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

AMICI CURIAE BRIEF OF PROFESSORS OF FEDERAL COURTS JURISPRUDENCE, CONSTITUTIONAL LAW, AND IMMIGRATION LAW IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

Amici curiae are academics whose expertise includes the jurisprudence of federal courts, constitutional law, and/or immigration law. *Amici* submit this brief to explain why, given constitutional commitments to separation of powers and legislative primacy in determining migration policy, the President lacked authority to issue the directive set forth in section 2 of Presidential Proclamation 9645 (the "Proclamation") barring the entry of noncitizens from eight countries solely on the basis of nationality. 82 Fed. Reg. 45,161 (Sept. 27, 2017).[1]

SUMMARY OF ARGUMENT

The sweeping new power claimed by the President to exclude individuals from the United States on the basis of their nationalities—purportedly grounded in his general "interests of the United States" authority under 8 U.S.C. § 1182(f)—implicates the foundational separation-of-powers principles of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Determining the extent of the President's statutory and constitutional authority in this area under *Youngstown* and its subsequent application in *Dames & Moore v. Regan,* 453 U.S. 654 (1981), requires analysis of what Congress has authorized and what it has prohibited in existing legislation that deals with visas and entry.

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[1] In accordance with Supreme Court Rule 37.6, amici state that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than amici and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Counsel of record for all parties have consented to the filing of this brief.

As we explain below, the Proclamation is not authorized by statute, it contravenes express and implied congressional mandates, and the President lacks the independent and exclusive authority to supplant congressional authority over immigration. In particular, the President has disregarded the unswerving legislative commitment to particularized determinations of risks to security and impermissibly used nationality as a proxy for risks to security. The result is a Proclamation that bars entry to tens of millions of individuals on the basis of nationality alone and thereby exceeds the President's authority.

Contrary to the President's assertion, the Immigration and Nationality Act ("INA") does not delegate plenary authority to the Executive to act invidiously by invoking nationality as the sole basis for excluding many millions of people from the United States. Reading section 212(f), codified at 8 U.S.C. § 1182(f) (hereinafter § 1182(f)), as authorizing such unfettered discretion is at odds with the provision's historical interpretation and usage and cannot be reconciled with the broader statutory context within which it operates. Moreover, the authority conferred by 8 U.S.C. § 1185(a)(1) is limited by the more specific requirements of § 1182(f). Not only is the President's broad reading of these provisions untenable, but—if accepted—it would raise concerns that Congress has abdicated its own constitutional role in setting immigration policy.

These provisions cannot sustain the Proclamation and must be read in the context of the INA as a whole, which has articulated a detailed scheme for immigration and imposed rules governing how decisions about migrants are to be made. In 1965, Congress rejected

the historic reliance on nationality as a stalking horse for racial, ethnic, and religious intolerance, and banned the use of nationality in the issuance of immigrant visas. *See* 8 U.S.C. § 1152(a). In the half century since, Congress has insisted on individualized inquiry, pursuant to specific, nondiscriminatory criteria, when denying a visa on the ground that an individual constitutes a threat to safety and security. The general authority granted by § 1182(f) does not empower the President to overturn these fundamental immigration-law principles.

The Proclamation, like the two Executive Orders preceding it, employs nationality as a stand-in for the propensity to undermine Americans' safety. This action by the President to resurrect the use of nationality as a sole basis to ban entry into the United States contravenes the congressional rejection of such discredited tests for entry. In these circumstances, under separation-of-powers principles, the President's power is at or near its "lowest ebb" and is valid only if the President possesses independent and exclusive constitutional powers that preclude Congress "from acting upon the subject." *Youngstown,* 343 U.S. at 637–38 (Jackson, J., concurring). Because the President has no such unfettered constitutional power over immigration, the Proclamation cannot be sustained.

ARGUMENT

Throughout the Nation's history, our courts have played a foundational role in delineating and enforcing constitutional limits on the authority of the other branches of government. *See, e.g.*, *Youngstown*, 343 U.S. 579 (holding unconstitutional an executive order that "legislated" the seizure of the Nation's steel mills); *Marbury v. Madison*, 1 Cranch 137 (1803)

(holding that courts possess power to review actions by even the highest officers of the government).

When seeking to avoid judicial review, the Executive branch has often invoked its prerogatives in the areas of national security, foreign affairs, citizenship, or immigration. Repeatedly, courts have concluded that such labels do not bar adjudication. *See, e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (notwithstanding Commander-in-Chief powers and an existing exigency, Executive lacked authority to convene the military commission at issue). *See also Dames & Moore*, 453 U.S. at 678 (evaluating Executive action to settle claims against a foreign nation against the "general tenor" of congressional legislation). As this Court has explained, "[t]he Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue." *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2090 (2015).

Here, the President's use of nationality as a proxy for security risk—and to bar entry to millions of individuals on that basis alone—not only lacks specific statutory authorization, but contravenes both express and implicit congressional directives. Accordingly, the Proclamation cannot stand.

I. The Governing Legal Framework

Youngstown provides the framework for assessing the validity of the Proclamation in this case. As that decision explains, "[t]he President's power, if any, to issue [an] order must stem either from an act of Congress or from the Constitution itself." 343 U.S. at 585. Thus, the President's power must be analyzed initially in light of relevant legislation. *See id.* at 585–86.

Youngstown invalidated an executive order directing a temporary government seizure of the nation's steel mills to avoid a strike that could have halted steel production during the Korean War.[2] Despite the threat to the lives of American service members if steel production ceased, the Court struck down the seizure order as an unconstitutional exercise of unilateral presidential power. The Court found that the order was "not only unauthorized by any congressional enactment," but also effectively legislated policy that Congress had specifically rejected. *Id.* at 586.[3] The Court further held that the President's constitutionally derived power could not authorize the seizure order. *Id.* at 587. At bottom, the Court deemed the power "to take possession of private property in order to keep labor disputes from stopping production . . . [to be] a job for the Nation's lawmakers, not for its military authorities." *Id.*

In his concurrence, Justice Jackson set forth what has become an influential tripartite framework to evaluate the legality of presidential action. He described exercises of presidential power as typically falling within one of three categories:

> 1. When the President acts pursuant to an express or implied authorization of Congress,

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[2] At the time *Youngstown* was decided, American armed forces had been fighting in Korea for "almost two full years . . . suffering casualties of over 108,000 men," and hostilities had not abated. *Youngstown*, 343 U.S. at 668 (Vinson, C.J., dissenting).

[3] Five years prior, Congress had considered—and rejected—enacting a law that would have authorized such governmental seizures in cases of emergency. *Youngstown*, 343 U.S. at 586.

> his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. [hereinafter "Category 1"]
>
> 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. [hereinafter "Category 2"]
>
> 3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers . . . . Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. [hereinafter "Category 3"]

Id. at 635–38 (Jackson, J., concurring).

Justice Jackson concluded that the seizure order fell in Category 3 because no statute explicitly authorized it, and because Congress had enacted detailed procedures for the seizure of property that were inconsistent with the President's order. *Id.* at 639. Accordingly, the order could be sustained only if the seizure were "within [the President's] domain and beyond control by Congress." *Id.* at 640. And Justice Jackson

rejected each of the President's asserted bases for such "conclusive and preclusive" constitutional authority. *Id.* at 638, 640–46.

Thirty years later, in *Dames & Moore*, this Court returned to the *Youngstown* categories. In evaluating three executive orders implementing an agreement to secure the release of U.S. hostages in Iran, the Court recognized that "executive action in any particular instance falls, not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition." *Dames & Moore*, 453 U.S. at 669.

The Court held that the first two executive orders were specifically authorized by the International Emergency Economic Powers Act ("IEEPA") and thus fell within *Youngstown*'s Category 1. *Id.* at 670–74. But with respect to the third order, which suspended pending claims against Iranian interests, the Court ruled that neither the IEEPA nor the so-called Hostage Act of 1868 provided statutory authority for this executive action. "Although the broad language of the Hostage Act suggests it may [have] cover[ed] this case," the Court recognized that the Act was passed in response to a non-analogous situation and was therefore "somewhat ambiguous" as to whether Congress contemplated the presidential action at issue. *Id.* at 675–77.

Given this ambiguity, the Court looked to two factors: (a) the "general tenor of Congress's legislation in this area" and (b) the long and unbroken history of claims settlement through Executive Agreement. *Id.* at 678–80. Based on these factors, the Court con-

cluded that Congress had acquiesced in the President's exercise of authority to settle claims against foreign powers. *Id.* The Court emphasized the "narrowness" of its decision, *id.* at 688, and subsequently indicated that its approach was not intended to "be construed as license for the broad exercise of unilateral executive power." *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1328 & n.28 (2017).

Under *Youngstown* and *Dames & Moore*, neither § 1182(f) nor § 1185(a)(1) can sustain the Proclamation's categorical and permanent bar, solely on the basis of nationality, to the entry of millions of immigrants and non-immigrants who would otherwise qualify for admission. Moreover, neither of the factors present in *Dames & Moore*, suggesting congressional "acquiescence" to the President's exercise of unilateral authority, is present in this case. Indeed, other "legislation in this area," *Dames & Moore*, 453 U.S. at 678, demonstrates Congress's affirmative *opposition* to the use of nationality in determining eligibility for entry and to substituting categorical proxies for "dangerousness" in place of an individualized assessment. Because the President lacks any "conclusive and preclusive" constitutional power to override this congressional intent, *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring), the President had no constitutional authority to issue the Proclamation.

II. Neither § 1182(f) Nor § 1185(a)(1) Grants The President Unfettered Discretion To Exclude Noncitizens.

As *Youngstown* and *Dames & Moore* illustrate, careful analysis of specific statutes is essential to evaluating the lawfulness of Executive action. Here, the

President asserts that 8 U.S.C. §§ 1182(f) and 1185(a)(1) provide authorization for the Proclamation. But neither provision grants the President unfettered discretion to employ invidious classifications to bar the entry of aliens.

Section 1182(f) provides:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

8 U.S.C. § 1182(f). Section 1185(a)(1)—a more general provision that confers no additional substantive authority and cannot be read to displace the more specific § 1182(f)—states that, "[u]nless otherwise ordered by the President, it shall be unlawful . . . for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe." 8 U.S.C. § 1185(a)(1).

The President claims that these provisions authorize him to exclude aliens based on any criteria whatsoever. However, canons of statutory construction and the statutes' interpretive history preclude such an expansive reading. As an initial matter, the statutes must be interpreted as a delegation of au-

thority that the Constitution primarily vests in Congress, not the Executive. The Constitution vests Congress with authority to "establish an uniform Rule of Naturalization" and to regulate or prohibit the "Migration" of persons. U.S. Const., art. I, §§ 8, 9.[4] The Migration Clause, notwithstanding its sorry history aimed at protecting the slave trade from immediate interference, provides the governing constitutional framework: After the stipulated twenty-year hiatus, it was for *Congress* to decide on the "Migration … of … Persons."[5] This area is thus unlike others in which the constitutional scheme may contemplate a primary role for Executive power. *Cf. United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 312 (1936).

Given congressional power in this arena, the question becomes understanding what power, if any, Congress has delegated to the Executive. This case is one of many in which a potentially broad authorization from Congress must be read to reflect basic separation-of-powers principles and to avoid constitutional questions about a potentially overbroad delegation. In *Hamdan,* for example, the Court concluded that the facially broad delegation in the Joint Resolution for the Authorization for Use of Military Force ("AUMF"), enacted immediately after the September 11 terrorist

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[4] Article I, Section 9 prohibits Congress, for a period of twenty years, from prohibiting "[t]he Migration or Importation of such Persons as any of the States now existing shall think proper to admit."

[5] This Court has identified other sources for Congress's power to regulate immigration, including the Commerce Clause, war powers, and powers inherent in sovereignty. *See generally, e.g.*, *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952).

attacks, did not authorize the use of military commissions to try suspected terrorists. The AUMF delegates to the President power to "'use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.'" 548 U.S. at 568 (quoting AUMF, 115 Stat. 224). The President invoked this authority to provide for trial by military commission for any individual suspected of membership in al Qaeda or participation in terrorist acts against the United States. *Id.* at 568. The Court concluded that "there is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the" Uniform Code of Military Justice. *Id.* at 594. Thus, even in the context of a direct response to domestic terrorist attacks, the Court rejected the President's claim of unfettered authority to convene military commissions to try noncitizens.

Similarly, *Jean v. Nelson*, 472 U.S. 846 (1985), shows that a broad statutory delegation of immigration discretion to the Executive does not confer limitless power to discriminate. There, the Eleventh Circuit had concluded that a statute granting the Attorney General discretion to "parole into the United States any . . . alien applying for admission 'under such conditions as he may prescribe' " authorized parole decisions on the basis of race or national origin, and was consistent with the Constitution. *Id.* at 848, 852 (quoting 8 U.S.C. § 1182(d)(5)(A)). This Court declined to endorse that view and concluded that the

statute and its implementing regulations prohibited such discrimination, *id.* at 854–56, despite the absence of statutory language expressly prohibiting nationality-based distinctions, *see id.* at 862–63 (Marshall, J., dissenting).

Even in *Dames & Moore*, which ultimately found that the Executive actions at issue were within a congressional authorization, the Court was unwilling to read a broadly worded statute without also considering the context of other relevant statutes and past practices. In particular, the Court analyzed the Hostage Act of 1868, which provided that whenever a U.S. citizen was unjustly held by a foreign government, "if the release … is unreasonably delayed or refused, *the President shall use such means, not amounting to acts of war and not otherwise prohibited by law, as he may think necessary and proper to obtain or effectuate the release*." 22 U.S.C. § 1732 *(*emphasis added). While recognizing this "broad language," the Court declined to construe it as authorizing the President's suspension of pending claims against foreign nations. The Court noted that the issue prompting the 1868 legislation involved not foreign powers interested in trading hostages back, but rather foreign powers seeking to repatriate American citizens. *See Dames & Moore*, 453 U.S. at 676-77. The Court then turned to the legislative history, which it described as "somewhat ambiguous." *Id.* at 677. It was only after finding (1) "a longstanding practice of settling such claims by executive agreement," and (2) that Congress *had* enacted specific procedures to implement Executive Agreements of this kind, that the Court concluded that Congress had "placed its stamp of approval" on such actions. *Id.* at 679-80.

The Proclamation here benefits from no such "stamp of approval." Unlike in *Dames & Moore,* there is no evidence that Congress assumed, much less endorsed, unlimited executive power to exclude noncitizens on the basis of nationality. No President has ever issued an order akin to the Proclamation—eliminating any possible inference that Congress has "acquiesced" in such a practice. Rather, past presidential actions suggest an understanding of meaningful limits to this power. A Congressional Research Service Report identified 43 instances between 1981 and 2017 where the President invoked § 1182(f) to suspend the entry of noncitizens. *See* Kate Manuel, Cong. Research Serv., R44743, *Executive Authority to Exclude Aliens: In Brief* (Jan. 23, 2017). In one additional instance, the President relied on § 1185(a)(1) to justify suspending entry of a class of noncitizens.[6]

On no occasion has a President used nationality alone to impute individualized characteristics to bar noncitizens' entry into the United States. In the vast majority of the Executive suspensions of entry, the President barred entry of noncitizens who had engaged in a particular course of conduct. *See, e.g.,* Proclamation No. 8697, 76 Fed. Reg. 49277 (Aug. 4, 2011) (individuals who participate in serious human rights violations); Proclamation No. 4865, 46 Fed. Reg. 48017 (Sept. 30, 1981) (noncitizens who approach the United States by sea without documentation). Although in a number of instances the Executive has ex-

[6] As discussed below, President Carter relied on § 1185(a) to "prescribe limitations and exceptions" on the entry of Iranians. *See infra* at 14.

cluded individuals from particular nations, those exclusions were based on particularized conduct or affiliations. *See* Exec. Order No. 13687, 80 Fed. Reg. 819 (Jan. 2, 2015) (officials of the North Korean government or the Workers' Party of Korea); Proclamation No. 7524, 67 Fed. Reg. 8857 (Feb. 22, 2002) (individuals who threaten Zimbabwe's democratic institutions); Proclamation No. 7249, 64 Fed. Reg. 62561 (Nov. 12, 1999) (individuals responsible for repression of civilian population in Kosovo); Proclamation No. 5377, 50 Fed. Reg. 41329 (Oct. 4, 1985) (nonimmigrant officers or employees of the Government of Cuba or the Communist Party of Cuba).

The President has suspended entry without regard to particularized conduct on only two occasions. In both, nationality was used to sanction a country for hostile acts toward the United States during discrete foreign policy crises. During the Iran hostage crisis, President Carter invoked § 1185(a)(1) to deny entry to Iranian nationals. Exec. Order No. 12172, 44 Fed. Reg. 67947 (Nov. 28, 1979); Exec. Order No. 12206, 45 Fed. Reg. 24101 (Apr. 7, 1980); *see also* Jimmy Carter, "Sanctions Against Iran Remarks Announcing U.S. Actions" (Apr. 7, 1980). Then, in response to Cuba's decision to suspend execution of a bilateral immigration agreement with the United States, President Reagan, in August 1986, suspended the entry of Cuban nationals under certain types of immigrant visas. Proclamation No. 5517, 51 Fed. Reg. 30470 (Aug.

22, 1986).[7] Both suspensions emerged from these crises and were considerably narrower than the Proclamation, which imposes a potentially permanent bar to the entry of millions of individuals from eight countries. Moreover, in neither instance did the Executive's actions impute individualized characteristics—such as dangerousness or criminality—on the basis of nationality. As such, they qualitatively differ from the Proclamation.

In an attempt to avoid suggesting that the covered noncitizens are presumed dangerous solely because of their nationalities, the Proclamation states that these individuals all hail from countries with "deficient . . . identity-management and information-sharing capabilities, protocols, and practices." Proclamation 9645, preamble. This claimed rationale does not withstand even minimal scrutiny. Iraq, for example, was left off this list despite failing the specified criteria, whereas Somalia was included despite satisfying those criteria. Moreover, the Proclamation targets five of the six countries targeted by the two prior, substantially similar Executive Orders—both of which made clear that the President had selected nationalities for exclusion based on a presumed heightened risk of terror. Iran, Libya, Somalia, Syria, and Yemen are targeted in all three orders; the Proclamation adds only Chad (another Muslim-majority nation), North Korea (from which there is no appreciable immigration), and a small set of Venezuelan government officials.

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[7] Even then, Cuban immigrants were exempt from this exclusion if they entered as the family members of American citizens or legal permanent residents. Proclamation No. 5517, 51 Fed. Reg. 30470 (Aug. 26, 1986) (citing INA §§ 201(b) and 203(a)).

As we have discussed, unlike in *Dames & Moore*, the President cannot rely on prior precedents to support this atypical Proclamation. The two isolated instances the Government cites—the response to the Iran hostage crisis and Cuba's suspension of a bilateral agreement with the United States—do not establish the type of "systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned," that was deemed sufficient to infer congressional acquiescence in *Dames & Moore*. 453 U.S. at 686 (quoting *Youngstown,* 343 U.S. at 610–11).

The present case is, thus, the inverse of *Dames & Moore*. There, the President asserted authority in an area in which the Executive had long exercised the power, and Congress had repeatedly acquiesced to such exercises. Here, by contrast, the President asserts broader authority than any President before him—in essence, the type of "license for the broad exercise of unilateral executive power" that the Court forbade. *Bank Markazi*, 136 S. Ct. at 1328 & n.28.

Nor does the "general tenor" of legislation in the immigration arena suggest congressional approval of the President's actions. *See Dames & Moore*, 453 U.S. at 678–79. Rather, Congress has enacted a complex statutory scheme that suggests just the opposite: Contrary to the Proclamation, denials of visa-based entry must be based on actual evaluations of dangerousness rather than the blanket assumption that certain nationalities are *per se* dangerous. *See, e.g.*, 8 U.S.C. § 1202(a)-(d) (requiring each visa applicant to produce individual documentation to establish identity and eligibility); 8 U.S.C. § 1202(h) (requiring each visa applicant to "submit to an in person interview

with a consular officer"); 8 U.S.C. §§ 1361, 1201(g) (providing that each visa applicant bears the ultimate burden of establishing, on an individual basis, that no ground of inadmissibility applies). As *FDA v. Brown & Williamson Tobacco Corp.* put it, "[i]t is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" 529 U.S. 120, 133 (2000) (quoting *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)).[8] *Amici* now turn to these other provisions of the INA.

[8] The President's position, if sustained, suggests that Congress has delegated to the Executive unilateral power to wipe away the statutory regime virtually in its entirety, allowing the White House to impose its own immigration law in lieu of Congress's. But *amici* respectfully submit that, contrary to Judge Harris's suggestion, *see Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 351 (4th Cir. 2018) (en banc) (Harris, J., concurring), this Court can narrowly resolve the statutory question without deciding that broader constitutional question or the Establishment Clause question. Given that §§ 1182(f) and 1185(a)(1), properly construed, do not confer unfettered executive discretion to engage in invidious nationality-based discrimination, the Court need not address whether the President's sweeping view of §§ 1182(f) and 1185(a)(1) would make Congress's delegation to the Executive invalid or violates the Establishment Clause. *See, e.g.*, *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981) ("[P]rior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision."); *cf. Curtiss-Wright Export Corp.*, 299 U.S. at 312 (rejecting non-delegation challenge where the President acted pursuant to a specific, limited authorization from Congress to prohibit "the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco").

III. The "General Tenor" of Immigration Legislation is Contrary to the Proclamation.

A review of the history of immigration law is required to understand how the "general tenor" of congressional legislation changed during the last century. By the time § 1182(f) was enacted in 1952, Congress had already begun to undo some of its prior use of nationality as a proxy for racial, ethnic, and religious intolerance in entry determinations. Legislation enacted after 1952 evinces Congress's repudiation of the use of nationality as the sole basis to exclude persons based on generalized fears of terrorism. Given "the institutional and other barriers to the passage of legislation," affirmative acts by Congress rejecting a particular course of presidential conduct "should be given very heavy interpretive weight." Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 Harv. L. Rev. 411, 449 (2012). Thereafter, in 1965, Congress enacted an explicit ban on the use of nationality to discriminate against persons seeking immigrant visas. More generally, other legislation demonstrates that Congress is committed to relying on individualized assessments—rather than discredited stereotypes—to determine eligibility for visa-based entry.

A. Congress Historically Used Nationality Categorically to Exclude Noncitizens.

Our Nation's immigration policies once routinely relied on notions of racial and cultural inferiority and religious prejudice to exclude certain nationalities as threats to our safety and stability. It was not until the mid-twentieth century that Congress, recognizing how nationality and national origin had historically

been employed as the basis for invidious discrimination based on race, religion, and ethnicity, prohibited the use of such classifications.

Beginning after the Civil War, Congress relied expressly on nationality to restrict the entry of certain noncitizens perceived as threats to national security and American identity.[9] Congress enacted a series of laws targeting and ultimately prohibiting virtually all Chinese immigration. *See, e.g.,* Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (1882); Scott Act of 1888, ch. 1064, 25 Stat. 504 (1888); Geary Act of 1892, ch. 60, 27 Stat. 25 (1892); Act of April 27, 1904, ch. 1630, 33 Stat. 394, 428 (1904).[10] In 1917, Congress created the "Asiatic Barred Zone," excluding noncitizens from a vast swath of the globe from Saudi Arabia to the Polynesian islands. *See* Act of February 5, 1917, ch. 29, § 3, 39 Stat. 874 (1917). In 1924, Congress imposed an even broader prohibition on the immigration of noncitizens who were not "free white persons," "aliens of African nativity, . . . [or] persons of African descent." *See* Immigration Act of 1924, Ch. 190, § 13, 43 Stat.

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[9] Prior to the Civil War, states enacted some measures that had the effect of regulating the entry of noncitizens. *See generally* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 Colum. L. Rev. 1833, 1885 (1993).

[10] Proponents of these measures frequently invoked national security rationales, characterizing the Chinese as "a standing menace to the social and political institutions of the country." H. R. Rep. No. 45-62, at 3 (1879). The United States Solicitor General, for example, argued that "the most insidious and dangerous enemies to the State are not the armed foes who invade our territory, but those alien races who are incapable of assimilation . . . ." Brief for the United States, *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (Nos. 1345, 1346, 1347).

153, 161–62 (1924); H. R. Rep. No. 68-350 at 6 (1924) (internal quotation marks omitted).

Noncitizens who were not categorically excluded on these grounds remained subject to strict national-origin quotas that favored certain immigrants from northern and western Europe. *Id.* These restrictions were understood to be aimed "principally at two peoples, the Italians and the Jews." 70 Cong. Rec. 3492, 3526 (1929). During this time, national origin served as a proxy for undesirable groups perceived to "reproduce more rapidly on a lower standard of living" and "unduly charge our institutions for the care of the socially inadequate." H. R. Rep. No. 68-350, at 13–14. The goal was to "preserve, as nearly as possible, the racial status quo in the United States." *Id.* at 16. These measures were part of a nativist approach expressly linking exclusion of "others" to national survival: "If therefore, the principle of individual liberty, guarded by a constitutional government created on this continent nearly a century and a half ago, is to endure, the basic strain of our population must be maintained." *Id.* at 13.

B. In 1965, Congress Expressly Prohibited the Use of Nationality in the Issuance of Immigrant Visas.

In 1965, Congress amended the INA and ended the national-origin quota system, replacing it with a system equally allocating 20,000 immigrant visas per country for all countries outside the western hemisphere. *See* Pub. L. No. 89-236, sec. 202, § 2(a), 79 Stat. 911, 911–912 (1965).

An overarching goal of the 1965 Act was to ensure that exclusions would be based on individualized determinations, not blanket stereotypes about race and country of origin. Senator Philip Hart, one of the chief sponsors of the bill, explained the rejection of the national-origins quota system: "[I]t is impossible to defend and it is offensive to anyone with a sense of the right of an individual to be judged as a good or a bad person, not from which side of the tracks he comes." Hearings on S. 500 Before the Subcomm. on Immigration & Naturalization, 89 Cong. 4 (1965). President Johnson described the prior system as "incompatible with our basic American tradition. . . . The fundamental, longtime American attitude has been to ask not where a person comes from but what are his personal qualities." *See* 111 Cong. Rec. 686 (1965). Thereafter, when he signed the bill, the President made plain its commitments: "This bill says simply that from this day forth those wishing to immigrate to America shall be admitted on the basis of their skills and their close relationship with those already here." Lyndon B. Johnson, Remarks at the Signing of the Immigration Bill (Oct. 3, 1965).

In addition, the 1965 Act expressly ruled out the use of nationality—as well as race, sex, place of birth, and place of residence—in the issuance of long-term immigrant visas. Pub. L. No. 89-236, sec. 2, 79 Stat. 911. Section 1152(a) provides, in relevant part, that except to enforce the uniform per-country visa allocation: "[N]o person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a).

Congress intended this prohibition on discrimination to be applied broadly. Unlike other provisions of the INA, § 1152(a) restrains the entire Executive branch, including the President. *Cf. Sale v. Haitian Centers Council, Inc.,* 509 U.S. 155, 172 (1993) (concluding that § 243(h) of the INA constrains the Attorney General but not the President). The only exceptions are to ensure the *equal* per-country limitations that Congress had just enacted. The President's exercise of power under § 1182(f) or § 1185(a)(1) is notably absent from that list of exceptions. *See* 8 U.S.C. § 1152(a).

C. Congress Has Repeatedly Required That Entry Decisions Be Based on Assessment of Non-Invidious Criteria.

In addition to the express language of § 1152(a) prohibiting discrimination against noncitizens seeking entry on immigrant visas as permanent residents, the historical arc of our Nation's immigration laws and the overall structure of the INA demonstrate congressional intent to preclude the use of invidious stereotypes for non-immigrant temporary entrants as well. The result is a detailed visa system that requires individualized consideration—and prohibits nationality-based bars.

For example, individual visa applicants must produce sufficient information and documentation to establish his or her identity and eligibility for a visa. *See* 8 U.S.C. § 1202(a)-(d). Each applicant must then "submit to an in person interview with a consular officer." 8 U.S.C. § 1202(h). And each applicant bears the ultimate burden to convince the consular officer that he or she is not subject to any individual ground

of inadmissibility, *see* 8 U.S.C. §§ 1361, 1201(g), including those related to terrorism and public safety, 8 U.S.C. § 1182(a)(2), (a)(3)(A)-(C), (a)(3)(F). Individuals who cannot carry this burden—for instance, individuals who are "member[s] of a terrorist organization" and cannot demonstrate that they "did not know, and should not reasonably have known, that the organization was a terrorist organization," 8 U.S.C. § 1182(a)(3)(B)—are denied visas, while individuals who can supply the requisite information are not excluded solely because their governments' perceived failings.

Similarly, with immigration issues unrelated to terrorism, Congress has also eschewed the use of nationality as a basis for exclusion. *See generally* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 §§ 341–353 (revising grounds for exclusion and deportation based on non-nationality-specific criteria). On the few other occasions where Congress has employed nationality classifications, it has done so in order to *grant relief* based on particular country conditions and characteristics—either to permit special opportunities to enter the United States or to avoid deportation—*without* imputing invidious or stigmatizing traits. *See, e.g.*, Nicaraguan Adjustment and Central American Relief Act of 1997, Pub. L. No. 105-100, 111 Stat. 2160, 2193; Haitian Refugee Immigration Fairness Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681; 8 U.S.C. § 1187 (Visa Waiver Program). Most notably, Congress's Visa Waiver Program allows certain foreign nationals to enter the country as temporary visitors without obtaining an individual visa

(akin to how U.S. citizens travel to countries in Europe without a visa) if their governments and passports meet specified criteria. To participate, a foreign government must issue electronic passports, 8 U.S.C. § 1187(a)(3)(B); report lost or stolen passports, 8 U.S.C. § 1187(c)(2)(D); share terrorism and crime information, 8 U.S.C. § 1187(c)(2)(F); not provide safe haven for terrorists, 8 U.S.C. § 1187(a)(12)(D)(ii); maintain control over its territory, 8 U.S.C. § 1187(c)(5)(B)(ii); and receive its deported nationals, 8 U.S.C. § 1187(c)(2)(E). Reliance on governments (rather than individuals) for identity and security information makes sense in the context of visaless entry because the individualized visa-application process—through which the government may gather information directly from affected individuals—does not apply. Moreover, using nationality to provide additional opportunities for entry entails no imputation of invidious, discriminatory purpose based on nationality, of the kind that can redound to the detriment of U.S. citizens and others within the United States of the same heritage.

The historical evolution of our Nation's immigration laws, the 1965 statutory ban on the use of nationality in issuing immigrant visas, and Congress's post-1965 enactments focusing on individualized assessments for visa-based entry demonstrate that the "general tenor of Congress's legislation in this area" repudiates the blanket use of "nationality" to impute traits of dangerousness or criminality for the purpose of imposing a categorical bar to entry. *Dames & Moore*, 453 U.S. at 678. Here, as a result, the President is "acting alone," without "the acceptance of Congress." *Id.*

This conclusion is consistent with this Court's approach to statutory interpretation. "[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one . . . ." *Id.* at 550–51; *see also Brown & Williamson Tobacco Corp.*, 529 U.S. at 133 ("[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.").

Here, § 1152(a) was enacted *after* §§ 1182(f) and 1185(a)(1), and that later-enacted provision mandates non-discrimination in the issuance of immigrant visas. Given that the President cannot discriminate against persons in the issuance of immigrant visas based on nationality, §§ 1182(f) and 1185(a)(1) should not be read to permit such discrimination. *See, e.g.*, *Brown & Williamson Tobacco Corp.*, 529 U.S. at 133. Thus, the provisions are reconcilable: The President may exercise § 1182(f) power—suspending entry of a "class of aliens" deemed to be "detrimental to the interests of the United States"—in circumstances where such exercise does not violate § 1152(a). Absent a discrete intergovernmental conflict—such as Iran's taking of U.S. hostages or Cuba's suspension of a bilateral agreement with the United States—imposing a bar to entry solely on the basis of nationality, and in a manner that carries invidious implications of criminal, terrorist, or dangerous tendencies on the part of all persons of that nationality, is not permissible. In short, the Executive's use of nationality as a proxy for

dangerousness so as to prevent entry into the United States cannot be reconciled with § 1152(a) and subsequent immigration laws, which demonstrate congressional intent to move the United States *away* from reliance on nationality as a categorical basis for exclusion.

IV. The Proclamation Is Not Authorized Under the *Youngstown* Framework.

By excluding individuals based solely on nationality—and justifying the use of nationality as a credible proxy for "heightened risks to the security of the United States" instead of making more individualized assessments—the President took "measures incompatible with the expressed [and] implied will of Congress." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

Even if this Court decided that Congress's position were "somewhat ambiguous," *Dames & Moore*, 453 U.S. at 677, the Proclamation could not be sustained. No longstanding history suggests congressional acquiescence to the action at issue here. *Cf. id.* at 680. *See also Bank Markazi*, 136 S. Ct. at 1328 & n.28 ("Much of the [*Dames*] Court's cause for concern, however, was the risk that the ruling could be construed as license for the broad exercise of unilateral executive power."). At a minimum, on the "spectrum running from explicit congressional authorization to explicit congressional prohibition," the Proclamation is quite close to the type of discriminatory actions Congress has rejected. *Dames & Moore*, 453 U.S. at 669.

Nor can the President rely on his exclusive constitutional powers to authorize the Proclamation. "Pres-

idential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Youngstown*, 343 U.S. at 638.

Here, the President can make no such claim. Although some earlier case law characterized executive authority over immigration as capacious, *see United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) (addressing executive exercise of power expressly authorized by Congress), this Court has repeatedly recognized legislative control over immigration as pivotal. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) ("Congress has 'plenary power' to create immigration law," subject to constitutional limitations); *Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (same). Any constitutionally derived presidential authority to regulate immigration is, at best, shared with Congress. Absent "conclusive and preclusive" constitutional power, the President has no power to act unilaterally, in contravention of congressional intent to prohibit the use of nationality as a basis for discrimination. *Youngstown*, 343 U.S. at 638 (Jackson, J. concurring).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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