Nos. 17-2231 (L), 17-2232, 17-2233, 17-2240 (Consolidated)

IN THE UNITED STATES COURT of APPEALS
FOR THE FOURTH CIRCUIT

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,
Plaintiffs-Appellees,

IRANIAN ALLIANCES ACROSS BORDERS, *et al.*,
Plaintiffs-Appellees,

EBLAL ZAKZOK, *et al.*,
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, in his official capacity as
President of the United States, *et al.*,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND, SOUTHERN DIVISION (NO. 8:17-CV-00361-TDC)

BRIEF OF *AMICI CURIAE* PROFESSORS OF FEDERAL COURTS JURISPRUDENCE, CONSTITUTIONAL LAW, AND IMMIGRATION LAW IN SUPPORT OF PLAINTIFFS-APPELLEES

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INTEREST OF *AMICI CURIAE*[1]

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, the President lacked authority to issue the directive set forth in section 2 of Presidential Proclamation 9645 (the "Proclamation") barring immigration to the United States by nationals of seven countries—as well as the issuance of various categories of non-immigrant visas—solely on the basis of nationality. 82 Fed. Reg. 45,161 (Sept. 27, 2017).

SUMMARY OF ARGUMENT

The Proclamation eliminates immigrant visas from a designated list of countries (five of which are majority-Muslim countries targeted in both of the President's previous Executive Orders, *see* 82 Fed. Reg. 8977, 82 Fed. Reg. 13209)—and denies various categories of non-immigrant visas—solely on the basis of nationality, on the premise that all of the affected nationals present heightened risks to national security. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), is central to evaluating the validity of this executive action to

[1] The parties have consented to the filing of this brief. No party, or counsel for a party, played a role in the drafting or preparation of this brief; nor did any person other than *amici* provide financial support in connection with the preparation and filing of this brief. A list of *amici* may be found at Appendix A.

assess whether it complies with established separation-of-powers principles. The *Youngstown* framework, and its subsequent application in *Dames & Moore v. Regan,* 453 U.S. 654 (1981), requires analysis of what Congress has authorized, what it has prohibited, and the "general tenor" of congressional immigration legislation. As we explain below, the Proclamation is not authorized by statute and contravenes express and implied congressional mandates; and the President lacks the independent and exclusive authority to supplant congressional authority over immigration.

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 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 President's broad reading of § 1182(f) would raise concerns that Congress has abdicated its own constitutional role in setting immigration policy.

Section 1182(f) itself does not 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, troubled by the historic abuse of nationality as a stalking horse for racial, ethnic, and religious intolerance, banned its use in the issuance of immigrant visas. *See* 8 U.S.C. § 1152(a). In the half century since, Congress has repeatedly insisted on the use of specific nondiscriminatory criteria when excluding entrants to the United States as purported threats to safety and security.

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 historically-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 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 argued 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 v. Regan*, 453 U.S. 654, 678 (1981) (evaluating Executive action to settle claims against a foreign nation against the "general tenor" of congressional legislation). As the Supreme 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 claimed basis for authorization must be scrutinized in the context of Congress's other, more specific actions dealing with the same general subject. As explained below, the President's use of nationality as a proxy for the individualized determination of risks to security—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.

I. THE GOVERNING LEGAL FRAMEWORK

"The President's power, if any, to issue [an] order must stem either from an act of Congress or from the Constitution itself." *Youngstown*, 343 U.S. at 585. *Youngstown* provides the framework for assessing the validity of the Proclamation in this case. As the Court explained, 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 it was "not only unauthorized by any congressional enactment," but also effectively legislated policy that Congress had specifically rejected. *Id.* at

[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).

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 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 important 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, 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 as case only by disabling the Congress from acting upon the subject. [hereinafter "Category 3"]

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[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.

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 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 was "within [the President's] domain and beyond control by Congress." *Id.* at 640. 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*, the Supreme 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 Supreme 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. With respect to the third order, suspending pending claims against Iranian interests, however, 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 concluded 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 of the broad exercise of unilateral executive power." *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1328 & n.28 (2017).

Under *Youngstown* and *Dames & Moore*, § 1182(f)'s facially broad language cannot 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. 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 its opposition 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 Proclamation was not authorized.

II. SECTION 1182(F) DOES NOT GRANT 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. The President asserts that 8 U.S.C. § 1182(f) provides authorization for the Proclamation. 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).[4]

Although the President claims that this language delegates unfettered discretion to exclude whole "class[es] of aliens" based on any criteria whatsoever, canons of statutory construction as well as the statute's interpretive history counsel against such an expansive reading. The House Report recommending the bill that would enact § 1182(f) began with a lengthy affirmance of the power of *Congress* to control immigration, *see* H.R. Report 82-1365 at 5–6, a principle derived directly from the Constitution, which 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, s. 8,9.[5] 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

[4] The Proclamation cites two additional provisions: section 215(a)(1) of the INA, which provides: "Unless 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), and 3 U.S.C. § 301, which allows the President to delegate his authority to others within the Executive branch. Neither provision adds to the President's substantive authority.

[5] 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."

hiatus, it was for *Congress* to decide on the "Migration … of … Persons."[6] 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, the question becomes understanding what Congress has delegated. This case is one of many in which a potentially broad authorization from Congress has to be read to reflect basic separation-of-powers principles and to avoid constitutional questions about the limits of delegation. In *Hamdan,* 548 U.S. 557, the Supreme Court concluded that the Joint Resolution for the Authorization for Use of Military Force (AUMF), enacted by Congress immediately after the September 11 terrorist attacks, while capacious, 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 determined 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

[6] The Supreme 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).

persons.'" *Id.* 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 Article 21 of the" Uniform Code of Military Justice. *Id.* at 594. Even in the context of a direct response to domestic terrorist attacks, the Supreme Court did not approve the 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 engage in discrimination. 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)). The Supreme Court declined to endorse this view, concluding 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).

In *Dames & Moore*, which upon review of the Executive action found it was within 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* at 676-77. The Court then turned to the legislative history, which it found "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) rather than § 1182(f) to justify suspending entry of a class of noncitizens.[7]

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 instances, the Executive barred noncitizens who engaged in a

[7] As discussed below, President Carter relied on § 1185(a) to "prescribe limitations and exceptions" on the entry of Iranians.

particular course of conduct. *See, e.g.,* Proclamation No. 8697, 76 Fed. Reg. 49277 (Aug. 9, 2011) (individuals who participate in serious human rights violations); Proclamation No. 4865, 46 Fed. Reg. 48017 (Oct. 1, 1981) (noncitizens who approach the United States by sea without documentation).

A number of instances target individuals from particular nations based on specific conduct or affiliations. *See* Exec. Order No. 13687, 80 Fed. Reg. 819 (Jan. 6, 2015) (officials of the North Korean government or the Workers' Party of Korea); Proclamation No. 7524, 67 Fed. Reg. 8857 (Feb. 26, 2002) (individuals who threaten Zimbabwe's democratic institutions); Proclamation No. 7249, 64 Fed. Reg. 62561 (Nov. 19, 1999) (individuals responsible for repression of civilian population in Kosovo); Proclamation No. 5377, 50 Fed. Reg. 41329 (Oct. 10, 1985) (nonimmigrant officers or employees of the Government of Cuba or the Communist Party of Cuba).

The President has suspended entry without regard to individualized conduct on only two occasions. 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. 26, 1979); Exec. Order 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 the Cuba's decision to suspend

execution of a bilateral immigration agreement with the U.S., 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. 26, 1986).[8] Both instances were considerably narrower than the instant case, 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. Nationality was instead used to sanction a country for hostile acts towards the United States during a discrete foreign policy crisis.[9] As such, they qualitatively differ from the Proclamation.

In an attempt to avoid suggesting that the covered non-citizens 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,

[8] The exclusion of Cubans applied only to those immigrant entrants who did not enter as "immediate relatives under Section 201(b)" or "as preference immigrant under Section 203(a)." Proclamation No. 5517, 51 Fed. Reg. 30470 (Aug. 26, 1986).

[9] The President has, through Executive Orders, identified specific nationalities in another context—to determine (and to potentially relax) the level of scrutiny to be applied to visa applicants—but those actions are explicitly authorized by Congress. *See* 8 U.S.C. § 1187.

preamble. The Government's brief similarly proffers this purported justification. *See* Gov't Br. at 32-34. But this rationale is hard to take seriously. The Proclamation targets five of the six countries targeted by the two prior, similar Executive Orders—both of which made clear that they selected nationalities based on a presumed heightened risk of terror. Iran, Libya, Somalia, Syria, and Yemen are targeted in all three orders, and the Proclamation adds only Chad (another Muslim-majority nation) and North Korea (from which there is no appreciable immigration) as subject to categorical exclusion based on nationality.

No prior precedents support this 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 U.S.—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 Supreme 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 entry must be based on more individualized evaluations of dangerousness rather than the blanket assumption that certain nationalities are *per se* dangerous. *See, e.g.,* Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214, § 302 (1996); USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272, § 411 (2001); REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, § 103 (2005). 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, 132 (2000) (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989)).[10] *Amici* now turn to these other provisions of the INA.

[10] Given that § 1182(f), properly construed, does not allow unfettered executive discretion to engage in invidious nationality-based discrimination, *see supra* § II, this Court need not address whether the President's sweeping view of § 1182(f) would make Congress's delegation to the Executive invalid. *See, e.g., Gulf*

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 eschew the use of nationality as a proxy for racial, ethnic, and religious intolerance in entry determinations. And 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.[11] Thereafter, in 1965, Congress enacted an explicit ban on the use of nationality to discriminate against persons seeking immigrant visas. And in other legislation, Congress has repeatedly demonstrated a commitment to relying on individualized assessments—rather than discredited stereotypes—to determine admissibility.

Oil Co. v. Bernard, 452 U.S. 89, 99 (1981) ("Prior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision."); *cf. United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 312 (1936) (rejecting non-delegation challenge where 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").

[11] 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).

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 the frequency with which 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.

A brief recap of this history is helpful here. Beginning after the Civil War, Congress relied expressly on nationality to restrict the entry of noncitizens perceived as threats to national security and American identity.[12] 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. 428 (1904).[13] In 1917, Congress created the "Asiatic Barred Zone," excluding noncitizens from a

[12] Prior to the Civil War, states regulated 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).

[13] 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. 45-62, 3 (1879).

vast swathe 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. 153, 161–62 (1924); H. R. Rep. 68-350 at 6 (1924) (internal quotation marks omitted).

Noncitizens who were not categorically excluded on these racial grounds remained subject to strict national-origin quotas that favored 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. 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. 68-350, 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 described as necessary 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 enacted the Hart-Celler Act, amending the Immigration and Nationality Act by abandoning the national-origin quota system and instead imposing a uniform per-country limit of 20,000 immigrant visas for all countries outside the western hemisphere. *See* Pub. L. No. 89-236, sec. 202, § 2(a), 79 Stat. 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]it 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 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 (Jan. 15, 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. 89-236, 79 Stat. 911, sec. 2 (1965). 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). Congress enumerated limited exceptions to the bar on using nationality to deny immigrant visas, relating to enforcement of the uniform cap on immigrant visas for all countries; the President's exercise of § 1182(f) power is notably absent from that list of exceptions.

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 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.

Beginning in the 1940s with the repeal of the Chinese Exclusion Acts, Congress has jettisoned nationality-based bars to entry in favor of individualized assessments for undesirable traits. Since the 1965 legislation, it has repeatedly affirmed the need for individualized assessment to determine whether a given noncitizen—immigrant or a non-immigrant—should be excluded as a national security risk. *See, e.g.,* Anti-Terrorism and Effective Death Penalty Act § 411 (expanding grounds for excluding noncitizens affiliated with terrorist organizations); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, 110 Stat. 3009 § 342; USA PATRIOT Act § 411 (2001) (expanding definition of terrorist activity for purposes of exclusion); REAL ID Act § 103 (same). Thus, individuals may be excluded because, for example, they are "a member of a terrorist organization"—*unless* "the alien can demonstrate" that he or she "did not know, and should not reasonably have known,

that the organization was a terrorist organization"—or because they are "the spouse or child of an alien who is inadmissible" on this basis, *unless* the spouse or child did not know of or has renounced the terrorist activity. 8 U.S.C. § 1182(3)(B).

Similarly, with immigration issues unrelated to terrorism, Congress has also eschewed the use of nationality as a basis for exclusion. *See generally* IIRIRA § 346. On the few occasions where Congress has employed nationality classifications, it did so to *grant relief* based on particular country conditions—either to permit special opportunities to enter the United States or to avoid deportation—and did so *without* imputing invidious or stigmatizing traits. *See, e.g.,* Nicaraguan Adjustment and Central American Relief Act of 1997, Pub. L. 105-100, 111 Stat. 2160; Haitian Refugee Immigration Fairness Act of 1998, Pub. L. 105-277, 112 Stat. 2681.

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 to determine admissibility all 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 the accepted 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 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) should not be read to permit such discrimination. *See, e.g. Brown & Williamson Tobacco Corp.*, 529 U.S. at 133. Moreover, the two sections 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 U.S.—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, and 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.[14]

IV. THE PROCLAMATION IS NOT AUTHORIZED UNDER THE *YOUNGSTOWN* FRAMEWORK

By excluding individuals based solely on nationality—and justifying its use as a credible proxy for "heightened risks to the security of the United States" instead of making more individualized assessments—the President took "measures

[14] *Amici* do not suggest that nationality classifications are never permitted in the immigration context in any respect. For example, the President has used nationality as a factor to determine the level of scrutiny for individuals of identified countries, or to respond to special disaster needs. In such instances, there is 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.

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 is "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. Dames & Moore*, 453 U.S. 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, the Proclamation is quite close, on the "spectrum running from explicit congressional authorization to explicit congressional prohibition," 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. "Presidential 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." *Id*.

Here, the President can make no such claim. Although some earlier case law characterized executive authority over immigration as capacious, *see Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) (addressing executive exercise of power

expressly authorized by Congress), the Supreme 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

The President lacked statutory and constitutional authority to issue the Proclamation. The decision of the court below should be affirmed.

Dated: November 17, 2017

Respectfully submitted,

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November 17, 2017

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
Effective 12/01/2016

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November 17, 2017

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