No. 17-965

In The

Supreme Court of the United States

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

Petitioners,

v.

STATE OF HAWAII, *et al.*,

Respondents,

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

Brief of *Amicus Curiae* Center for Constitutional Jurisprudence in Support of Petitioners

John C. Eastman
Counsel of Record
Anthony T. Caso
Center for Constitutional Jurisprudence
c/o Chapman Univ. School of Law
One University Dr.
Orange, CA 92866
(877) 855-3300
jeastman@chapman.edu

Counsel for Amicus Curiae
Center for Constitutional Jurisprudence

QUESTIONS PRESENTED

This case presents four questions concerning Presidential Proclamation No. 9645, 82 Fed. Reg. 45,161, issued by the President on September 27, 2017:

1. Whether Respondents' challenge to the President's suspension of entry of aliens abroad is justiciable;

2. Whether the Proclamation is a lawful exercise of the President's authority to suspend entry of aliens from abroad;

3. Whether the global injunction is impermissibly overbroad; and

4. Whether Proclamation No. 9645 violates the Establishment Clause?

This *Amicus Curiae* brief addresses the second question.

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INTEREST OF *AMICUS CURIAE*[1]

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a non-profit educational foundation whose stated mission is to "restore the principles of the American Founding to their rightful and preeminent authority in our national life," including the separation of powers principles at issue in this case regarding the President's authority to take measures that are reasonably calculated to further the interests of the United States abroad and that adequately safeguard the United States from foreign threats. The Center has participated as *amicus curiae* before this Court in several cases addressing similar issues, including *U.S. v. Texas*, 136 S.Ct. 2271 (2016); *Zivotofsky v. Kerry*, 135 S.Ct. 2076 (2015); and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

SUMMARY OF ARGUMENT

The President has not exceeded his inherent or statutory authority by issuing Proclamation 9645. Section 212(f) of the Immigration and Nationality Act of 1952 ("INA"), codified at 8 U.S.C. § 1182(f) (hereinafter "Section 1182(f)"), unambiguously grants the President broad authority to suspend the entry of any alien or any class of aliens whose entry that he finds would be detrimental to the interests of the United States. A plain reading of the statute's text reveals no ambiguity in this broad grant of authority. Although

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[1] *Amicus* files this brief with the consent of all parties. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

Section 202(a)(1)(A) of the Immigration and Nationality Act of 1965, codified at 8 U.S.C. § 1152(a)(1)(A), prohibits consular officers from denying *immigrant visas* on the basis of, amongst other things, nationality, that section operates in a separate sphere from Section 1182(f) and does not conflict with the President's authority under Section 1182(f) regarding *entry* of immigrants. The Ninth Circuit's holding to the contrary ignored or rejected basic rules of statutory construction, rejected the consistent practice of prior administrations and precedent from this and other courts, and failed to adopt the clearly reasonable harmonizing interpretations of the two provisions.

Moreover, the Ninth Circuit failed to account for the President's independent, inherent authority in the arena of foreign affairs. This authority, which the President derives directly from the Constitution and even inherently in the nature of sovereignty, is particularly acute when dealing with exclusion of aliens whom the President has determined may pose a threat to the nation's interests broadly, and national security interests in particular. The President alone, as the sole organ of the nation in the realm of foreign policy, has the inherent authority to exclude aliens he finds to be potentially dangerous, even without express authorization from Congress. That Congress has bolstered that power with a broad authorization of its own makes this an easy case, requiring that the decision of the Ninth Circuit be reversed.

ARGUMENT

I. The Plain Meaning of Sections 1182(f) and 1152(a)(1)(A) Yields No Conflict Or Check On The President's Authority To Suspend Entry of Aliens.

A. The text of Section 1182(f) unambiguously grants the President broad power to suspend entry to any alien or any class of aliens whose entry he finds would be detrimental to the interests of the United States.

Section 212(f) of the Immigration and Nationality Act of 1952 ("INA") 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). The statute unambiguously delegates to the President the authority to "suspend the entry" of "all aliens or any class of aliens," either "as immigrants or nonimmigrants," whenever he "finds" that the entry "would be detrimental to the interests of the United States."

In Proclamation 9645, the President made the requisite findings, backed up by months of consideration by the Departments of Homeland Security, State, and Justice, that the entry of certain classes of aliens

would be detrimental to the interests of the United States because their home countries failed to meet global requirements for information sharing that the Secretary of Homeland Security, in consultation with the Secretary of State and Director of National Intelligence, had determined were necessary for the adequate screening of immigrants needed to prevent terrorist attacks in the United States. Pet.App. 8a-9a. Based on those findings, and after further consultation with "appropriate Assistants to the President and members of the Cabinet, including the Secretaries of State, Defense, and Homeland Security, and the Attorney General," Pet.App. 11a, the President then suspended entry of those classes of aliens, as Section 1182(f) unambiguously authorizes him to do.

That should have been the end of the matter. When a statute is unambiguous on its face, the courts have no authority to deviate from the text's plain meaning in search of an extra-textual intention. *See, e.g.*, *U.S. v. Wiltberger*, 18 U.S. 76, 95-96 (1820) ("Where there is no ambiguity in the words, there is no room for construction."); *see also Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) (noting that deference is to be given to the words of a statute because "a legislature says in a statute what it means and means in a statute what it says there"). The Ninth Circuit nevertheless determined that the unambiguous statute does not mean what it says, for several reasons.

First, the Ninth Circuit concluded, based on the statutory word "suspend" and the statutory phrase "for such period as he shall deem necessary," that "Congress . . . likely did not contemplate that an executive order of the Proclamation's sweeping breadth

would last for an indefinite duration." Pet.App. 26a and n.10. But neither the statute's breadth, nor its terms, renders the statute ambiguous.

The statute is admittedly broad, but the mere fact that a statute is broad and applies to situations not expressly anticipated by Congress does not render the statute ambiguous. *See Pennsylvania Dept. of Corrections v. Yeskey,* 524 U.S. 206, 212 (1998) (noting the fact that a statute can be "applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." (citations omitted)).

Moreover, the Ninth Circuit's interpretation that "[t]he word 'suspend' connotes a temporary deferral," which in the court's view precluded a suspension of "indefinite duration," Pet.App. 26a and n.10 erroneously treated "indefinite duration" rather than "permanent deferral" as the opposite of "temporary deferral." And by cherry-picking the word "suspend" from the statute, the Ninth Circuit also adopted a "word-in-isolation" approach to statutory interpretation that this Court has rejected since its earliest days. "In expounding a statute, [the courts] must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *U.S. v. Boisdore's Heirs*, 49 U.S. 113, 122 (1850).

Here, the object and policy of Section 1182(f) is manifestly to grant the President sufficient authority to prevent foreign threats from reaching United States soil. H.R. Rep. No. 1365, 82d Cong., 2d Sess. 53 (1952) (House Report); S. Rep. No. 1137, 82d Cong., 2d Sess. 14 (1952) (Senate Report) (same). The Proclamation advances this objective by aiming to incentivize

the governments of the named countries to "improve information-sharing and identity-management protocols and procedures" by suspending alien entry until they participate and meet the established baseline requirements. Pet.App. 121a-122a. With that purpose in mind, it would truly declaw the Proclamation for such suspension to be anything less than indefinite. If the suspension were for a limited time only, the named countries could simply run out the clock and refuse to share any information with the United States. This interpretation would render the Proclamation meaningless and rob the President of the ability adequately to safeguard the United States from foreign threats by way of the delegated authority intended by Section 1182(f).

In short, the actual text of Section 1182(f) contains no temporal limitations, and it is not the duty of the court to breathe limitations into statutes that are simply not there. *See U.S. v. Union Pac. R.R. Co.*, 91 U.S. 72, 85 (1875). In light of the historical usage and judicial precedent discussed in Part 1(B) below, and particularly in light of the President's own significant authority directly under Article II discussed in Part II below, the Ninth Circuit's textual argument is a stretch even to create ambiguity, much less to find unambiguity the other direction, which this Court's *Chevron* doctrine would require.

B. **The statutory framework, legislative history, and prior executive practice all support rather than undermine the plain language of Section 1182(f).**

The Ninth Circuit also relied on the "[s]tatutory framework as a whole, legislative history, and prior executive practice," Pet.App. 25a, to find a way around

the plain meaning of the statute's text. The weakness of its reasoning only serves to bolster the statute's plain language.

With respect to the statutory framework, the Ninth Circuit correctly recognized that elsewhere in the Immigration and Nationality Act, Congress specifically prohibited entry by, for example, "any alien who has 'engaged in a terrorist activity,'" or crimes of moral turpitude, drug trafficking, or human trafficking. Pet.App. 29a-30a (quoting 8 U.S.C. § 1182(a)(3)(B) and citing, *e.g.* §§ 1182(a)(2)(A), 1182(a)(2)(C); and 1182(a)(2)(H). Yet far from reading these as mandatory baseline prohibitions fully consistent with the plain-language delegation of authority to the President to impose additional restrictions as necessary, the Ninth Circuit read them as setting out the only grounds on which admission could be denied. That is a specious reading of the statutory framework, which creates a false conflict between the authority delegated to the President to deny entry to certain classes of aliens and the specific denials of entry already mandated by Congress. And it renders Section 1182(f) largely meaningless, except for the Ninth Circuit's apparent concession that the President could ban entry in "wartime or exigent circumstances," Pet.App. 31a—the very authority the President already had *prior to* the adoption of Section 1182(f)'s expressly broader language.

The Ninth Circuit's legislative history analysis fares no better. Indeed, the legislative history—including the portions of it relied upon by the Ninth Circuit—actually supports rather than undermines the "facially broad," Pet.App. 34a, text of Section 1182(f).

When Congress enacted Section 1182(f), there already existed Presidential authority, delegated by Congress, to "provide additional prohibitions and restrictions on the entry and departure of persons during time of war or the existence of a national emergency." H.R. Rep. No. 1365, 82d Cong., 2d Sess. 53 (1952) (House Report); S. Rep. No. 1137, 82d Cong., 2d Sess. 14 (1952) (Senate Report) (same). That authority, which is now codified at 8 U.S.C. § 1185(a)(1), was first enacted in 1918 and expressly granted the President authority to proscribe rules and prohibitions on alien entry, but confined such authority to "time[s] of war" and "national emergency." Act of May 22, 1918, ch. 81, §1(a), 40 Stat. 559.

A major committee report prepared at the outset of debate over what would eventually become the Immigration and Nationality Act of 1952 specifically noted that the Committee was considering a provision that would remove those restrictions and "permit the President to suspend any and all immigration whenever he finds such action to be desirable in the best interests of the country." Pet.App. 32a-33a, n. 14 (quoting S. Rep. No. 81-1515, at 381 (1950)). Section 1182(f) did just that, albeit in a more limited way than the Committee initially envisioned.

Instead of recognizing that this important piece of legislative history fully supports the plain meaning of the statute, the Ninth Circuit buried the evidence in a footnote. In the text of its opinion, it instead focused on a proposed amendment that would have continued to limit the President's authority to suspend entry only "[w]hen the United States is at war or during the existence of a national emergency proclaimed by the President," as the prior statute had allowed. But that

limiting amendment was *rejected*, and the broader language now contained in Section 1182(f) was adopted. As should be obvious (but apparently was not to the Ninth Circuit), a committee report that is fully consistent with the plain language actually adopted is much more relevant legislative history than an amendment designed to limit the statute's language that failed to pass. *See*, *e.g.*, *Johnson v. Trans. Agency, Santa Clara Cty., Cal.*, 480 U.S. 616, 671-72 (1987) (Scalia, J., dissenting) ("one must ignore rudimentary principles of political science to draw any conclusions regarding that intent from the failure to enact legislation").

There is more in the Ninth Circuit's "legislative history" analysis that is likewise unavailing. The bill's sponsor, speaking in opposition to that unsuccessful limiting amendment, mentioned in a passage quoted by the Ninth Circuit that the broad delegation of authority to the President was "absolutely essential" to deal with things like an epidemic outbreak when "it is *impossible* for Congress to act." Pet.App. 33a (quoting 98 Cong. Rec. 4423 (statement of Rep. Weber), emphasis added by Ninth Circuit). Despite the Ninth Circuit's added emphasis, Representative Weber also indicated in the same speech that Section 1182(f) was "absolutely essential" so that the President could restrict immigration during "a period of great unemployment," hardly an example of time-sensitive exigency that the Ninth Circuit claimed. Yet instead of recognizing that these statements by the bill's sponsor fully support the plain meaning of the statute's text, the Ninth Circuit found that they created enough ambiguity as to warrant interpreting the text to mean its opposite—as though it merely continued the prior "war and national emergency" limitation that Section

1182(f)'s very purpose was to eliminate. Moreover, even if the legislative history can be read as ambiguous, the courts should not "allow[] ambiguous legislative history to muddy clear statutory language." *Milner v. Department of the Navy*, 562 U.S. 562, 572 (2011).

The Ninth Circuit also noted that because most prior executive exercises of Section 1182(f) authority were more limited in scope than the current exercise of that authority, the clear statutory language should be interpreted more narrowly than it is. That a more limited ban was thought sufficient by prior Presidents to meet the necessities those Presidents had identified simply does not, as a matter of logic, preclude exercise of the full extent of the authority conferred by the statute's plain text when the sitting President deems a broader ban to be necessary. The Ninth Circuit appears to have recognized this flaw in its logic, acknowledging that prior Presidents had exercised the broader authority conveyed by Section 1182(f) on two occasions, Pet.App. 36a, but it chose to discount those examples as merely "isolated instances" that "cannot sustain the weight placed on them by the Government. Such *ipse dixit* reasoning is not sufficient to countermand the statute's plain language.

In any event, previous Presidents have used Section 1182(f)'s broad authority in a vast array of situations to accomplish a vast array of objectives. A short review of that prior usage reveals the historical understanding of the statute's broad reach. For example, in 1981, President Reagan suspended the entry of undocumented aliens by sea in response to the large waves of Haitians migrating to the southeast United

States. Proclamation 4865, 46 Fed. Reg. 48107 (September 29, 1981). President Reagan noted in the proclamation that the determination was made "[a]s a result of our discussions with the Governments of affected foreign countries and with agencies of the Executive Branch of our Government." *Id.*

President Reagan again utilized Section 1182(f) in 1986 when he suspended unrestricted entry of Cuban citizens as immigrants "in light of the continuing failure of the Government of Cuba to resume normal migration procedures with the United States." Proclamation 5517, 51 Fed. Reg. 30470 (August 22, 1986).

In 1993, President Clinton suspended the entry of certain Haitian nationals as immigrants and nonimmigrants in hopes to promote "progress of the negotiations designed to restore constitutional government to Haiti." Proclamation 6569, 58 Fed. Reg. 31897 (June 3, 1993).

President Obama utilized Section 1182(f)'s authority more often than any other President in history, and was never challenged. President Obama utilized Section 1182(f) to suspend entry to various classes of aliens who engaged in human rights violations (Proclamation 8697, 76 Fed. Reg. 49277 (July 24, 2011)); aliens who engaged in certain actions in Iran (Executive Order 13628, 77 Fed. Reg. 62139 (October 9, 2012)); and members of the Workers' Party of North Korea (Executive Order 13687, 80 Fed. Reg. 819 (January 2, 2015)).

Moreover, none of those examples contained a specific termination date for the suspension of entry, the lack of which the Ninth Circuit found to be a fatal de-

fect in President Trump's Proclamation. Indeed, it appears rather to be common practice for Presidents to impart boundless discretion to the Secretary of State or Attorney General to "determine[] that [the order] is no longer necessary and should be terminated, either in whole or in part." *See e.g.,* Proclamation Nos. 5517, 51 Fed. Reg. 30470 (August 22, 1986); 6569, 58 Fed. Reg. 31897 (June 3, 1993); 7452, 66 Fed. Reg. 34775 (June 26, 2001); 8693 76 Fed. Reg. 44751 (July 24, 2011); and 8697, 76 Fed. Reg. 49277 (August 4, 2011).

In any event, President Trump's Proclamation is actually *more* solicitous of potential termination than past proclamations, because it requires agencies to continuously assess whether entry restrictions should be continued, whether baseline criteria has been met, and to report to the President every 180 days. Pet. App. at 142a-144a (§ 4). From such an assessment, if a country meets it baseline requirements set forth by the Proclamation, the effects of the Proclamation will terminate.

In sum, the statutory framework, legislative history, and prior use of Section 1182(f)'s broad authority by other Presidents fully support rather than undermine the Proclamation at issue here.

C. Section 1152(a)(1)(A) bars preferential treatment and discrimination in the *issuance of immigrant visas*, nothing more.

The courts below also held that the ban on national origin discrimination in the issuance of visas contained in Section 202(a)(1)(A) of the Immigration and Nationality Act, as amended in 1965, further restricts the plain meaning of Section 1182(f). That provision reads:

> Except as specifically provided in paragraph (2) and in sections 1101(a)(27), 1151(b)(2)(A)(i), and 1153 of this title, no 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)(1)(A) (emphasis added).

A plain reading of Section 1152(a)(1)(A) makes it clear that the section concerns only the "issuance of immigrant visas." Notably, the section is silent on non-immigrant visas, which are encompassed by the Proclamation. Pet.App. 123a (restricting both "the immigrant and nonimmigrant entry into the United States of persons described in section 2"). It is also noteworthy that in the ten years preceding the Proclamation, over 90% of visas issued to nationals of the named countries have been nonimmigrant visas [2] Therefore, even if Section 1152 limited the broad authority delegated to the President by Section 1182(f) to suspend entry, that limitation would extend by its

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[2] U.S. Dept. of State, "Immigrant Visa Statistics," available at https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/immigrant-visa-statistics.html. For fiscal years 2008-2017, 2,082,058 non-immigrant visas were issued to nationals of the named countries as opposed to 164,845 immigrant visas during the same time period. Venezuela had the most non-immigrant visas issued to them (1,661,258) and operated as a bit of an outlier. Since the Proclamation does not suspend entry to Venezuelan citizens, but only to government officials and family members, the calculation can be run without considering them. Without considering Venezuela, 420,800 non-immigrant visas were issued from 2008-2017 to the remaining seven named countries, as opposed to 145,161 immigrant visas (74.35%/25.65%, respectively).

express terms only the "issuance of an immigrant visa," not to the issuance of nonimmigrant visas. The nationwide injunction issued by the district court and upheld by the Ninth Circuit, which covers both immigrants and nonimmigrants, is therefore overbroad at the very least.

More significantly, Section 1152 deals with the issuance of visas, not with entry, and as Section 1182(a) makes clear, those are separate processes. *See* 8 U.S.C. § 1182(a) ("aliens who are inadmissible under the following paragraphs are *ineligible to receive visas* and *ineligible to be admitted* to the United States" (emphasis added)). The issuance of visas is a process conducted by consular officers, according to another provision of the Immigration and Nationality Act, Section 1201, which provides:

> Under the conditions hereinafter prescribed and subject to the limitations prescribed in this chapter or regulations issued thereunder, *a consular officer* may issue (A) to an immigrant who has made proper application therefor, an immigrant visa . . . and (B) to a nonimmigrant who has made proper application therefor, a nonimmigrant visa . . . .

8 U.S.C. § 1201(a)(1) (emphasis added); *see also* 8 U.S.C. § 1101(a)(9) ("The term 'consular officer' means any consular, diplomatic, or other officer or employee of the United States designated under regulations prescribed under authority contained in this chapter, for the purpose of issuing immigrant or nonimmigrant visas"). The point at which the issuance of visa occurs, therefore, is at the consular officer level; the restrictions contained in Section 1152 regarding the "issuance" of visas therefore constrain the exercise of

consular officer authority contained in Section 1201(a)(1), and even then only under subsection (A), which deals with immigrant visas, not subsection (B), which deals with nonimmigrant visas.

The actual process by which visas are issued confirms this constraint on the operation of Section 1152(a)(1)(A). When an alien located outside the United States seeks to enter the United States on a permanent basis, he or she must apply for an immigrant visa through consular processing with a U.S. Department of State embassy or consulate abroad.[3] Critical to the determination of eligibility for the issuance of an immigrant visa is an in-person interview with a consular officer.[4] In this interview, the consular officer will determine if the particular alien is eligible for the issuance of an immigrant visa. It is therefore at that point in the immigration process that Section 1152 operates: The consular officer's determination of eligibility may not be based on "the person's race, sex, nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a)(1)(A).

That restriction simply does not apply to "entry" (the word used in Section 1182) or "admission" (the word used in the definitional Section 1101 as amended in 1996 by the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Div. C. Pub. L. 104-208. *See* 8 U.S.C. § 1101(a)(4) ("The term 'application for admission' has reference to the application

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[3] USA.gov, "How to Enter the United States," available at https://www.usa.gov/enter-us.

[4] U.S. Citizenship and Immigration Services, "Consular Processing," available at https://www.uscis.gov/greencard/consular-processing.

for admission into the United States and not to the application for the issuance of an immigrant or nonimmigrant visa"). Indeed, as Section 1201(h) itself makes clear, "nothing in [the entire Immigration and Nationality] chapter shall be construed to entitle any alien, to whom a visa or other documentation has been issued, to be admitted [to] the United States," and the substance of that caveat "shall appear on every visa application." 8 U.S.C. § 1201(h).

And "entry" has a specific meaning in immigration law. The term "entry" was formerly defined under the INA as: "any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise..." *See Landon v. Plasencia*, 459 U.S. 21, 29 (1982); Pub. L. No. 82-414, 66 Stat. 163 (1952). For the purposes of entry, it does not matter "whether the coming be the first or any subsequent one." *See U.S. ex rel. Volpe v. Smith,* 289 U.S. 422, 425 (1933). Historically, whether an alien had "entered" for the purposes of the INA determined whether they were entitled to a deportation hearing, or merely exclusion. *See e.g., Yamataya v. Fisher,* 189 U.S. 86, 101 (1903) (holding that plaintiff's deportation decision did not need to conform to the constitutional demands of due process because she had not "entered"); *see also Rosenberg v. Fleuti,* 374 U.S. 449, 461 (1963) (holding that lawful permanent residents need not seek entry upon returning from a departure for a "couple of hours"); *Landon,* 459 U.S. at 32 (holding that a lawful permanent resident was able to invoke the Due Process Clause on returning to the U.S.).

From *Landon*, the Board of Immigration Appeals ("BIA") derived a more precise definition of "entry."

For their purposes, an entry requires: "(1) a crossing into the territorial limits of the United States, i.e., physical presence; (2) (a) inspection and admission by an immigration officer, or (b) actual and intentional evasion of inspection at the nearest inspection point; and (3) freedom from official restraint." *Matter of Z-*, 20 I. & N. Dec. 707, 708 (BIA 1993). Notably, this definition encompasses both lawful entry and unlawful entry to the United States, but it has nothing to do with the issuance of a visa. Upon arrival to the United States, it is the duty of immigration officers to inspect the applicant for admission to determine if he is indeed eligible to enter. 8 U.S.C. § 1225.

Although in the 1996 IIRIRA law Congress replaced "entry" with "admission" in the definitional section of the Immigration and National Act, 8 U.S.C. § 1101, "Admission" is similarly defined as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A). In other words, both the word "entry," which still appears in Section 1182(f) and elsewhere in the immigration statutes,[5] and the post-IIRIRA "admission," deal with arrival into the territory of the United States, not with the issuance of a visa.

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[5] For these provisions, the BIA continues to use the pre-IIRIRA definition of "entry." *See e.g., Matter of Martinez-Serrano*, 25 I. & N. Dec. 151, 153-54 (BIA 2009) (interpreting the term "entry" as it was defined under former section 101(a)(13) of the Act, 8 U.S.C. § 1101(a)(13) (1988)). That definition is at least entitled to deference under this Court's *Chevron* doctrine. *Chevron U.S.A., Inc. v. N.R.D.C., Inc.*, 467 U.S. 837 (1984).

Sections 1152 and 1182 therefor govern two distinct actions. Section 1182(f) governs the *entry* of aliens into the United States, while section 1152(a)(1)(A) governs the *issuance of immigrant visas*. The statutes simply do not conflict.

The Ninth Circuit's decision to the contrary struggled to find a conflict, in contravention of one of the most basic tenets of statutory interpretation, which provides that "when two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976). And it runs afoul of the additional tenet as well, namely, that a court should not interpret a statute as impliedly repealing another "unless an intent to repeal is clear and manifest." *Rodriguez v. United States*, 480 U.S. 522, 524 (1987) (citations omitted).

II. The President's Inherent Authority Over Foreign Affairs and National Security Should Resolve Any Legislative Conflict in His Favor.

Because Section 1182(f) clearly authorizes the Presidential Proclamation at issue here, resorting to the President's independent powers directly under Article II of the Constitution should not be necessary. *See, e.g.*, *DeBartolo Corp. v. Florida Gulf Coast Trades Council,* 485 U.S. 568, 575 (1988). But those powers, standing alone—even without Section 1182(f), and arguably even in the face of a statutory prohibition—support the President's action.

A. The President has inherent authority over issues involving foreign affairs, which includes the authority to exclude aliens.

In Federalist 32, James Madison explained that the Constitution left to the states issues of local concern, but assigned to the national government inherent powers of a national sovereignty. The Federalist No. 32 (James Madison). When the United States separated from Great Britain, "the powers of the external sovereignty passed from the Crown . . . to the colonies in their collective and corporate capacity as the United States of America." *U.S. v. Curtiss-Wright Export Corp.,* 299 U.S. 304, 316 (1936).

Prior to the adoption of the Constitution, the United States of America stood as a sovereign. Inherent in a sovereign are the powers to "declare and wage war, to conclude peace, to make treaties, [and] to maintain diplomatic relations with other sovereignties." *Id.* at 318. Had the Constitution not proscribed such powers to the federal government, they would be vested within it as "necessary concomitants of nationality." *Id.*

With respect to internal affairs, the federal government must act in accordance with those powers explicitly enumerated in the Constitution and those implied powers necessary and proper to carry out their enumerated powers. *Id.* 315-316. But as this Court has recognized, the same is not true in the field of foreign affairs. "[T]he President is the sole organ of the nation … and its sole representative with foreign nations" and as such has inherent powers not derived from the text of the Constitution. *Id.* at 319.

The power to exclude aliens is an inherent function of sovereignty. *Id.* at 318. Exclusion of aliens "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." *U.S. ex rel. Knauff v. Shaughnessy,* 338 U.S. 537, 542 (1950) (citations omitted). Thus, the foreign affairs power, which is inherent and exclusive to the President, encompasses the exclusion of aliens.

As the "sole organ of the federal government in the field of international relations," *Curtiss-Wright,* 299 U.S. at 319-320, the President has inherent and exclusive power to exclude aliens from the United States. While Congress may proscribe procedures concerning the admissibility of aliens, when it does so, "it is not dealing alone with a legislative power. It is implementing an inherent executive power." *Knauff,* 338 U.S. at 542. A "decision to admit or to exclude an alien may be lawfully placed with the President." *Id.* at 543.

B. By utilizing the President's inherent authority coupled with express authorization of Congress, the Proclamation is an example of the President's power at its peak.

"When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for in includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances … [he may] be said … to personify the federal sovereignty." *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 635-636 (Jackson, J. concurring).

As is well known, Justice Jackson set forth three "tiers" of Presidential power in his concurrence in

Youngstown. *Id.* at 635-638. The first tier, as referenced above, acknowledges the circumstances in which the President's power is at his greatest. This is when the President is acting both within his authority, and the authority expressly or impliedly given to him by Congress. *Id.* The second tier, referred to by Jackson as the "zone of twilight," involves a situation in which the President has acted and Congress has neither approved nor opposed such an action. *Id.* at 637. And finally, the third tier, referred to as the "lowest ebb," concerns when the President takes measures directly contrary to the expressed or implied will of Congress. *Id.* It is here where the President may act only if authority he derives directly from the Constitution prevents Congress from constraining him. *Id.*

The Ninth Circuit held that the Proclamation falls, if anywhere, in the third tier of Justice Jackson's analysis, placing the President's powers at their "lowest ebb." Pet. App. 54a. But the Ninth Circuit could only reach that conclusion by conflating the restrictions on *immigrant visa issuance* contained in Section 1152 with the express and broad delegation of power given to the President in Section 1182(f) to *suspend entry*. The broad authority in Section 1182(f), unconstrained by any restrictions in Section 1152 for the reasons stated above, instead places this case squarely in Justice Jackson's first category.

To be sure, Congress has plenary power to set immigration policy pursuant to the naturalization clause, U.S. Const. art. I, § 8 cl. 4. Pursuant to this plenary power, Congress may proscribe conditions in the issuance of a visa (as it has done with Section 1152), but "because the power of exclusion of aliens is

so inherent in the executive department of the sovereign, Congress may in broad terms authorize the executive to exercise the power" without violating the non-delegation doctrine. *Knauff,* 338 U.S. at 543. In other words, because the power at issue is executive in nature, the President could exercise it even without the delegation from Congress, just as in *Curtis-Wright* this Court rejected a non-delegation challenge to an act of Congress authorizing the President to prohibit shipment of arms to foreign belligerents because the President's power in the field of international relations "does not require as a basis for its exercise an act of Congress." 299 U.S. at 320.

Indeed, if the Ninth Circuit's construction of §1152(a)(1)(A) were correct, it would be that statute, rather than the President's Proclamation, that must fall, as an unconstitutional transgression on the Executive power by the Legislature. This Court should therefore use "every reasonable construction … in order to save [the] statute from unconstitutionality." *DeBartolo,* 485 U.S. at 575.

But this Court has already recognized the President's independent authority to take actions also authorized by Section 1182(f). In *Sale v. Haitian Centers Council, Inc.,* 509 U.S. 155 (1993), this Court upheld President Reagan's Proclamation No. 4865, which concerned "[t]he ongoing migration of persons to the United Stated in violation of our laws." Proclamation 4865, 46 Fed. Reg. 48107 (September 29, 1981). The decision largely centered around the extraterritoriality of the INA, *see Sale*, 509 U.S. at 173-88, and this Court upheld the broad grant of Presidential authority by Section 1182(f). *Id.* at 187-188. Significantly,

though, this Court also acknowledged that the President has unique responsibility for matters that involved foreign and military affairs, the authority for which derive directly from the Constitution. *Id.* (citing *Curtiss-Wright*); *see also Mow Sun Wong v. Campbell,* 626 F.2d 739, 744 n.9 (9th Cir. 1980) (noting that the President's power over foreign affairs "arises from the Constitution, rather than from an delegation" from Congress); *cf. Abourezk v. Reagan*. 785 F.2d 1043, 1049 n.2 (D.C. Cir. 1986) (noting that the President's delegated authority under Section 1182(f) allowed him to exclude aliens even if they were not covered by Section 1182(a)'s listed grounds of inadmissibility).

In short, the power exercised by the President here is a core aspect of sovereignty, in the arena of foreign affairs where the President is the sole organ of that sovereignty. Even without the express delegation of power from Congress, the President could act as he has done. With that delegation, the President's authority is at its maximum and fully supports the Proclamation at issue here.

CONCLUSION

The Ninth Circuit's decision below is based on a strained reading of Congress's broad delegation of authority to the President to suspend entry of any class of aliens he deems detrimental to the interests of the United States, finds a statutory conflict between that authority and Section 1152's restrictions on the issuance of visas where none exists, and fails to acknowledge that the President's actions are independently within his authority directly from the Constitution quite apart from the statutory delegation. It

should be reversed, so that the exercise of this core *executive* aspect of sovereignty can be implemented by the branch of government where that authority is actually vested.

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Respectfully submitted,

John C. Eastman
Counsel of Record
Anthony T. Caso
Center for Constitutional Jurisprudence
c/o Chapman University
Fowler School of Law
One University Dr.
Orange, CA 92866
(877) 855-3330
jeastman@chapman.edu

Counsel for Amicus Curiae
Center for Constitutional Jurisprudence