationality Bans for Terrorism Deterrence or Foreign Policy Reasons

"[T]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand." *Brown & Williamson*, 529 U.S. at 133. "This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand." *Id.* at 143. Indeed, this Court has held that "a specific policy embodied in a later . . . statute should *control* our construction of the [earlier broad] statute, even though it ha[s] not been expressly amended." *Id.* (quotations and citations omitted; brackets in original). In particular, when Congress has more specifically addressed a problem on multiple occasions, and "Congress stopped well short of ordering a ban," the Court should not read an earlier

broad statute as authorizing an executive ban. *Id.* at 138.

Congress has addressed when to ban entry to deter terrorism or assist foreign policy on at least seven occasions since September 11, 2001, and at least two more times in 1990 and 1996. *See infra,* at 16–22. These provisions specifically address the topic at hand—when to restrict entry of "nationals" of or from a "country" to combat "terrorism" or assist "foreign policy," including to cause countries "to share information." *See infra,* at 16–22. In contrast, the more general §§ 1182(f) and 1185(a)(1) never use any of these words.

EO-3 bans travel based on problems in countries that were "well known," *Brown & Williamson*, 529 U.S. at 138, when the limits in specific statutes were enacted. As EO-2 explained, each country's being "a state sponsor of terrorism, hav[ing] been significantly compromised by terrorist organizations, or contain[ing] active conflict zones" is what diminishes the foreign government's "willingness or ability to share or validate important information." EO-2, § 1(d). Iran and Syria have been continuously designated as state sponsors of terrorism since 1984 and 1979, respectively. *Id.* § 1(e)(i),(v). Libya was so designated from 1979 until 2006, John O'Neil, *U.S. Restores Diplomatic Ties to Libya* (May 15, 2006), http://nyti.ms/2tZFQyi, and its civil war began in 2011. The Editorial Board, *In Libya, a New Front in the War on ISIS* (Aug. 2, 2016), http://nyti.ms/2ppwhmW. Al-Qa'ida has been present in Somalia since at least 1993, when it helped kill 19 U.S. soldiers. P. Bergen, *Holy War,*

Inc. 22 (2001). Al-Qa'ida has carried out attacks from Yemen since at least 2000, when it bombed the U.S.S. Cole. Eric Schmitt, *Militant Tied to Ship Bombing Is Said to Be Killed* (May 6, 2012), http://nyti.ms/2pnwHuJ. Since 2002, the United States has helped Chad "counter known terrorist operations and border incursions." *Pan Sahel Initiative*, U.S. Dep't of State, Office of Counterterrorism (Nov. 7, 2002), http://bit.ly/2GJsvNz.

Aware of these well-known problems, "the collective premise of the [more specific] statutes," *Brown & Williamson*, 529 U.S. at 139, enacted through 2015, was to limit nationality restrictions on entry to two narrow and here inapplicable circumstances. *See infra*, at 16–22. These subsequent, specific provisions limiting nationality restrictions to deter terrorism or assist foreign policy apply here rather than the more general §§ 1182(f) and 1185(a)(1). *See, e.g.*, *Morton v. Mancari,* 417 U.S. 535, 550–51 (1974) (specific provision controls over more general "regardless of the priority of enactment"); Scalia & Garner, *supra,* at 186 (specific later statute establishes "an implicit repeal of the earlier statute's application to" the topic at hand).

At a minimum, this Court may seek to "fit, if possible, all parts into an harmonious whole." *Brown & Williamson*, 529 U.S. at 133 (quotations and citation omitted). In that case, the "necessary" "period" in § 1182(f) for a *nationality* suspension "by proclamation"—a nationality ban that Congress, in enacting legislation, has rejected—would end when

the President has investigated and decided not to propose any statutory continuation.

A. Anti-Terrorism Provisions

1. *In 2001, Congress Limits Terrorism Deterrence Exclusions to Individuals*

After September 11, 2001, Congress substantially amended the statutory exclusion to deter "terrorist activity," 8 U.S.C. § 1182(a)(3)(B), in October 2001 in the USA PATRIOT Act, 115 Stat. 272, 345–48 (Oct. 26, 2001), and in 2005 in the REAL ID Act, 119 Stat. 302, 306–09 (May 11, 2005). Subsection 1182(a)(3)(B) contains a critical limit that EO-3 transgresses. Subsection 1182(a)(3)(B) authorizes a terrorism-deterrence exclusion only for an individual—"the alien" and "an alien"—not for a nationality. *Cf, Freytag v. Comm'r.*, 501 U.S. 868, 902 (1991) ("[t]he definite article 'the' obviously narrows . . ."). *See generally* H.R. Rep. No. 100-182, at 30 (1988) (subsection 1182(a)(3)(B) "must be applied on a case by case basis").

2. *In 2002, Congress Limits Nationality-Based Restrictions to* (a) *Some* Non-*Immigrants from* (b) *State Sponsors of Terrorism*

The Enhanced Border Security and Visa Reform Act of 2002 ("2002 Act") enacted 8 U.S.C. § 1735(a), 116 Stat. 555–56 (May 14, 2002). Unlike the then-recent USA PATRIOT Act, subsection 1735(a) enacted a very narrow nationality restriction that

bars issuing a "*nonimmigrant* visa under [the INA] . . . to any alien from a *country* that is a state sponsor of international *terrorism unless* the Secretary of State determines . . . that such alien does not pose a threat to the safety or national security of the United States." Thus, Congress left intact 8 U.S.C. § 1152's prohibition against denying *immigrant* visas based on nationality. *See Trump*, 878 F.3d at 696–97. Subsection 1735's restriction on *non*immigrant entry is only "applicable to the *nationals* of *such states*" designated as sponsors of international terrorism by the Secretary of State. 8 U.S.C. §§ 1735(a), (b).

EO-3 transgresses § 1735(a)'s limit on nationality restrictions in three pertinent ways. First, EO-3 bars immigrant and nonimmigrant visas for nationals of Chad, Libya, and Yemen, and immigrant visas for nationals of Somalia—although *none* of those countries is listed by the Secretary of State as a state sponsor of terrorism.[2] Second, for nationals of Iran and Syria, EO-3 improperly precludes immigrant visas. *See* EO-3, §§ 2(b)(ii), 2(e)(ii). Third, EO-3 overrides 8 U.S.C. § 1735(a)'s "unless" clause, which allows a nonimmigrant visa for Iranians and Syrians when one condition is satisfied. *Supra,* at 16–17. EO-3 requires

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[2] Yemen was removed in 1990 and Libya in 2006. Taylor Wofford, *Who Does the U.S. Still Consider a State Sponsor of Terrorism?*, Newsweek (Apr. 15, 2015, 1:12 P.M.), http://bit.ly/2FQKfJK. The Administration designated North Korea as a state sponsor of terrorism on November 20, 2017. U.S. Dep't of State, *Country Reports on Terrorism 2017, State Sponsors of Terrorism* (2017), http://bit.ly/2md65ID.

satisfaction of three *cumulative* conditions by adding that "denying entry would cause the foreign national undue hardship" *and* "entry would be in the national interest." EO-3, § 3(c)(i).

The Court properly examines the proposals that "Congress considered and rejected" when it "enacted" narrower, more specific provisions. *Brown & Williamson*, 529 U.S. at 144, 147, 155. When Congress enacted the 2002 Act, it considered and rejected a much broader ban that bears a strong resemblance to EO-3. *See* 148 Cong. Rec. H806–07 (Mar. 12, 2002) (statement of Rep. Weldon). The rejected ban, similar to EO-3, would have barred any "*immigrant or* nonimmigrant visa" for any national of Somalia and Yemen (and seven other countries), *in addition to* "[a]ny country designated as a state sponsor of terrorism" which, in 2002, included Iran, Syria, and Libya. H.R. 3286, "Securing America From Terrorist Entries Act," § 3(a)(1), 107th Cong. (introduced Nov. 13, 2001).

Like EO-3, the rejected ban's justifications included the need to "know with greater certainty who is entering and exiting the United States," that "[t]errorist organizations are operating in . . . Somalia," and that Yemen is "a haven for terrorists." *Id.* §§ 2(2), (5), (10). The rejected ban would have lasted until the Attorney General certified that a number of improvements "have been fully implemented," *id.* §§ 3(b)–(c), including the development of technology to "verify the identity of persons" applying for a visa or seeking to enter the United States "for the purpose of conducting background checks [and] confirming identity." Pub.

L. No. 107-56, § 403(c)(1), 115 Stat. 344. Like EO-3, the rejected ban had an exception that required showings that the alien's entry was "in the national interest of the United States" *and* denial was a "hardship." H.R. 3286, § 3(d).

In 2004, Congress enacted the Intelligence Reform and *Terrorism Prevention* Act, which extended the requirement of "an in person interview with a consular officer" to nearly "every alien applying for a nonimmigrant visa." 118 Stat. 3638, 3735–36 (Dec. 17, 2004); *see* 8 U.S.C. § 1202(h)(1). This *included* "a *national* of a *country* officially designated by the Secretary of State as a state sponsor of terrorism." *Id.* § 1202(h)(2)(D).

In 2008, Congress enacted 8 U.S.C. § 1182(*l*) to bring Guam and the Northern Mariana Islands within the "uniform adherence to *long-standing* fundamental immigration policies *of the United States*," including "*national security and homeland security issues.*" Pub. L. No. 110-229, § 701(a), 122 Stat. 853 (May 8, 2008). Subsection 1182(*l*)(1) authorizes the Secretary of DHS to admit nonimmigrants to those territories without a visa. Subsection 1182(*l*)(5) authorizes, however, a Secretary who determines "that visitors from a *country* pose a risk to . . . *security interests* . . . of the United States" to "suspend the admission of *nationals* of such *country under this subsection*." The limiting words "under this subsection [1182(*l*)]" confirm that when "nationals" of a "country" pose a security risk, the executive branch has statutory authority only to require visas, not to bar entry

indefinitely—except for the clear and express, but very limited, restriction in 8 U.S.C. § 1735(a).

3. *In 2015, Congress Rejects Nationality Bans Based on Deficient Information Sharing by Countries Later Designated by EO-3*

In 2015, after the San Bernardino attack, Congress substantially amended 8 U.S.C. § 1187 in the Visa Waiver Program Improvement and *Terrorist Travel Prevention Act* ("TTPA"), 129 Stat. 2242, 2988–95 (Dec. 18, 2015). As amended, 8 U.S.C. § 1187 prescribes that nationals of a country obtain visas as the remedy for when a country is unwilling or unable "to *share information* regarding . . . citizens and *nationals* of that *country* traveling to the United States." *Id.* §§ 1187(c)(2)(F), (c)(9), (f)(6). As the government admitted in its prior merits brief, President Trump "look[ed] at the same information relied upon by the prior . . . Congress" and "ma[d]e his own judgment" instead to ban entry. Pet. Br. 48, Nos. 16-1436 & 16-1540 (Aug. 10, 2017) ("Prior Pet. Br."). That is exactly what *Brown & Williamson*, *supra*, precludes.

When Congress enacted the TTPA, Congress *rejected* entry bans on nationals of countries later designated by EO-3. *See, e.g.*, H.R. 3314, 114th Cong., introduced July 29, 2015; S. 2302, 114th Cong., introduced Nov. 18, 2015 (proposing ban on refugees from Libya, Somalia, Syria, and Yemen). The House initially passed a ban on refugees from Syria or Iraq absent personal certifications by the

Secretary of DHS, the FBI Director, and the Director of National Intelligence that a specific refugee was not a security threat. H.R. 4038, 114th Cong. § 2(a) (2015). Realistically, this bill would have operated as a ban. *See* Evan Perez, *First on CNN: FBI Director James Comey balks at refugee legislation*, CNN (Nov. 19, 2015), http://cnn.it/1Ngw5ik. The Senate did not pass this bill. *See* H.R. 4038, 114th Cong. (2015), http://bit.ly/2w3XhK7.

B. Foreign Policy Provisions

1. *In 1990, Congress Limits Exclusions Based on Foreign Policy to Individuals*

The Immigration Act of 1990, 104 Stat. 4978, 5081 (Nov. 29, 1990), provides authority to exclude "*an* alien" for an unlimited duration based on "potentially serious adverse *foreign policy* consequences." 8 U.S.C. § 1182(a)(3)(C). EO-3's bans nullify two of subsection 1182(a)(3)(C)'s specific limits on foreign policy exclusions. First, § 1182(a)(3)(C) permits exclusion of "an alien," but not a class of aliens. *See also* § 1182(a)(3)(C)(iv) (referring to "*the* identity of *the* alien and *the* reasons for *the* determination"). Second, subsection 1182(a)(3)(C)(iii) prohibits an exclusion based on "*the* alien's . . . associations" when such "associations would be lawful within the United States, unless the Secretary of State personally determines that *the* alien's admission would compromise a compelling United States foreign policy interest." Being a national of one of the designated countries is an association that "would be lawful within the United

States." Nor does EO-3 assert that admitting any particular alien "would compromise a compelling United States foreign policy interest."

2. *In 1996, Congress Limits Any Country-Based Entry Restriction for Leverage to a Single Cause That Does Not Apply Here*

Congress enacted 8 U.S.C. § 1253(d) in 1996, 110 Stat. 3009-614 (Sept. 30, 1996). Unlike § 1182(a)(3)(C), § 1253(d) provides a very narrow country-based restriction. Subsection 1253(d) provides that when the "government of a foreign *country* denies or unreasonably delays accepting an alien who is a citizen, subject, *national*, or resident of that *country*" after a final order of removal of that alien from the United States, State Department officials "in that foreign country" will "discontinue granting immigrant visas or non-immigrant visas, or both, to citizens, subjects, *nationals*, and residents of that *country until* the Attorney General notifies the Secretary [of State] that the country has accepted the alien." This *leverage* exclusion is limited to this single reason. Yet the government's interpretation of subsection 1182(f) authorizes the President to impose country-based bans indefinitely for *any* foreign policy leverage reason.

C. EO-3 Nullifies, Rather than Complements, the Statutory Boundaries for Indefinite Nationality Bans Based on Terrorism Deterrence or Foreign Policy

The government contends that EO-3 "complements" the specific provisions on terrorism and foreign policy. Pet. Br. 44. But when a specific statutory provision stops short of what it might have done, that sets a statutory boundary. As Justice Scalia and Bryan Garner summarized:

> After all, *no statute*, . . . pursues its "broad purpose" at all costs. The statute might not have won majority approval without the provisions that limit its application *or that simply stop short of what it might have done*. Those limiting provisions (or the absence of more expansive provisions) are no less a reflection of the genuine "purpose" of the statute than the operative provisions, and it is not the court's function to alter the legislative compromise.

Scalia & Garner, *supra*, at 21 (citing Supreme Court cases). In particular, even when the Court is understandably "anxi[ous] to effectuate the congressional purpose of protecting the public, [it] must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop." *Brown & Williamson,* 529 U.S. at 161 (quotations and citation omitted).

This principle applies when the executive branch seeks to deter terrorism, as here, "in a field with a history of congressional participation and regulation." *Hamdan v. Rumsfeld*, 548 U.S. 557, 638 (2006) (Kennedy, J., joined by Souter, Ginsburg, Breyer, JJ., concurring). *Hamdan* construed 10 U.S.C. § 821, which stated that the UCMJ did "not deprive military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions." *Id.* at 641 (quoting 10 U.S.C. § 821). The Court read that provision implicitly to "limit[]" military commissions to "only" those authorized "by statute or by the law of war." *Id.*; *accord id.* at 593–94 & nn.23–24 (majority opinion).

Finally, the more general §§ 1182(f) and 1185(a)(1) lack the critical language needed to control despite limits, including stopping points, in more specific provisions. "Drafters often use *notwithstanding* in a catchall provision." Scalia & Garner, *supra,* at 127 (emphasis in original). But §§ 1182(f) and 1185(a)(1) do not. In contrast, other, here inapplicable INA provisions begin: "Notwithstanding any other provision at law . . . ." 8 U.S.C. §§ 1182e, 1182f. *See also* 1952 Act § 212(c), 66 Stat. 188 (granting limited waiver authority to Attorney General "without regard to the provisions of" twenty-seven paragraphs of § 212(a)). The government's interpretation improperly would rewrite subsections 1182(f) and 1185(a)(1) to add the "notwithstanding" language that Congress omitted. *See Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 824 (2018) (relying on statute's use of "'[n]otwithstanding'" in only a *different* provision).

III. Avoiding Serious Separation of Powers Issues Supports Narrowly Construing the Pertinent Text

A. Separation of Powers, Including Nondelegation, Is Not Diluted for Statutes Governing Entry by Aliens

Boumediene v. Bush, 553 U.S. 723 (2008), addressed legislation affecting foreign affairs and national security and held that, "[b]ecause the Constitution's separation-of-powers structure . . . protects persons as well as citizens, [even] *foreign nationals* who have the privilege of litigating in our courts can seek to enforce separation-of-powers principles." *Id.* at 743. "Security subsists, too, in fidelity to freedom's first principles . . . [A]mong these [is] . . . adherence to the separation of powers." 553 U.S. at 797. Our separated powers, including constraints on delegation of legislative powers, "may be destined to pass away. But it is the duty of the Court to be [the] last, not first, to give them up." *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 655 (1952) (Jackson, J., concurring).

For five reasons, the government is incorrect that a critical aspect of separation of powers—constraints on congressional delegation of legislative powers—is at its "nadir" because powers over aliens affect foreign affairs. Pet. Br. 45. First, *United States v. Witkovich*, 353 U.S. 194 (1957), applied without dilution the rule that "a restrictive meaning must be given if a broader meaning would generate constitutional doubts" to an ambiguous statute delegating powers over aliens. *Id.* at 199; *accord id.*

at 201–02; *Carlson v. Landon*, 342 U.S. 524, 544 (1952).

Second, pursuant to Article I, Section 8 of the Constitution, "the power of naturalization is *exclusively in Congress*," *Chirac v. Chirac*, 15 U.S. 259, 269 (1817), for a reason. The Declaration of Independence had listed "obstructing the laws for Naturalization of Foreigners" *and* "refusing to pass [laws] to encourage their *migrations* hither" as among the acts of "absolute Tyranny" of "the present King of Great Britain." The DECLARATION OF INDEPENDENCE (U.S. 1776). As Justice Jackson wrote in *Youngstown*, 343 U.S. at 641: "The example of such *unlimited executive power* that must have most impressed the forefathers was the prerogative exercised by George III, and *the description of its evils in the Declaration of Independence* leads me to doubt that they were creating the new Executive in his image."

Third, as Justice Jackson admonished, no judicial ruling would be "more sinister and alarming" than a holding that Presidential power to "conduct . . . foreign affairs" provides a basis to "vastly enlarge his mastery over internal affairs of the country." *Id.* at 642. This admonition applies here because the power over entry by aliens is a mixed power that affects domestic and foreign affairs.

Whether to admit immigrants and nonimmigrants affects "trade, investment, [and] tourism" in our Nation. *Arizona v. United States*, 567 U.S. 387, 395 (2012). "The history of the United

States is in part made of the stories, talents, and lasting contributions of those who crossed oceans and deserts to come here." *Id.* at 416. Moreover, as illustrated by the 1952 legislative history, proponents of limiting entry often rely on domestic "economic" reasons. 98 Cong. Rec. 4423 (1952) (Statement of Rep. Walter).

The Constitution's framers and ratifiers emphasized the domestic impacts of immigration. *See, e.g.*, 5 *Debates on the Adoption of the Federal Constitution* (Jonathan Elliot ed.) ("*Debates*") 411 (1845) (Madison at the Constitutional Convention: "America was indebted to emigration for her settlement and prosperity. That part of America which had encouraged them most had advanced most rapidly in population, agriculture, and the arts."); *id.* at 412 (James Wilson: "encouraging emigrations" helped make Pennsylvania "among the foremost in population and prosperity"); 3 *Debates* (Jonathan Elliot ed.) (2d ed. 1836), at 78 (Governor Edmund Randolph at Virginia Ratifying Convention: after ratification, "immigration will increase," "commerce will flourish," and state tax revenues "will therefore be more sure and productive").

Indeed, Madison in Federalist No. 42 listed the power of "the general government to establish a uniform rule of naturalization throughout the United States" among the "class of powers" to "provide for the harmony and proper intercourse *among the states.*"[3] When Federalist Nos. 41 and 42

[3] Both Federalist No. 42 and Justice Story explained how, "[u]nder the confederation, the states possessed the sole authority to exercise the power . . . of naturalization . . ."

comprehensively listed the federal powers of "[s]ecurity against foreign danger" and to "regulate the intercourse with foreign nations," naturalization was *not* among them.

Fourth, even concerning foreign relations, "[a] presidency more reminiscent of George III than George Washington" is "not the chief magistrate under which the American people agreed to live when they adopted the national charter." *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2116 (2015) (Scalia, J., joined by Roberts, C.J., and Alito, J., dissenting). As Justice Scalia summarized:

> Before this country declared independence, the law of England entrusted the King with the exclusive care of his kingdom's foreign affairs . . . . The People of the United States had other ideas when they organized our Government. They considered a sound structure of balanced powers essential to the preservation of just government, and *international relations formed no exception to that principle*.
>
> The People therefore adopted a Constitution that divides responsibility for the Nation's foreign concerns between the legislative and executive departments. *The Constitution . . . gave Congress powers over* war, foreign commerce, *naturalization*, *and more*. Art. I, § 8.

J. Story, *Commentaries on the Constitution* § 1098 (1833). *See Chirac*, 15 U.S. at 261 (referring to a 1779 Maryland statute).

Id.

Fifth, the constitutional-doubt canon is a rule of "judicial policy—a judgment that statutes *ought not* to tread on questionable constitutional grounds unless they do so clearly." Scalia & Garner, *supra*, at 249 (emphasis in original). History shows that Congress would tread on questionable constitutional grounds if it gave a President unconstrained power over the presence of aliens from countries with which our nation was not at war. The much-lamented Act Concerning Aliens of June 25, 1798 ("Alien Act") raised serious separation of powers issues even though it set clearer principles than would the government's limitless interpretation of subsections 1182(f) and 1185(a)(1). The Alien Act was limited to aliens who themselves were "dangerous to the peace and safety of the United States," expired in two years, and did not give the President power to nullify limits in any other then-existing statutory provision. 1 Stat. 570, 572. President Adams "never invoked" the Alien Act. D. McCullough, *John Adams* 505 (2001).

In the Virginia Resolution of 1798, Madison wrote that the Alien Act, "by uniting legislative and judicial powers to those of the executive, *subverts* the general principles of free government; as well as *the particular organization*, and positive provisions *of the federal constitution*." James Madison, Virginia Resolution (Dec. 21, 1798), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, 131–36 (Philip B. Kurland & Ralph Lerner eds., 1987) (first emphasis in original). Madison's analysis powerfully rebuts the government's argument that, if ambiguous, 8

U.S.C. §§ 1182(f) and 1185(a)(1) need not be construed narrowly to avoid serious constitutional issues.

B. *Knauff* and *Curtiss-Wright* Are Distinguishable

The government misplaces reliance on *dicta* in two opinions issued before *Witkovich* and *Youngstown—United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), and *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). *Knauff* addressed a prior statute that applied to banning entry "only when the United States is at war or during the existence of the national emergency proclaimed May 27, 1941," not during "ordinary times." 338 U.S. at 544–45. *Knauff* noted that "a state of war still exists." *Id.* at 546.

Curtiss-Wright did not concern entry, but rather a Joint Resolution that barred arms and munitions sales to countries at war in the Chaco (Bolivia and Paraguay) after "the President finds" in a "proclamation" that such a bar "may contribute to the reestablishment of peace between those countries." 299 U.S. at 312. Also, "[t]here [wa]s no suggestion that the [joint] resolution is fatally uncertain or indefinite." *Id.* at 331.

After the *dicta* in *Knauff* and *Curtiss-Wright*, *Witkovich* correctly applied delegation constraints to ambiguous statutory powers over aliens from nations with which we are not at war. *Supra,* at 25–26. The Court also held that *Curtiss-Wright* "does not mean

that simply because a statute deals with foreign relations, it can grant the Executive totally unrestricted freedom of choice," *Zemel v. Rusk*, 381 U.S. 1, 17 (1965), or that the executive has "unbounded power" over foreign affairs. *Zivotofsky*, 135 S. Ct. at 2089.

Finally, the government ignores the premise of the *dicta* on which it relies. That premise was that because there was an "entire absence of state power[s] to deal with [foreign] affairs" and national defense before the Constitution, such powers were conferred on the federal government *outside* the Constitution, and may be delegated more freely. *Curtiss-Wright*, 299 U.S. at 317.[4] That premise cannot apply here because, before the Constitution, the states *had* legislative powers over both naturalization, *supra*, at 27–28, & n.3, and entry of aliens, *see New York v. Miln*, 36 U.S. 102, 130–33, 141–42 (1837) (explaining why domestic reasons gave "the State of New York . . . power to pass this law [limiting entry by foreigners] before the adoption of the Constitution"). Indeed, the government does not dispute that Congress's "power of the *exclusion* of foreigners . . . [is] part of those sovereign powers *delegated by the Constitution*." *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889).

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[4] The *dicta* in *Curtiss-Wright* are "notorious (at least to originalists)." G. Lawson, *Delegation and Original Meaning,* 88 VA. L. REV. 327, 394 n.261 (2002).

C. The Government's Limitless Interpretation of Subsection 1182(f) Raises Two Serious Separation of Powers Issues

The government admits that its interpretation of subsection 1182(f) would give all Presidents authority to make "the *decisions* (1) *whether, when,* and *on what basis* to suspend entry . . . (2) *whose* entry to suspend . . . , [and] (3) *for how long*." Pet. Br. 31. At a minimum, the government's limitless interpretation raises two serious separation-of-powers issues: whether it would (1) authorize a line-item veto over other statutory provisions or (2) constitute an invalid delegation.

1. *Line-Item Veto*

The Presentment Clause and separation of powers preclude Congress from authorizing "*unilateral* Presidential action that either repeals or amends *parts* of duly enacted statutes." *Clinton v. City of New York*, 524 U.S. 417, 439 (1998). "Concentration of power in the hands of a single branch is a threat to liberty." *Id.* at 450 (Kennedy, J., concurring). "The Framers of the Constitution could not command statesmanship. They could simply provide structures from which it might emerge." *Id.* at 452–53. The bar against a line-item veto applies even *if* a President raises a concern of "first importance" that, if unaddressed by statutory changes, might put the "Constitution and its survival in peril." *Id.* at 449.

In particular, Congress may not give the President a line-item veto to address "conditions which prevail *in foreign countries*." *Id.* at 445 (majority opinion). Rather, even in those circumstances, the Presentment Clause and separation of powers require a statutory authorization in which "[(a)] *Congress itself made the decision to suspend* or repeal the particular [other] provisions at issue [(b)] *upon the occurrence of particular events subsequent to enactment*, and [(c)] it left *only the determination of whether such events occurred up to the President.*" *Id.* (footnote omitted).

Here, in two ways, the government's interpretation of § 1182(f) amounts to a line-item veto to suspend the limits in specific statutory provisions, in addition to an unconstitutional delegation. First, that interpretation not only "gives the President power to suspend entry when he deems it necessary on grounds *beyond those the INA itself prescribes*," Pet. Br. 46, it enables the President to suspend the limits on nationality bans in the "parts of duly enacted statutes," *Clinton*, 524 U.S. at 439, where Congress specifically addressed terrorism, foreign policy, and foreign information sharing. *Supra*, at 16–22. Second, the government does not dispute that the deficiencies in the designated countries existed when Congress enacted those statutory limits. *Supra*, at 14–15.[5]

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[5] In contrast, the statute in *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 375 (2000), where no separation-of-powers challenge was made, merely authorized a President "to respond to change."

If this Court adopts the government's interpretation of subsection 1182(f), unilateral Presidential power to revise the statute would be unbounded. A President could unilaterally ban immigrant entry from European countries that have failed to identify and intercept terrorists—or from any and all countries for any reason that arguably advances any foreign *or* domestic "interest[] of the United States"—without ever seeking a statutory amendment. *See* Prior Pet. Br. 41 ("Congress placed no restrictions on which 'interests' count or what 'detriments' suffice . . . ."). At a minimum, to save § 1182(f) from serious line-item veto issues, a nationality suspension that overrides other statutory provisions must be limited to the period necessary for investigation and congressional consideration of legislation proposed by the President.

2. *Unconstitutional Delegation*

Like all separation of powers, the important constraints on delegation "exist[] to protect liberty." *Ass'n of Am. Railroads*, 135 S. Ct. at 1237 (Alito, J., concurring). *See also United States v. Nichols*, 784 F.3d 666, 671 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing en banc) (importance makes "the difficulty of the inquiry . . . worth the effort"). The government's interpretation of § 1182(f) raises serious issues of invalid delegation because it "gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit." *Panama Refining Co. v. Ryan*, 293 U.S. 388, 415 (1935). *See supra*, at 32.

"[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." *Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 475 (2001). *See also id.* at 487 (Thomas, J., concurring) (sometimes "the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative'"); *Nichols,* 784 F.3d at 676 (Gorsuch, J., dissenting from denial of rehearing en banc) (delegation doctrine requires more, *inter alia*, the broader the discretion given and the larger "the number of people affected"); *id.* at 668–69 (citing statute's failure to specify the times at which executive discretion would start and end). The government has admitted that its interpretation of § 1182(f) gives the President "power [that] is parallel to Congress's *legislative* determinations regarding admissibility of classes of aliens." Prior Pet. Br. 64. To reduce the serious delegation issues raised by this interpretation, the Court should construe narrowly the "necessary" "period" for such a breathtaking power.

As George Washington explained, no matter how beneficial violating separation of powers may be "in one instance, . . . it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit." George Washington, *Farewell Address* (1796), http://bit.ly/1dLozEs. Even "emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them." *Youngstown*, 343 U.S. at 652 (Jackson, J., concurring). One violation of

separation of powers would not "plunge us straightaway into dictatorship, but it is at least a step in that wrong direction." *Id.* at 653. In contrast:

> Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine—through democratic means—how best to do so. The Constitution places its faith in those democratic means.

Hamdan, 548 U.S. at 636 (Breyer, J., joined by Kennedy, Souter, Ginsburg, JJ., concurring).

IV. Invalidation of EO-3 on Duration Grounds Would Not Disturb Abundant Presidential Powers

As this Court noted in an immigration case, "durational limits on [statutory] authorizations . . . lie well within Congress's constitutional power." *I.N.S. v. Chadha,* 462 U.S. 919, 959 n.19 (1983). The statutory duration of the "necessary" "period" does not disable Presidents from suspending entry for a period necessary to investigate a problem and have ample opportunity to persuade Congress—including through classified briefings—to continue the ban. This includes Presidential suspensions in the government's hypotheticals of "the brink of war" and when the President is "aware of a particular threat

from an unidentified national of [a particular] country." Pet. Br. 54.

Presidents also may vigorously enforce the numerous statutory provisions, *supra*, Part II, based on deterring terrorism or assisting foreign policy. In particular, invalidating EO-3's bans will not limit this Administration's enhanced vetting. This enhanced vetting includes: (1) Longer, more detailed interviews, and a "mandatory social media review" when an "applicant may have ties to ISIS or other terrorist organizations or has ever been present in an ISIS-controlled territory . . . ." State Dep't Cable 25814 ¶¶ 8, 10, 13 (Mar. 17, 2017), http://bit.ly/2o0wBqt. (2) Reviews of "online" information. 82 Fed. Reg. 19380 (Apr. 27, 2017). (3) Requirements that applicants list (a) for fifteen years, every place they have lived, worked, and traveled internationally—and how such travel was funded; (b) every passport ever held; (c) names and birth dates of all siblings, children, spouses, and partners; and (d) for five years, every social media handle, phone number, and e-mail address. U.S. Dep't of State, Supplemental Questions for Visa Applicants (June 1, 2017), http://bit.ly/2wzoatR. (4) Increased searches of electronic devices of international travelers. U.S. Customs and Border Prot., CBP Releases Statistics on Electronic Device Searches (Apr. 11, 2017), http://bit.ly/2oyyLAu.

As President Trump has stated, his Administration achieved "extreme vetting" *without* a travel ban. When lower courts *fully* enjoined EO-2's travel bans, President Trump stated: "*In any event we are* EXTREME VETTING people coming into the

U.S. in order to help keep our country safe." Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017, 3:37 a.m. and 3:44 a.m.), http://bit.ly/2hGHz2Z and http://bit.ly/2rtbEIK (capitalization in original). And while the District Court's injunction against EO-3's bans was in effect, President Trump "ordered" his Administration "to step up our *already Extreme Vetting* Program." Donald J. Trump (@realDonaldTrump), Twitter (Oct. 31, 2017, 6:26 p.m. EDT), http://bit.ly/2A6exkS.

State Department data demonstrate the immediate and dramatic impact—without a travel ban—of this Administration's "Extreme Vetting." Comparing April 2017—when *all EO-2 bans were entirely enjoined*—to the 2016 monthly averages, non-immigrant visa issuances by State Department officials were *down* 55% *among the six countries designated by EO-2.* Nahal Toosi and Ted Hesson, *Visas to Muslim-majority countries down 20 percent*, Politico (May 25, 2017, 10:28 p.m. EDT), http://politi.co/2r0XBHQ. This decrease is especially compelling as, before this Administration, the visa refusal rate was already 79 percent higher for nationals of the EO-2 designated countries. Brief of the Cato Institute as *Amicus Curiae* at 9, Nos. 16-1436 and 16-1540 (U.S. Sept. 9, 2017) (citing State Department data).

Moreover, Presidents retain power to suspend entry by nationals of a country for the duration of a war with that country. *Knauff*'s holding recognized "an inherent executive power" to exclude such aliens "during" a war. 338 U.S. at 542–45. That holding remains good law as, unlike nationality bans based

on terrorism deterrence or foreign policy, no specific, current, statutory provision addresses, much less limits, exclusion of nationals of a country at war with the United States.

Finally, invalidating EO-3's bans on duration grounds will not set a precedent for judicial review of the prudence or motives of suspensions under § 1182(f). Instead, "[t]he political departments" may address any topics they consider pertinent when they "engage in a genuine debate about how to best preserve constitutional values while protecting the Nation from terrorism." *Boumediene*, 553 U.S. at 798.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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DATED: March 23, 2018

APPENDIX A

LIST OF AMICI CURIAE

William Webster, Director, Central Intelligence Agency, 1987–1991; Director, Federal Bureau of Investigation, 1978–1987; Circuit Judge, United States Court of Appeals for the Eighth Circuit, 1973–1978; Judge, U.S. District Court for the Eastern District of Missouri, 1970–1973; U.S. Attorney for the Eastern District of Missouri, 1960–1961.

Thomas Kean, Governor, New Jersey, 1982–1990; Chairman, National Commission on Terrorist Attacks Upon the United States, 2002–2004.

John Danforth, United States Senator, 1976–1995, including Member, Senate Select Committee on Intelligence; United States Ambassador to the United Nations, 2004–2005.

Peter Keisler, Acting Attorney General, 2007; Assistant Attorney General for the Civil Division, 2003–2007; Principal Deputy Associate Attorney General and Acting Associate Attorney General, 2002–2003; Assistant and Associate Counsel to the President, 1986–1988.

Carter Phillips, Assistant to the Solicitor General, 1981–1984.

Brackett Denniston, Chief Legal Counsel to Republican Governor of Massachusetts William Weld, 1993–1996; Chief of Major Frauds Unit in the U.S. Attorney's Office for the District of Massachusetts, 1982–1986; Former General Counsel, General Electric Company.

Michael Castle, U.S. Representative, 1993–2011; Governor, Delaware, 1985–1992.

Ray LaHood, Representative, U.S. Congress, 1995–2009; Member, House Permanent Select Committee on Intelligence, including Chairman of its Terrorism and Homeland Security Subcommittee, and Vice Chairman of the Intelligence Policy and National Security Subcommittee.

Connie Morella, Representative, U.S. Congress, 1987–2003; United States Representative to the Organization for Economic Cooperation and Development, 2003–2007.

Christopher Shays, Representative, U.S. Congress, 1987–2009; Chairman, Subcommittee of National Security and Foreign Affairs of the House Oversight and Government Reform Committee; Member, Subcommittee on Intelligence, Information Sharing and Terrorism Risk Assessment of the House Homeland Security Committee.

Christine Todd Whitman, Administrator, Environmental Protection Agency, 2001–2003; Governor, New Jersey, 1994–2001.

Stanley Twardy, U.S. Attorney for the District of Connecticut, 1985–1991.

Richard Bernstein, Appointed by this Court to argue in *Cartmell v. Texas*, 529 U.S. 513, 515 (2000); *Montgomery v. Louisiana*, 136 S. Ct. 718, 725 (2016).